




The Referendum Revival and the Constitutional Moment

I. INTRODUCTION

The use of referendums around the world has proliferated remarkably in the past 30 years. It has been estimated that of the 58 functioning electoral democracies with a population of more than three million, 39 had conducted at least one national referendum between 1975 and 2000.¹ Although in some places, such as California and Switzerland, they act almost as adjuncts to the legislature, a particularly notable development is that referendums are being deployed increasingly in the settlement of fundamental constitutional questions, and often in countries with no tradition of direct democracy. Taking stock of this new wave of ‘direct constitutional democracy’ we can identify four types of constitutional process where the referendum is regularly used today: the founding of new states, most recently Montenegro in 2006 and South Sudan in 2011; the amendment of constitutions or the creation of new ones, for example in Iraq in 2005; the establishment of complex new models of sub-state autonomy, particularly in multinational states such as Spain and the UK; and the transfer of sovereign powers from the state to international institutions, with referendum use proliferating in the accession to and ratification of European Union treaties.

In this book I address the challenge which this important and under-theorized feature of contemporary politics poses for constitutionalism, many of the empirical and indeed normative precepts of which are built upon the implicit presupposition of an exclusively representative model of government and lawmaking. In this context, the central focus of the book will be the relationship between constitutional referendums and democracy. As direct democracy is used increasingly to supplement, and in some situations to supplant, representative democracy, it is important to revisit the age-old

¹ Lawrence LeDuc, *The Politics of Direct Democracy: Referendums in Global Perspective* (Broadview Press 2003) 29.

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but now somewhat outdated debate over the respective merits and demerits of these two models. I will ask whether constitutional referendums can be truly democratic as an instrument of republican government. For defenders of referendum democracy the very question is oxymoronic—referendums encapsulate the democratic ideal of government by the people. For critics, however, it is the democratic failings of referendums that represent their principal weakness as a mode of constitutional decision-making, and it is in light of this critique that referendums bear an overwhelmingly negative association within political and constitutional theory today. My task then is in large part a normative undertaking. Adopting republican theory as a benchmark, and supplementing this analysis with the recent and related turn in constitutional theory towards deliberative democracy, I ask how well does, and how better could, the referendum fit within a democratic constitutional system.

II. TOWARDS CIVIC REPUBLICAN DELIBERATION

The framework theory which girds and contextualizes my normative approach is that of constitutional theory—a tradition which is itself enjoying something of a renaissance. Constitutional theory is both immanent and functionalist in its focus. Its methodology and content are therefore each distinguishable from the substantive normativity implied by both republicanism and deliberative democratic theory. As a way of thinking, constitutional theory differs from political philosophy in that it is not an exercise in ideal theorizing from first, abstract principles. Rather, it is an attempt both to understand constitutionalism as a form of political practice, and to frame evaluations of how this practice works against its own internal logic.² However, the fact that constitutional theory is not a Platonic quest from original normative principles does not imply that it operates in a normative vacuum, detached from morally informed political debate; quite the contrary. It is the very contingency of constitutional theory, and the centrality of political practice to its essence, that makes inoculation of constitutional analysis from value judgement impossible. In this sense, the approach adopted in this book might be characterized as ‘functional normativity’. By this is meant a constitutionalist analysis which accepts that even in functional terms any account of constitutional law must recognize that normative presuppositions are inherent within any exercise of constitutional creation, reform, or practice. To take one example of how the empirical characteristics of contemporary constitutional practice are shaped by

² Martin Loughlin, ‘Constitutional Theory: A 25th Anniversary Essay’ (2005) 25 OJLS 183.

underpinning, if not always clearly articulated, normative principle, we need only reflect upon how in the practice of contemporary constitutionalism the terms ‘constitution’ and ‘democracy’ are invariably conceptually juxtaposed. Debates over constitutionalism within democracies are inevitably about the good and the bad (or more often, the better and the worse), set against a model of good democratic practice. Even positivist accounts that focus upon explicandum³ as opposed to critique, recognize democracy as one of the very building blocks of present-day public law.⁴ But given that arguably the most important function of constitutional practice is to create and secure a democratic system of government against some vision of the good, then an evaluation of how well that democratic system is working by the normative standards it sets itself is key to such a functional analysis. And it is by these lights that this book will assess the normative implications in the shift to direct democracy within the contemporary state.


It is in adopting at the methodological level such a functional normativity that we will address the rise of the referendum from the perspective of our two related—and as traditions of political theory, more avowedly normative—theoretical traditions, each of which, it will be argued, are central to justifying the place of the referendum within broader systems of representative government. Republicanism has itself been the focus of a considerable revival in the past three decades, particularly by those scholars and political practitioners who sense that modern representative democracy is losing much of its legitimacy as an effective vehicle for popular government. Republicanism is of course a very broad church, but if we are to encapsulate an encompassing goal, commonly shared by almost all who would describe themselves as ‘republican’, it is the commitment to ‘government by the people’. For some, the primary focus is upon securing this goal by way of representative institutions, be they parliaments,⁵ or even courts.⁶ Another strain, what we might call ‘popular republicanism’, tends to accentuate the particular importance of politically engaged citizens. This emphasis can have either an instrumental purpose, namely that a politically active people is better able to call governmental institutions to account, or a more idealistic conviction that such engagement is central to the very idea of

³ *ibid* 186.

⁴ As seen, eg, in Loughlin’s relational theory of sovereignty and in his focus upon constituent power and responsible government as foundational to the very idea of public law. Martin Loughlin, *Foundations of Public Law* (OUP 2010).

⁵ Adam Tomkins, *Our Republican Constitution* (Hart Publishing 2005); Richard Bellamy, *Political Constitutionalism: A Republican Defence of the Constitutionality of Democracy* (CUP 2007).

⁶ Philip Pettit, *Republicanism: A Theory of Freedom and Government* (OUP 1997); John Rawls, *Political Liberalism* (Columbia University Press 1993).

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citizenship and the fuller realization of the individual as a political person.⁷ It is this latter tradition of popular or civic republicanism—combining both its instrumental and inherent dimensions—which I will use to assess immanently the value of the referendum to contemporary democratic constitutionalism; and later in the chapter I argue further that a civic republican approach is particularly useful in assessing specifically *constitutional* referendums.

Deliberative democracy is an area of constitutional theory that has also been the focus of much recent attention. If we are to try to identify a principle that unites deliberative theorists across the spectrum it is that decision-making is best made in an open and reflective manner, where participants listen as well as speak, and in doing so are amenable to changing their positions. Deliberative democratic theory, like republicanism, encompasses many differing voices, from elite-focused accounts that tend to centre upon the decision-making of legislators, judges, and the like,⁸ to those which are more concerned with the feasibility of ‘popular deliberation’ through which ordinary citizens can be directly engaged in the democratic process.⁹ It is this latter approach, ‘popular deliberative democracy’, which, as a complement to civic republicanism, will be my focus as I ask whether constitutional referendums can meet the deliberative challenge. For Elkin, the principal weakness in deliberative theory is ‘a lack of deep engagement by theorists with the question of how a political order that revolves around deliberation . . . will actually work’; or as he puts it: ‘politics is precisely what ideal theory seeks to avoid’.¹⁰ We are looking precisely at how deliberation might work within political practice; specifically in the engagement of citizens within constitutional decision-making.

In other words, as an exercise in constitutional theory, this book looks immanently at constitutional practice, assessing it by its own light. But since this by necessity implies some form of normativity I will thicken this analytical account by deploying recent turns in both republican and deliberative theory—both of which pose their own difficult challenges for referendum democracy. What I propose is a hybrid model of assessment

⁷ Cass R Sunstein, ‘Beyond the Republican Revival’ (1988) 97 Yale LJ 1539; Sanford Levinson, *Our Undemocratic Constitution: Where the Constitution Goes Wrong (and How We the People Can Correct It)* (OUP 2006).

⁸ John Rawls, ‘The Idea of Public Reason Revisited’ (1997) 64 U Chic L Rev 765; Amy Gutmann and Dennis Thompson, *Democracy and Disagreement* (Harvard University Press 1996).

⁹ Benjamin R Barber, *Strong Democracy: Participatory Politics for a New Age* (University of California Press 1984); Bruce Ackerman, *We the People: Foundations* (Harvard University Press 1991); David Miller, *Citizenship and National Identity* (Polity Press 2000); John S Dryzek, *Deliberative Democracy and Beyond: Liberals, Critics and Contestations* (OUP 2000).

¹⁰ Stephen L Elkin, ‘Thinking Constitutionally: The Problem of Deliberative Democracy’ (2004) 21 Social Philosophy and Policy 39, 40.

that adopts complementary elements of both. This allows me further to refine the key question this book will attempt to answer: can the referendum, from the perspective of civic republican deliberative democracy, be an appropriate mechanism with which to make democratic constitutional decisions, and if so when and how?

Although there is a considerable body of literature on the subject of referendums, theoretical assessments are fairly sparse, and in particular no systematic analysis from the perspective of constitutional theory has so far been undertaken.¹¹ Most of the existing work takes the form of empirical studies by political scientists and a number of these offer insightful accounts of the recent rise of referendums, how referendums are used, their impacts upon voters etc.¹² Mendelsohn and Parkin's collection of essays was one of the first to address referendums in thematic ways but, again, here the concerns of their book are mainly, and perfectly appropriately, those of the political scientist, focusing upon the important issues of electoral behaviour and the political motives and power of elite actors.¹³ In the same field we also find useful case-by-case studies.¹⁴ Many of these again are empirical contributions that address in detail the use of referendums in specific states or regions.¹⁵


¹¹ The most notable theoretical accounts in the tradition of political theory are: Markku Suski, *Bringing in the People: A Comparison of Constitutional Forms and Practices of the Referendum* (Martinus Nijhoff 1993) see esp 30–4; and Maija Setälä, *Referendums and Democratic Government. Normative Theory and the Analysis of Institutions* (Macmillan Press 1999).

¹² Francis Hamon, *Le Référendum: Étude Comparative* (LGDJ 1995); Ian Budge, *The New Challenge of Direct Democracy* (Polity Press 1996); LeDuc, *The Politics of Direct Democracy*; Matt Qvortrup, *A Comparative Study of Referendums: Government by the People* (2nd edn, Manchester University Press 2005); David Altman, *Direct Democracy Worldwide* (CUP 2011).

¹³ Although the chapter by Brian Galligan in this collection does attempt to address the specificity of constitutional referendums. Brian Galligan, 'Amending Constitutions through the Referendum Device' in Matthew Mendelsohn and Andrew Parkin (eds), *Referendum Democracy: Citizens, Elites, and Deliberation in Referendum Campaigns* (Palgrave 2001) 109–24.

¹⁴ David Butler and Austin Ranney (eds), *Referendums Around the World: The Growing Use of Direct Democracy* (Macmillan Press 1994); Michael Gallagher and Pier Vincenzo Uleri (eds), *The Referendum Experience in Europe* (Macmillan Press 1996).

¹⁵ eg on Europe: Kris Kobach, *The Referendum: Direct Democracy in Switzerland* (Dartmouth Publishing 1993); Hanspeter Kriesi, *Citoyenneté et démocratie directe* (Seismo 1993); Anders Jenssen et al, *To Join or Not to Join: Three Nordic Referendums* (Scandinavian University Press 1998); Simon Hug, *Voices of Europe: Citizens, Referendums, and European Integration* (Rowman & Littlefield 2002). On New Zealand: Alan Simpson (ed), *Referendums: Constitutional and Political Perspectives* (Victoria University of Wellington 1992). In the US context, see: Thomas Cronin, *Direct Democracy: The Politics of Initiative, Referendum and Recall* (Harvard University Press 1989); Shaun Bowler, Todd Donovan, and Caroline J Tolbert (eds), *Citizens as Legislators: Direct Democracy in the United States* (Ohio State University Press 1998); John Haskell, *Direct Democracy or Representative Government?* (Westview Press 2001). On South America: Altman, *Direct Democracy Worldwide*. And on Canada: Patrick Boyer, *The People's Mandate: Referendums and a More Democratic Canada* (Dundurn Press 1991); Richard Johnston et al, *The Challenge of Direct Democracy: The 1992 Canadian Referendum* (McGill-Queen's University Press 1996). For references to other works written in German and

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With the emergence of the referendum as such an important feature of the constitutional landscape across so many states, it is perhaps surprising therefore that the voices of constitutional theorists have largely been silent.¹⁶ My quest in this book is to go beyond existing accounts of political practice, while drawing upon the helpful empirical and analytical findings that these works have produced. I do not propose to extract the referendum as an exotic constitutional device, detachable in some way from, or contrastable with, the broader system of representative constitutionalism operating within the state. Instead, the referendum is fully entwined with the changing dynamics of contemporary representative government as some of the established certainties both of constitutional supremacy and of citizen trust and efficacy erode in the face of normative, political, and economic pressures which today affect the established contours of statal constitutionalism. One key task then is to consider referendums in the context of the balance of power between legally codified constitutionalism on the one hand and active political capacity on the other, an issue which is itself of broader interest for theorists in an age of constitutional flux,¹⁷ particularly as, both beyond and below the state, new constitutional actors enter the stage in processes of constitutional globalization.¹⁸ The referendum in this sense becomes in fact a fascinating case study with which to address a changing normative architecture in which older territorial, institutional, and identificatory certainties which underpinned the unitary and hierarchical order of the constitutional state become ever more insecure and in which citizens increasingly look to new and often direct forms of political engagement to compensate for the perceived democratic failings of traditional constitutional models.

III. DIRECT DEMOCRACY IN AN AGE OF INSTABILITY

It is not a purpose of this book to explore in any depth *why* the referendum has emerged as such a key player in contemporary constitutional practice, but the reference to a changing normative order does lead us to think about

Italian see Simon Hug, 'Some Thoughts About Referendums, Representative Democracy, and Separation of Powers' (2009) 20 *Constitutional Political Economy* 251, 251–2.

¹⁶ And it seems that this is a propitious time for a theoretical intervention. One scholar of referendums has recently concluded that much of the debate within political science as to the merits of referendums is in some respects at a 'dead end', having failed to ask the right questions. Simon Hug, 'Some Thoughts About Referendums, Representative Democracy, and Separation of Powers', 262.

¹⁷ Martin Loughlin and Neil Walker (eds), *The Paradox of Constitutionalism* (OUP 2007).

¹⁸ Neil Walker, Jo Shaw, and Stephen Tierney (eds), *Europe's Constitutional Mosaic* (Hart Publishing 2011); Colin Warbrick and Stephen Tierney (eds), *Towards an International Legal Community?: The Sovereignty of States and the Sovereignty of International Law* (BIICL 2006).

this question, even if only by way of speculation. In particular, it is notable that some of the trends that seem intuitively to have influenced this phenomenon also speak to the health or indeed infirmity of contemporary democracy.


First, we might note that there are three ways in which the proliferation of constitutional referendums (across the four constitutional processes outlined) is occurring. One is the increased application of ad hoc or discretionary referendums in states where the constitution does not require their use. An example is the UK, which hosted two referendums in 2011, one a state-wide poll on the voting system and another in Wales on the devolution of further powers to the National Assembly. Another example is the Netherlands which, in 2005, conducted its first ever referendum, on the draft European Union Constitutional Treaty. Second is the growth in the number of constitutions that now mandate their use, a trend we find in the new orders emerging in Central and Eastern Europe after 1989. And third is the promotion of the referendum by international institutions as they intervene in post-conflict processes around the globe, for example in Bosnia-Herzegovina (1992), East Timor (1999), Montenegro (2006), and South Sudan (2011).

In some respects the rise of the referendum is clearly a product of circumstance. For example, one key driver was the break-up of multinational states which coincided with the collapse of communism in Europe. In this context the referendum offered dissenting political actors a vehicle for popular revolt, legitimizing and in due course foreclosing acts of constitutional rupture through direct popular intervention. A common usage for the referendum over the past quarter of a century, therefore, has been in the creation of new states and their subsequent constitutions, as well as the move to liberal democracy by many of the former USSR's satellite states. From 1989 to 1995, there were at least 16 referendums in Yugoslavia.¹⁹ An additional 31 referendums were posed in Eastern Europe (six) and on the territory of the former Soviet Union (25). Of these 31, 12 were on sovereignty or independence, 7 on new constitutions or forms of government, and 12 dealt with policy matters.²⁰

Another source for the spread of constitutional referendums has been European integration. The period since the early 1990s has also been one of fairly intense treaty-making within the EC/EU. Since the constitutions of some member states—most notably Denmark and Ireland—in effect

¹⁹ It is difficult to be too precise; the referendum was used as a political tool by rival political actors at this time and the use of unofficial polls by small regions proliferated.

²⁰ Henry E Brady and Cynthia S Kaplan, 'Eastern Europe and the Former Soviet Union' in Butler and Ranney (eds), *Referendums Around the World: The Growing Use of Direct Democracy*, 180.

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mandate referendums ahead of the ratification of such treaties, in this context again referendums emerge simply as the indirect result of other political processes.

But these three factors do not tell the whole story. As we have observed, an increasing number of states, including those emerging by way of referendum in Central and Eastern Europe, have seen fit to include the referendum in new constitutions as a key instrument of constitutional amendment. In other words, the referendum was not only instrumentally useful in the overthrow of communism or the securing of independent statehood, it retained sufficient salience to be included in the post-revolutionary constitution. There are, therefore, several features which suggest that the growth of the constitutional referendum is not simply a short-lived consequence of a particularly intense period of 'sovereignty politics'. One is the very fact that they came to be seen as an essential part in almost every move to new statehood by a sub-state people (one notable exception is the dissolution of Czechoslovakia, where the parties could not agree on a referendum question²¹). This can be contrasted with earlier periods of state-making in the twentieth century after both the First and Second World Wars, when the referendum was rarely used, even in the face of widespread empire collapse. This suggests that by the late twentieth century for the first time the referendum had become for many an automatic part of constituent constitutionalism and even of the constitutional amendment process. Second, another feature of the referendum revival is the influence of international actors in these processes. We see this in the international community's norm-creation processes, particularly in Europe, and in intervention in the cases mentioned earlier. Another element is the application of the referendum by countries with little or no constitutional tradition of using the referendum, but which now seem increasingly inclined to turn to the referendum at important constitutional moments. The political capital to be made from demanding a referendum and the danger in denying one suggests that this development is not only a consequence of political manoeuvring but of the changing expectations of citizens.

It seems, therefore, that while remaining mindful of the historical contingency of much recent referendum use, we also need to locate the rise of the referendum within broader changes in contemporary democratic practice and critique. One trend that has been identified is the increasing sophistication of contemporary electorates through better education and access to information. Dalton has called this development 'cognitive mobilisation'

²¹ Stephen White and Ronald J Hill, 'Russia, the Former Soviet Union and Eastern Europe: The Referendum as a Flexible Political Instrument' in Gallagher and Uleri (eds), *The Referendum Experience in Europe*, 157–60.

and argues it is leading to stronger popular pressure for a greater say in governmental decision-making.²²

If public demand is a factor, then another reason for referendum proliferation may be increasing disaffection among voters towards conventional representative politics. There is certainly evidence of a loss of public trust and efficacy within democracies, which has been well documented by political scientists.²³ Mendelsohn and Parkin identify both cognitive mobilization and heightened scepticism as important factors behind the rise of 'referendum democracy'. In their analysis: '[i]t is... likely... that a shift in political attitudes has taken place, the effect of which has been to make citizens either more confident in their ability to make key policy decisions or less confident in the ability of their elected representatives to do so'.²⁴ Various trends seem to have heightened citizen dissatisfaction with representative government: the elite monopolization of policy-making; the ever more efficient communications machinery of government that seems to be increasingly manipulative in 'spinning' stories; the expanding influence of big business in the political process; the hiving-off of government functions to technocratic and semi-private agencies, with concomitant breaks in the chain of accountability; the fall away in respect for the standards of behaviour of elected representatives; and the incongruous results within certain electoral systems which do not seem to reflect voter preferences. The parallel decline in levels of party membership and electoral turnout is therefore no coincidence.

Globalization has also nourished citizen disaffection with politics as people see power move away from the state not just to supranational 'constitutional' sites but also to private transnational corporations and structures. It seems, therefore, that the revitalization of direct democracy is in part a reaction not just to the declining standards of representative democracy but also to its emasculation in a world where its capacity for power is diminishing. It is interesting that the ad hoc referendum has emerged particularly as a feature of the recent EU constitution-making process, where France as well as the Netherlands turned to direct democracy for the draft EU Constitutional Treaty, even though the decision to hold a referendum was within the discretion of the French president and not

²² Russell J Dalton, *Citizen Politics in Western Democracies: Public Opinion and Political Parties in the US, UK, Germany and France* (2nd edn, Chatham House 1996). See also Ronald Inglehart, *The Silent Revolution: Changing Values and Political Styles Among Western Publics* (Princeton University Press 1977).

²³ Neil Nevitte, *The Decline of Deference: Canadian Value Change in Cross-national Perspective* (University of Toronto Press 1996).

²⁴ Matthew Mendelsohn and Andrew Parkin, 'Introduction' in Mendelsohn and Parkin (eds), *Referendum Democracy* 1, 6.

mandated by the constitution. The acts of rebellion we saw in the Dutch and French processes and in Ireland over the subsequent Lisbon Treaty also hint at a growing popular disquiet with the trajectory, or at least the process, of integration.

The debacle of the draft Constitutional Treaty also reminds us that in recent times referendum use has begotten its own further proliferation. In the first place, precedents are being created.²⁵ We see this in the UK, for example, particularly in respect of devolution matters. Also, the use of referendums in Slovenia, Croatia, and Bosnia-Herzegovina, as well as in the former Soviet republics, in moves towards statehood seem to have made direct popular consultation an automatic assumption today for sub-state nationalist movements looking for statehood. There can also be a domino effect, where the proposal of a referendum in one state can pressurize others into holding one. President Chirac's decision to initiate a popular vote on the draft Constitutional Treaty can be explained in part by political pressure arising from the earlier commitment of the UK to hold a referendum. We see this also at the level of constitution-making. Surely one of the reasons why the referendum was introduced so systematically as a feature of constitutional amendment in the first constitutions to emerge in the new states of Central and Eastern Europe after 1989 was that it had been deployed to secure independence; once popular consultation had become part of state-framing processes it was easier to argue for, and harder to resist, its retention for constitution-framing exercises; and the people emerging from undemocratic models of government were in many cases reluctant to hand constitutional power back exclusively to elites. As other constitutions emerged, one example followed another, and the entrenchment of the referendum in the constitutional amendment process became again an almost universally adopted principle throughout the region, and one that has since been adopted more broadly, for example, in the new constitutions of Iraq and East Timor.

Finally, it seems that technology has been and is likely increasingly to be a factor in demands for more direct democracy. Anthony Giddens has observed that '[t]he downward pressure of globalization introduces not only the possibility but also the necessity of forms of democracy other than the orthodox voting process'. In his view referendums are one of the 'experiments with democracy' resulting from this by which government and citizens can 're-establish more direct contact' with one another.²⁶ Certainly,

²⁵ Morel talks of the 'politically obligatory' referendum: Laurence Morel, 'The Rise of Government-Initiated Referendums in Consolidated Democracies' in Mendelsohn and Parkin (eds), *Referendum Democracy*, 60–2.

²⁶ Anthony Giddens, *The Third Way: The Renewal of Social Democracy* (Polity Press 1998) 75.

with people taking part more and more in informal online polls, engaging more directly in politics through social networking, blogging, and micro-blogging etc,²⁷ the notion that their only engagement in constitutional politics should come indirectly through periodic representative elections is, for many, ever more incongruous.

IV. CONSTITUTIONAL REFERENDUMS

The category of ‘constitutional’ referendums is a broad one.²⁸ I take it to mean any direct citizen vote on the specific issue of constitutional change or constitutional creation.²⁹ In the context of the referendum–democracy nexus which I concentrate upon throughout the book, it is important to begin by distinguishing between two types of constitutional referendum which contain, respectively, very different implications for constitutional sovereignty. It is also in this context that what I have called a ‘civic republican’ approach to evaluating referendums will be further explained.

The referendum operating as an instrument of constitutional amendment either in place of, or alongside, parliamentary mechanisms (which may include, for example, a referendum used in the transfer of established constitutional powers to supra-state bodies), operates wholly within existing constitutional structures. As such, these are referendums internal to the constitution. By contrast, referendums deployed in the creation of new constitutions or new states are involved in processes which transcend the existing order, and can be said to supplant the constitution, becoming in some sense external to it. We might term these types of referendum ‘constitution-changing’ and ‘constitution-framing’, respectively.

The latter in particular causes us to reflect upon the concept of constitutional sovereignty. Kalyvas introduces a distinction between ‘command sovereignty’ and ‘constituent sovereignty’.³⁰ The former is the classical model of the final word, central to modernist accounts of the legal system

²⁷ Robin Effing, Jos van Hillegerberg, and Theo Huibers, ‘Social Media and Political Participation: Are Facebook, Twitter and YouTube Democratizing Our Political Systems?’ (2011) 6847 Lecture Notes in Computer Science 25. See this volume more generally, which contains the proceedings of an International Conference in Delft on ‘Electronic Participation’.

²⁸ As is that of ‘referendum’ more generally. By referendum I mean any poll where citizens vote on a specific issue rather than for a representative. The terms ‘plebiscite’ and ‘direct democracy’ will occasionally also be used largely synonymously in this general sense.

²⁹ In a similarly broad way the Venice Commission of the Council of Europe has defined constitutional referendums as: ‘popular votes in which the question of partially or totally revising a State’s Constitution . . . is asked’. European Commission for Democracy Through Law (Venice Commission), *Guidelines for Constitutional Referendums at National Level* (11 July 2001) COE Doc CDL-INF(2001) 10, I.

³⁰ Andreas Kalyvas, ‘Popular Sovereignty, Democracy and Constituent Power’ (2005) 12 Constellations 223, 224.

as *Rechtsstaat*. Within the Westphalian tradition of state-building, as conceptualized by Kelsen³¹ and Hart,³² it is considered that any legal order must have an absolute and final arbiter, and hence the sovereign is characterized, for example by de Spinoza, as he who ‘has the sovereign right of imposing any commands he pleases’.³³ Constituent sovereignty, however, is for Kalyvas a neglected model which is concerned not with ‘coercive power’ but rather ‘constituting power’:

Thus, contrary to the paradigm of the sovereign command that invites personification and can better be exercised by an individual who represents and embodies the unity of authority—from the ancient imperatore to the king to the modern executive—the constituent power points at the collective, intersubjective, and impersonal attributes of sovereignty, at its cooperative, public dimension.³⁴

This involves seeing the sovereign as ‘constituent subject’ as the one who shapes not only the governmental structure of a community but also its juridical and political identity,³⁵ in other words, as the source of the constitution and of its authority.

It seems that different types of constitutional referendum are better conceptualized by either the ‘command sovereignty’ or ‘constituent sovereignty’ models, respectively. On the one hand internal, constitution-changing referendums, as part of a broader amendment process, are more accurately encapsulated by the command sovereignty model. The people are engaged directly in producing constitutional law, but it is highly debatable that they are engaged explicitly in ‘constituting power’. Rather, the use of the referendum is provided for by the constitution, its process is regulated by that constitution, and its result takes effect within the normative order of that constitution. As such, the command sovereignty of that constitution is not in any way overridden or replaced by the referendum. By contrast, the constitution-framing referendum, which intervenes in the making of a new constitution (Iraq 2005) or a new state (Eritrea 1993, East Timor, Montenegro, South Sudan) is categorically distinct as a popular constitutive act which brings about a new order.

The term ‘popular sovereignty’ is frequently used to describe ‘referendum democracy’³⁶ in general. But such a generalization is, in light of this distinction, a category mistake, and one of some significance. There is

³¹ Hans Kelsen, *The Pure Theory of Law* (2nd edn, M Knight tr, University of California Press 1967).

³² HLA Hart, *The Concept of Law* (Clarendon Press 1961) 89–96.

³³ Benedict de Spinoza, *A Theologico-Political Treatise* (RHM Elwes tr, Dover 1951) 207, cited by Kalyvas, ‘Popular Sovereignty, Democracy and Constituent Power’.

³⁴ *ibid* 235–6. ³⁵ *ibid* 226.

³⁶ Mendelsohn and Parkin (eds), *Referendum Democracy*.

certainly a sense in which, whenever the people are directly engaged in any lawmaking process, their exercise of collective will-formation and expression acts as a symbolic reminder that constitutional authority finds its democratic legitimacy in the consent of the people. But at the same time we must not lose sight of the fact that ‘sovereignty’ refers to the ultimate source of legal power within a legal system, identifying second-order competence to determine authoritatively the status of first-order rules; and, therefore, any reference to popular ‘sovereignty’, to remain a coherent concept for legal theory, particularly within the elaborate constitutional frameworks that exist today, must be concerned precisely with those situations where ‘the people’ can be shown to exercise direct control over second-order lawmaking—in other words, acting to ‘produce’ sovereignty in Kalyvas’s sense. Just as we must not elide first- and second-order rules, nor should we confuse the modes of their respective creation, nor the role citizens play in these different lawmaking processes.³⁷

I am concerned here with both types of referendum, since each is in its own way a vehicle for constitutional politics. However, at various points throughout the book we will return to this distinction. It is important first in relation to defining the relationship between direct and representative democracy. Since constitution-changing referendums are constrained to operate within mainstream *representative* democracy, subordinate to the second-order rules that provide them with their normative competence, even the categorization of these referendums as an instance of *direct* as opposed to *representative* democracy is perhaps something of an oversimplification. In playing a role within a broader representative system of government, where the legal effect of the referendums is dependent upon the overarching hierarchy of the existing constitution, they should perhaps more accurately be portrayed as part of that representative system, since the effect given to the outcomes they produce is ultimately subject to the representative competence of constitutional institutions; most obviously legislatures, but also courts. It will be important to bear in mind that constitutional referendums do not emerge, therefore, from a political vacuum, creating a hard-and-fast distinction between direct and representative democracy. Direct democracy is almost always a rarely activated constitutional device which is produced within a broader representative system. For example, a common model of constitutional amendment is a hybrid involving a role not only for a referendum but also requiring the complementary endorsement of representative institutions.³⁸ Whereas direct democracy is

³⁷ This argument is presented further in Stephen Tierney, ‘Constitutional Referendums: A Theoretical Enquiry’ (2009) 72 MLR 360.

³⁸ eg Australian Constitution, s 128.

often presented in contrast to representative democracy, constitutional practice shows this to be a caricature; in complex modern systems the two operate in parallel.

But we should also be alive to the fact that the second type, polity-framing/constitution-framing referendums—which I will generally term ‘constitutive referendums’—can manifest a people’s direct democratic capacity to act as the supreme source of constitutional law in foundational constitutional acts. In this latter type the people act as original constitutional authors, bringing about a clear break in the old order; and whether forming new states or new constitutions they imbue the new construct with a new popular source of legitimacy.

Civic republicanism is useful to address the specifically ‘constitutional’ aspect of these referendums, whether they be of a constitution-changing or constitution-framing character. Despite their differences, both types are deployed in higher order lawmaking, albeit the former in modifying rather than supplanting an existing system. There are two features specific to this broad role that, from the perspective of civic republicanism, seem to offer a strong *prima facie* defence of the deployment of direct democracy in both constitution-changing and constitution-framing acts. The first concerns the importance of the issues at stake. Civic republicans committed to the goal of an active citizenry may argue that when matters involving the very framing or reframing of a democratic system of government, whether in whole or in part, is at stake, the direct engagement of the people either supplementing, or indeed in place of, representative institutions is appropriate. This builds upon work within the republican revival that focuses upon constitutional politics as distinct from ordinary politics and in doing so stresses the desirability of engaging more overtly with ordinary citizens, particularly at the constitutional level per Ackerman’s distinction between ‘the will of We the People’ and ‘the acts of We the Politicians’.³⁹ The second argument is that in such decisions, particularly where they involve truly fundamental or constitutive constitutional issues such as the founding of a new state, the transformation of the constitution, or even the transfer of sovereign powers beyond the state, the very identity of the demos can be implicated. What is meant by this is that a constitution can come to embody the political selfhood of the people. In this sense, as well as serving the functional purpose of framing a system of government, by being ‘popular’ in orientation the constitution can also take on a symbolic representational role, encapsulating the very identity of the people, while also embodying emblematically

³⁹ See Ackerman, *We the People: Foundations*, 10.

its collective settled will.⁴⁰ In turn, individuals come reflexively to identify with one another through their shared commitment to this constitution. It is, therefore, also in this context of the polity-building or nation-building potential of constitutional lawmaking that we must address constitutional referendums. When referendums are used to make or recreate constitutions they can themselves take on a vital nation-building role. In light of these high stakes, from a civic republican perspective there again appears to be a strong *prima facie* case for direct popular engagement.

These two features—the importance of the issues at stake and the ‘identity-forming’ potential of certain constitutional processes—are more evidently present in constituent referendums. As such, throughout the book the specific potential of the constituent referendum and the particular issues it can raise for the operation of both representative government and constitutional supremacy will be an important point of distinction. That said, our overall focus is more broadly upon constitutional referendums in general, and in this light we should also note that there is not always a hard-and-fast line between constitutive and non-constitutive constitutional referendums, with the latter also capable of raising fundamental questions and issues which can also touch upon the identity of a constitutional people.

One final point about constitutional practice that brings home this point is that even constitutive referendums do not emerge in a political or legal vacuum. In many cases, the referendum comes at the end of a process that was not necessarily from the beginning a self-consciously constitutive one, or at least not one where the success of constitutive aspirations was certain. In a number of situations the referendum is in fact invoked within one constitutional order but in the course of the constitutional process of which it is the culmination the referendum comes to take on constitutive potential, rupturing and supplanting the existing system. The open-ended constitutive potential of the constitutional referendum will be returned to, particularly in the context of sub-state nationalism, in Chapter 5.

V. OUTLINE

In Chapter 2 we will begin the task of addressing whether, from the perspective of republican democratic theory, the referendum can be an appropriate mechanism for the direct engagement of the mass public in processes of constitution-framing or changing. I will scrutinize the main

⁴⁰ Rosenfeld discusses how modernist constitutionalism has played the role of constructing a form of collective self that builds upon but is, in its unitary and unifying functions, also different from diverse pre-constitutional cultural and ethnic attachments. Michel Rosenfeld, *The Identity of the Constitutional Subject: Selfhood, Citizenship, Culture and Community* (Routledge 2010).

criticisms aimed at referendums and will begin to assess the strength of these against the normative benchmark of civic republicanism. I will also turn to deliberative democracy, asking if this turn in democratic theory which focuses upon the procedural dimension of political decision-making offers a way in which republican theory might be deployed to construct referendum processes that go some way to answer the main charges of their critics.

The application of the arguments and principles outlined in Chapter 2 will be the main task of Chapters 4 to 9. But first, in Chapter 3, we will address how the constitutional referendum implicates the very idea of ‘the people’. In the ordinary course of representative democracy this concept tends to lie dormant. However, the constitutional referendum by definition implicates an anterior act of demotic border-drawing—the framing of the collective self who will perform an act of constitutional self-determination and in doing so explicitly articulate itself as a constitutional people. This is often uncontroversial, but in some cases, particularly in the context of constitutive referendums, the referendum can expose tensions in the boundary question.

In Chapter 4 we will begin to assess in detail the main criticisms of the referendum set out in Chapter 2. The first issue is control. A common trope in contemporary democratic theory is that referendums are fundamentally undemocratic because they are controlled by and open to the manipulation of elites. In this chapter I will explore this question further, arguing that the issue of control must be broadened from the political context to examine the broader interplay of constitutional competence and political capacity throughout the referendum process, looking at the referendum as a series of stages, and addressing how the complicated motives of political actors all impact upon the control issue. Chapters 5 and 6 explore the control issue further, addressing situations where the constitutional referendum intervenes in some of the most contested debates today about the nature of sovereignty in both its internal (constitutional) and external (state-focused) dimensions.

In Chapter 7 we return in detail to the question of how it might be possible to facilitate deliberation in constitutional referendums by engaging direct citizen participation actively and meaningfully. The chapter asks whether it is feasible to introduce elements of deliberative participation into a referendum process which can overcome the allegation that referendums serve simply to aggregate pre-formed preferences and thereby fail to foster meaningful deliberation. One major conundrum for democratic theory is that deliberation is widely thought possible only within small groups.⁴¹ As Fishkin puts it, ‘we seem to face a forced choice between

⁴¹ The paradox that efforts to extend participation and decision-making power to the mass public in a referendum must come at the expense of meaningful deliberation was an issue even at the

politically equal but relatively non-deliberative masses and politically unequal but relatively more deliberative elites.⁴² This is the key dilemma which the chapter confronts by addressing both the opportunity for participation and the quality of participation feasible within a referendum process. The focus is upon referendum practice, considering the prospects for deliberation within a referendum as they might arise in different ways over a range of stages, across various settings, and by means of a plurality of modes.

Referendums are criticized not just for obvious process defects but also on the basis that the subject matter is open to manipulation, which makes it difficult, if not impossible, to put a fair question to the people. In Chapter 8 we address this issue, asking what factors contribute to the fairness, and hence the legitimacy, of a referendum question. One issue is the clarity and intelligibility of the questions and the impediments to achieving a clear question. But another equally important concern is that the referendum represents a meaningful choice between options which a plurality of people consider important and worth both deliberating over and voting on. A particular concern is divided societies; I will ask whether a referendum is ever appropriate in such an environment and if so what issue-framing and other process factors would be needed for such an act to meet the demands of deliberative theory.

Finally, in Chapter 9 we will consider the issue of decision-making. The goal of constitutional politics is, in the end, political action. And it is by the benchmark of good or bad decision-making that constitutional referendums must in the end be assessed. The decision-making power of the referendum provides, for its supporters, much of its appeal and, for its detractors, much of its threat. In this chapter we address how deliberative theorists face up to the moment of decision, viewing it as an inevitable part of the imperfect and difficult business of democracy. But we will also see that it is in the moment of decision-making that the referendum faces some of its most compelling criticisms from deliberative theorists. One danger I will address is that the referendum can be used to foreclose a political conversation that should be kept open. In this context I will consider respectively how mechanisms can be built into the process to make the referendum so far as possible part of an ongoing constitutional process. Another issue is the danger to minorities posed by the decision-making potential of a referendum. Here we will address the use of threshold rules requiring some level of support beyond merely 50 per cent plus 1 of those who turn out to vote.

time of Rhode Island's referendum on the new American Constitution. James S Fishkin, 'Deliberative Democracy and Constitutions' (2011) 28 *Social Philosophy and Policy* 242, 243.

⁴² *ibid* 243–4.

Throughout I will try to test theoretical claims in light of empirical evidence and against concrete examples. I will also use case studies to help illustrate some of the problems that referendums present for contemporary constitutional democracy and also to show how, by careful planning and the efforts of political actors and ordinary citizens, process design can be shaped which will help overcome the democratic problems that have at times beset the application of the referendum. This task is not one that can be avoided by the constitutional lawyer or theorist. The constitutional referendum, it seems, is here to stay, and the undertaking with which we are faced is how to make the best of that reality.

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