

MARRIAGE EQUALITY IN THE UNITED STATES AND IRELAND: HOW HISTORY SHAPED THE FUTURE

Conor O'Mahony*

As marriage equality becomes a legal reality in an increasing number of Western countries, controversy and debate has arisen not just around the substantive issue, but also around the mechanism through which the debate is resolved: through the legislature, the courts, or by popular vote. During 2015, Ireland became the first country to introduce marriage equality following a national referendum, while the U.S. became the first to do so directly on foot of a national court decision. On the one hand, some criticized the use of the courts in the U.S. as inherently undemocratic, since it restricted the decision-making power to just nine unelected judges. In contrast, some saw the use of the referendum in Ireland as almost too democratic, in that it used a purely majoritarian process to decide on whether a minority group should enjoy a human right on an equal basis.

Notwithstanding these criticisms, this Article argues that the mechanism used for settling the marriage-equality debate in each country was inevitable, and that it was appropriate to that country. The resolution of the marriage equality debate followed established patterns in the search for a decisive victory in a religious-moral controversy and has close parallels with the abortion debate in each country. Other countries have resolved such issues by way of ordinary legislation; and legislation has the advantage of navigating a middle road between the contrasting disadvantages of court decisions and referendums. This may well have been appropriate to those countries; but it does not mean that it would have been the appropriate route for either the U.S. or Ireland, where certain fundamental political disputes tend to be resolved through constitutional politics rather than ordinary politics.

* Senior Lecturer, School of Law, University College Cork. E-mail: conor.omahony@ucc.ie. For discussion of and comments on this paper, I am grateful to the participants at the Constitutional History: Comparative Perspectives Symposium hosted by Professor Jason Mazzone in Chicago in April 2016, to participants at the Irish Society of Comparative Law conference in Galway in May 2016, to my colleagues in the University College Cork School of Law research colloquium, and to Aengus Carroll.

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I. INTRODUCTION

Marriage equality is a growing legal trend in the Western world. Currently, twenty countries allow marriage between persons of the same sex, and it is also legal in sub-national territories in several other countries (including the majority of the UK and large parts of Mexico). While the introduction of marriage equality is of enormous significance for each country and society in which it happens, developments have reached the point where its legalization in a Western country is no longer especially noteworthy on a global level.

Nonetheless, the two most recent countries to join the club (Ireland and the United States) were the cause of some interest and discussion—not so much because of the decision reached, but because of the means by which that decision was taken. There are three possible ways in which the debate on marriage equality may be settled. The most common route is through the legislative process. In May 2015, Ireland became the first country to introduce marriage equality through a national referendum (which amended the Irish Constitution). The following month, the U.S. became the first to do so directly through a national court decision (legislation in some countries was prompted by court decisions, but in the U.S., there was no legislative involvement).

Both Ireland and the U.S. were the subject of some criticism for settling the marriage-equality debate in the way that they did. The use of the courts in the U.S. was seen by some as inherently undemocratic, since it restricted the decision-making power to just nine unelected judges. The use of the referendum in Ireland was seen by some as almost too democratic, in that it used a purely majoritarian process to decide on whether a minority group should enjoy a human right on an equal basis. If both of these criticisms are taken seriously, it would be tempting to conclude that the more commonly used legislative process is the most appropriate way to decide whether marriage equality should be legalized. This process

gives expression to the democratic will of the majority, but also filters out animus and prejudice by requiring representatives to explain and justify their vote, and it affords minorities the opportunity to advance their interests through deliberation, alliances, and bargaining.

This Article has two main arguments, both of which are grounded in constitutional history: first, that the mechanism used for settling the marriage-equality debate in each country was inevitable; and second, that it was appropriate *to that country*. The resolution of the marriage-equality debate followed established patterns in the search for a decisive victory in a religious-moral controversy and has close parallels with the abortion debate in each country. The fact that the legislative route has been used in every other country where marriage equality has been introduced, and that this route navigates a middle road between the opposing disadvantages of litigation and referenda, does not mean that it would have been the appropriate route for either the U.S. or Ireland, where certain fundamental political disputes tend to be resolved through constitutional politics rather than ordinary politics.

Part II sets the scene by outlining the criticisms levied at the advent of marriage equality by way of the Supreme Court decision in the U.S. and by way of referendum in Ireland. Part III examines how major issues are resolved in each country by comparing and contrasting their respective political-constitutional dynamics. Part IV explores political culture and the tendency for certain issues with religious or moral implications to become elevated from the realm of ordinary politics to constitutional politics. Part V provides historical context by examining the path followed by the abortion debate through the prevailing structures in the U.S. and Ireland. Finally, Part VI concludes by considering the similarities between the abortion debate and the marriage-equality debate in this regard.

II. YOU CAN'T PLEASE EVERYONE

In June 2015, the U.S. Supreme Court ruled in *Obergefell v. Hodges* that laws excluding same-sex couples from marrying, or refusing to recognize same-sex marriages performed out of state, violated their right to marry under both the Due Process and Equal Protection clauses of the Fourteenth Amendment.¹ Four weeks earlier, in Ireland, the people voted in a national referendum to amend the Irish Constitution, stipulating that “[m]arriage may be contracted in accordance with law by two persons without distinction as to their sex.”² As the old adage goes, you can’t please all of the people, all of the time; and the criticism of the means through which the marriage-equality debate was settled in the U.S. and Ireland is a case in point.

1. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2604–05 (2015).

2. Constitution of Ireland 1937 art. 41.4, http://www.irishstatutebook.ie/eli/cons/en/html#article41_4.

The resolution of the issue by the Supreme Court in the U.S. was considered by some as fundamentally undemocratic. Perhaps the best example of this criticism is Justice Scalia's dissenting opinion in *Obergefell*, in which he called the decision a "judicial Putsch" that "robs the People of . . . the freedom to govern themselves A system of government that makes the People subordinate to a committee of nine unelected lawyers does not deserve to be called a democracy."³ Other judges shared this view. Two weeks after *Obergefell* was decided, the Supreme Court of Louisiana dismissed an appeal against a lower-court decision striking down a Louisiana law precluding the recognition of same-sex marriages performed out of state.⁴ In a separate concurring opinion, Justice Knoll noted that she was "constrained to follow the rule of law set forth by a majority of the nine lawyers appointed to the United States Supreme Court,"⁵ but proceeded to decry the *Obergefell* decision:

It is a sad day in America when five lawyers beholden to none and appointed for life can rob the people of their democratic process, forcing so-called civil liberties regarding who can marry on all Americans when the issue was decided by the states as solemn expressions of the will of the people. I wholeheartedly disagree and find that, rather than a triumph of constitutionalism, the opinion of these five lawyers is an utter travesty as is my constrained adherence to their 'law of the land' enacted not by the will of the American people but by five judicial activists.⁶

Her colleague, Justice Hughes, went so far as to issue a dissenting opinion (in clear violation of the Supremacy Clause of the U.S. Constitution⁷ and classic Supreme Court decisions on supremacy⁸).

This strident criticism of the resolution of contested claims about moral issues by unelected judges, whose decisions are all but impossible to reverse by democratic means, is a familiar one.⁹ Justice Scalia often made similar remarks in other contexts; for example, he also rejected the legitimacy of the decisive intervention by the U.S. Supreme Court in the abortion debate:

[B]y foreclosing all democratic outlet for the deep passions this issue arouses, by banishing the issue from the political forum that gives all participants, even the losers, the satisfaction of a fair hearing and an honest fight, by continuing the imposition of a rigid national rule instead of allowing for regional differences, the Court merely prolongs and intensifies the anguish.¹⁰

3. *Obergefell*, at 2627, 2629 (Scalia J., dissenting).

4. *Costanza v. Caldwell*, 167 So. 3d 619, 621 (2015).

5. *Id.* at 622 (Kroll J., concurring).

6. *Id.*

7. U.S. CONST. art. VI, cl. 2.

8. *See, e.g., Cooper v. Aaron*, 358 U.S. 1 (1958).

9. *See, e.g., Jeremy Waldron, The Core of the Case Against Judicial Review*, 115 YALE L.J. 1346, 1353 (2006).

10. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 1002 (1992).

The above criticisms clearly cannot be applied to the marriage-equality referendum in Ireland. In 2013, the Constitutional Convention, an assembly consisting of sixty-six citizens, thirty-three elected representatives, and an independent chairperson, recommended that the Constitution be amended to provide for marriage equality.¹¹ The Oireachtas (Irish Parliament) voted overwhelmingly in favor of this amendment in 2015, but in line with Article 46 of the Irish Constitution, the final say rested with the people in a referendum held on May 22, 2015.¹² This process allowed a contested moral issue to be directly resolved by a majority of the people themselves (following deliberation by their elected representatives), thus giving the losers the satisfaction of a fair hearing and an honest fight. (Admittedly, this satisfaction was not universally shared;¹³ but in comparative terms, the process was still surely more satisfactory to opponents of marriage equality than a court ruling would have been.)

Instead of being widely criticized as undemocratic, the referendum was criticized by a significant number of commentators for being almost too democratic, in that it used a purely majoritarian process to decide on whether a minority group should enjoy particular human right on an equal basis.¹⁴ In *West Virginia State Board of Education v. Barnette*, Justice Jackson famously said that

[t]he very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as

11. See UNA MULLALLY, IN THE NAME OF LOVE 233–45 (2014).

12. See Constitution of Ireland 1937 art. 46,

<http://www.irishstatutebook.ie/eli/cons/en/html#article46>; Marie O'Halloran, *Standing Ovation as Seanad Passes Same Sex Marriage Bill*, IRISH TIMES (Mar. 27, 2015, 7:19 PM), <http://www.irishtimes.com/news/politics/oireachtas/standing-ovation-as-seanad-passes-same-sex-marriage-bill-1.2156393>.

13. See, e.g., Breda O'Brien, *Asking Questions About Funding for Referendum Campaign*, IRISH TIMES (May 9, 2015, 03:30 AM), <http://www.irishtimes.com/opinion/breda-o-brien-asking-questions-about-funding-for-referendum-campaign-1.2205469>; Breda O'Brien, *Garda Body's Call for a Yes Vote Undermines Democracy*, IRISH TIMES (May 2, 2015, 01:00 AM), <http://www.irishtimes.com/opinion/breda-o-brien-garda-body-s-call-for-a-yes-vote-undermines-democracy-1.2197267>; Breda O'Brien, *Think About Intolerance of Thought Police Before You Vote*, IRISH TIMES (May 16, 2015, 02:30 AM), <https://www.irishtimes.com/opinion/breda-o-brien-think-about-intolerance-of-thought-police-before-you-vote-1.2214369>. See also David Quinn, *Government Refuses to Respect 'No' Side in Marriage Debate*, IRISH INDEP. (May 8, 2015, 02:30 AM), <http://www.independent.ie/opinion/columnists/david-quinn/government-refuses-to-respect-no-side-in-marriage-debate-31204991.html>; David Quinn, *In 2015 We Voted Against the Right of a Child to a Mother and a Father*, IRISH INDEP. (Jan. 1, 2016, 02:30 AM), <http://www.independent.ie/opinion/columnists/david-quinn/in-2015-we-voted-against-the-right-of-a-child-to-a-mother-and-a-father-34327836.html>; David Quinn, *The Secret Life of a 'No' Voter May Haunt Official Ireland Yet*, IRISH INDEP. (April 24, 2015, 02:30 AM), <http://www.independent.ie/opinion/columnists/david-quinn/the-secret-life-of-a-no-voter-may-haunt-official-ireland-yet-31167115.html>.

14. See, e.g., Saeed Kamali Dehghan, *A Referendum is not the Way to go When it Comes to Gay Rights or Minority Issues*, GUARDIAN (May 22, 2015, 03:00 PM), <https://www.theguardian.com/world/commentisfree/2015/may/22/a-referendum-is-not-the-way-to-go-when-it-comes-to-gay-rights-or-minority-issues>; Omar G Encarnación, *Ireland's Referendum, However Inspiring, is not a Step Forward for Gay Rights*, IRISH TIMES (May 26, 2015), <http://www.irishtimes.com/opinion/ireland-s-referendum-however-inspiring-is-not-a-step-forward-for-gay-rights-1.2225587>; Liam Weeks, *Rule by Referendum is not the Best Way to Make Decisions*, IRISH TIMES (June 2, 2015), <http://www.irishtimes.com/opinion/rule-by-referendum-is-not-the-best-way-to-make-decisions-1.2233896>.

legal principles to be applied by the courts [F]undamental rights may not be submitted to vote; they depend on the outcome of no elections.¹⁵

This statement was quoted with approval in the majority opinion of the U.S. Supreme Court in *Obergefell*.¹⁶ Indeed, an extensive body of scholarship has documented the danger posed to minority rights by direct-democracy devices such as the referendum and the initiative.¹⁷

In the lead up to polling day in Ireland, columnist Colette Browne tapped into this line of thinking when she wrote in the *Irish Independent*:

The closer the referendum on marriage equality comes, the more uncomfortable I get with the notion of voting on other people's right to marry—not because I don't support the measure, or think the vote will fail, but because I don't believe the rights of minorities should be the subject of a popular vote. . . . Would you feel comfortable going door-to-door, begging, cajoling and pleading with the people you meet to be extended the same rights they currently enjoy? How would you feel approaching those doors not knowing if the people you meet were going to be supportive or abusive—bracing yourself every time someone answers for the possibility that they find you, by virtue of your sexuality, disgusting? . . . This is why we don't usually let majorities decide on whether minorities in society should enjoy the same rights we do—because very often those majorities are either indifferent, or hostile, to those groups. Minorities in societies are often marginalised and discriminated against precisely because of their status as 'other' or 'different.' This is where, ordinarily, the Constitution steps in.¹⁸

These sentiments were captured in a campaign video called “Sinéad's Hand,”¹⁹ which depicted a well-dressed young man nervously knocking on a door and asking an older man for permission for Sinéad's hand in marriage. He was then shown repeating the question at multiple doors, composing himself as he approached a large apartment block, and asking passers-by on the street along the way. The video concluded with the question: “[h]ow would you feel if you had to ask 4 million people for permission to get married?” In the event, the process of knocking on doors asking for permission to marry was to play out in very real terms,

15. 319 U.S. 624, 638 (1943).

16. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2605–06 (2015).

17. See, e.g., Derrick Bell, *The Referendum: Democracy's Barrier to Racial Equality*, 54 WASH. L. REV. 1 (1978); Todd Donovan, *Direct Democracy and Campaigns Against Minorities*, 97 MINN. L. REV. 1730 (2013); Julian N. Eule, *Judicial Review of Direct Democracy*, 99 YALE L.J. 1503, 1551–1558 (1990); Barbara S. Gamble, *Putting Civil Rights to a Popular Vote*, 41 AM. J. POL. SCI. 245 (1997); Priscilla F. Gunn, *Initiatives and Referendums: Direct Democracy and Minority Interests*, 22 URB. L.J. 135 (1981).

18. Colette Browne, *In the Face of Political Inaction, It Is up to Us to Back the Rights of Minority Groups*, IRISH INDEP. (May 12, 2015, 2:30 AM), <http://www.independent.ie/irish-news/referendum/in-the-face-of-political-inaction-it-is-up-to-us-to-back-the-rights-of-minority-groups-31214250.html>.

19. Marriage Equality, *Sinead's Hand*, YOUTUBE (Aug. 19, 2009), <https://www.youtube.com/watch?v=6ULdaSrYGLQ>.

as members of the LGBT community and their allies conducted a large scale canvassing effort in cities and towns around Ireland.²⁰

On the day of the referendum, UK-based journalist Saeed Kamali Dehghan wrote in the *Guardian* newspaper that referendums are not the right way to go, “especially when it comes to gay rights or in fact, any minority issues The idea that the majority can legitimise the right of a minority is fundamentally flawed.”²¹ Even after the outcome of the referendum, which was a clear victory for marriage equality (with 62% voting in favor and a high voter turnout), the discomfort of many supporters did not subside. Political scientist Omar G. Encarnación wrote in the *Irish Times* that

Ireland’s referendum, however inspiring, is not a step forward for gay rights As gay activists have argued for decades, there is something inherently unseemly about putting the civil rights of any group, especially a historically oppressed one, to a popular vote. Most people could not conceive of doing so to ethnic and racial minorities or even women. So what makes gay people deserving of this particular indignity?²²

Similarly, Liam Weeks wrote that the use of a referendum “reinforce[d] the idea that might is right and that we should be governed by the wishes of the majority, whatever they might be,”²³ while Brian Tobin characterized the process as “crude.”²⁴ Opponents of marriage equality expended considerable resources in portraying same-sex couples as inferior or unsuitable parents,²⁵ and campaigners for marriage equality canvassing in public places and door to door were regularly subjected to personal abuse.²⁶ An LGBT helpline service experienced its busiest year ever, with a huge spike in demand in the lead up to polling day from people seeking support “to cope with the intensity of having their lives debated in public, or to deal with negative attitudes expressed by family members or friends.”²⁷ Clearly, the human cost of the referendum was very significant for members of the LGBT community.

If deciding on a controversy like marriage equality by court decision is undemocratic, but deciding on it by referendum is too majoritarian,

20. GRÁINNE HEALY ET AL., IRELAND SAYS YES: THE INSIDE STORY OF HOW THE VOTE FOR MARRIAGE EQUALITY WAS WON 79–91 (2016).

21. Kamali Dehghan, *supra* note 14.

22. Encarnación, *supra* note 14.

23. Weeks, *supra* note 14.

24. Brian Tobin, *Marriage Equality in Ireland: The Politico-Legal Context*, 30 INT. J. LAW, POL’Y & FAM. 115, 127 (2016).

25. HEALY ET AL., *supra* note 20, at 116–20. See also Johan Elkind et al., *Understanding the 2015 Marriage Referendum in Ireland: Context, Campaign, and Conservative Ireland*, 31 IR. POL. STUD. 5–6 (2016).

26. *Id.* at 88–89, 96–97. See also CHARLIE BIRD, A DAY IN MAY 118, 160, 234 (Kevin Rafter ed., 2016).

27. Ed Carty & Michael McHugh, *Same-Sex Marriage Vote Sparks Surge in Calls to LGBT Helpline*, IRISH EXAM’R (Feb. 2, 2016), <http://www.irishexaminer.com/ireland/same-sex-marriage-vote-sparks-surge-in-calls-to-lgbt-helpline-379400.html>. This is not a uniquely Irish phenomenon. See, e.g., Ellen D.B. Riggle et al., *The Marriage Debate and Minority Stress*, 38 POL. SCI. & POL. 221 (2005) (discussing the impact of the marriage equality debate on mental health in the U.S.).

what is the solution? It would be tempting to conclude that it would have been more appropriate to settle the debate through the legislative process. After all, in every one of the eighteen other countries that have introduced marriage equality to date, the final action was taken by the legislature (although occasionally at the urging of a court).²⁸ The legislative route treads a line between the two extremes described above: it gives expression to the democratic will of the majority, but also filters out animus and prejudice by calling on representatives to explain and justify their vote, and it affords minorities the opportunity to advance their interests through deliberation, bargaining, and coalition formation.²⁹ Of course, the legislative process is not especially well-suited to protecting minority interests,³⁰ but comparatively speaking, it is less prone to naked majoritarianism than a referendum.³¹

Tempting as it may be to conclude that marriage equality would have been more appropriately introduced by way of legislation in the U.S. and Ireland, this paper argues that such a conclusion would ignore the constitutional history of each country. It is debatable whether the legislative route would actually have been possible in either country; and even if it would have been possible, it is questionable whether it would in fact have been appropriate. Part III will explain the factors that militated against the use of the legislative route in each country, as well as the factors that militated in favor of reliance on a court decision or a referendum.

III. POLITICAL-CONSTITUTIONAL DYNAMICS

As noted in the Introduction, the debate over marriage equality may be settled by way of ordinary legislation, court decision, or constitutional amendment (with a referendum being a common feature in constitutional amendments on marriage equality to date).³² This Part will ex-

28. See, e.g., *Minister of Home Affairs v. Fourie*, 2005 (60) SA 1 (CC) (S. Afr.) (prompting the enactment of the Civil Union Act 2006 in South Africa).

29. See, e.g., THOMAS CRONIN, *DIRECT DEMOCRACY: THE POLITICS OF INITIATIVE, REFERENDUM, AND RECALL* 28–29 (1989); MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* 159–60 (1999).

30. See JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 78 (1980).

31. See KENNETH P. MILLER, *DIRECT DEMOCRACY AND THE COURTS* 220–21 (2009); Eule, *supra* note 17, at 1526–28; Gamble, *supra* note 17, at 246–51.

32. While Ireland is the only country in the world to have legalized marriage equality through a national referendum, it is not the only jurisdiction in which a referendum has been held on a constitutional amendment affecting the definition of marriage. Between 1996 and 2012, thirty-one states in the U.S. passed referendums inserting a provision into their state constitution either restricting marriage to different-sex couples, or giving the state legislature the power to define marriage. See MICHAEL J. KLARMAN, *FROM THE CLOSET TO THE ALTAR: COURTS, BACKLASH, AND THE STRUGGLE FOR SAME-SEX MARRIAGE* 89–118 (2013). In 2013, Croatia passed a referendum inserting provisions into its national constitution restricting marriage to different-sex couples. See Srećko Horvat, *Croatia's Vote Forbidding Gay Marriage: A Sign of the Rotten Heart of Europe*, *GUARDIAN* (Dec. 4, 2013, 11:51 AM), <https://www.theguardian.com/commentisfree/2013/dec/04/croatia-gay-marriage-vote-europe-rotten-heart>. A similar referendum was held in Slovakia in 2015 but failed due to inadequate voter turnout. See Ben Tufft, *Referendum to Entrench Gay Marriage Ban in Slovakia Overwhelmingly Supported but*

plain how there were political-constitutional dynamics at play in the U.S. and Ireland that militated against choosing the legislative route, notwithstanding the fact that this is the route most commonly used around the world. With the legislative route off the table, each country then had to choose between a court decision or a constitutional amendment. Again, there were political-constitutional dynamics that militated in favor of each country choosing one route over the other. In using the term “political-constitutional dynamics,” I refer to the interaction between constitutional law and constitutional politics. The factors at play involve not just constitutional rules, as elaborated in the text of the constitution and associated case law, but also political realities in how various political and constitutional actors view the constitution and their role in interpreting, applying, or amending it.

A. *Why Marriage Equality Was Not Introduced by Way of Legislation*

The first point to explore is that there were constitutional reasons militating against the introduction of marriage equality by way of national legislation in both the U.S. and Ireland. While the right to marry has long been recognized under the U.S. Constitution,³³ the regulation of access to marriage has always been a matter for state law.³⁴ State laws governing marriage must comply with the U.S. Constitution, but they are passed at the state, rather than federal, level; Congress does not have the power to legislate in this regard.³⁵ While the Defense of Marriage Act³⁶ reserved federal recognition of marriage and its accompanying benefits to marriages between one man and one woman, irrespective of whether a couple was regarded as married under state law, and provided that no state would be required to recognize a same-sex marriage that was treated as a marriage under the laws of another state, it did not purport to place any restrictions on how states defined marriage. For constitutional reasons, marriage equality could have been neither prohibited nor mandated on a nationwide basis in the U.S. by way of legislation enacted by Congress.³⁷ The choice was between individual laws being passed in all fifty states or a national solution consisting of either a constitutional amendment or a Supreme Court decision validating or striking down laws to the contrary. The paragraphs to follow argue that constitutional

Fails Due to Low Turnout, INDEP. (Feb. 8, 2015), <http://www.independent.co.uk/news/world/europe/referendum-to-entrench-gay-marriage-ban-in-slovakia-overwhelmingly-supported-but-fails-due-to-low-10031769.html>.

33. See, e.g., *Turner v. Safley*, 482 U.S. 78, 81 (1987); *Zablocki v. Redhail*, 434 U.S. 374, 390–91 (1978); *Loving v. Virginia*, 388 U.S. 1, 12 (1967); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923); Cass R. Sunstein, *The Right to Marry*, 26 CARDOZO L. REV. 2081 (2004); Nelson Tebbe & Deborah Widiss, *Equal Access and the Right to Marry*, 158 U. PA. L. REV. 1375 (2009).

34. See *United States v. Windsor*, 133 S. Ct. 2675, 2691 (2013).

35. *Id.*

36. Defense of Marriage Act, Pub. L. No. 104–199, 110 Stat. 2419 (1996) (codified as amended at 1 U.S.C. § 7 (2006), 28 U.S.C. § 1738C (2006)), *invalidated by Windsor*, 133 S. Ct. 2675.

37. See *Windsor*, 133 S. Ct. at 2695.

history played a key role in determining the eventual choice in favor of the latter.

In Ireland, the prevailing view was that there was a constitutional bar on legislation in favor of marriage equality, but the reasons are very different and the position less clear-cut. Article 41.3 of the Irish Constitution of 1937 provides that “[t]he State pledges to guard with special care the institution of Marriage, on which the Family is founded, and to protect it against attack.”³⁸ The term “Marriage” is not defined in the Constitution and was certainly considered to be restricted to different-sex couples both at the time of drafting and for many years thereafter.³⁹ It is well-established, however, that the Irish Constitution is a living constitution, the interpretation of which should evolve to reflect changing values and conditions in society.⁴⁰ This principle has extended to judgments in which constitutional terms have been given interpretations that clearly depart from an accepted original meaning.⁴¹ When the marriage-equality debate began, there were conflicting views on the impact of the constitutional provisions on marriage.⁴²

The courts had the opportunity to clarify the position in *Zappone and Gilligan v. Revenue Commissioners*, in which two women who married each other in Canada argued that their marriage should be recognized under Article 41.3 on the basis of changed consensus on the meaning of marriage.⁴³ In a confused judgment, the High Court accepted the concept of the living constitution,⁴⁴ then briefly suggested, relying on questionable use of authority, that Article 41.3 was an exception to the general rule.⁴⁵ It ultimately relied on evidence of prevailing consensus against same-sex marriage (in the form of a two-year old-statute providing that it was an impediment to marriage if the parties were of the same

38. Conor O'Mahony, *Principled Expediency: How the Irish Courts Can Compromise on Same-Sex Marriage*, 35 DUBLIN U. L.J. 199, 200 (2012).

39. *Id.*

40. See *McGee v. Att'y Gen.* [1974] IR 284, 319 (1973) (Ir.) (Walsh, J.) (“[N]o interpretation of the Constitution is intended to be final for all time. It is given in the light of prevailing ideas and concepts.”). This passage has been repeatedly approved in subsequent Supreme Court case law. See, e.g., *A v. Governor of Arbour Hill Prison*, [2006] 4 IR 88, 129–30 (Ir.) (Murray, C.J.); *Sinnott v. Minister for Educ.*, [2001] 2 IR 545, 664 (Ir.) (Denham, J.); *Dir. of Pub. Prosecutions v. Best*, [2000] 2 ILRM 1, 17–18 (1999) (Ir.) (Denham, J.); *State (Healy) v. Donoghue*, [1976] IR 325, 347 (Ir.) (O'Higgins, C.J.). See generally Conor O'Mahony, *Societal Change and Constitutional Interpretation*, 1 IR. J. LEG. STUD. 71 (2010).

41. See, e.g., *Sinnott* 2 IR at 718–19 (Geoghegan, J.) (interpreting the expression “primary education” to include a provision for disabled children that clearly went beyond what was contemplated when the Constitution was drafted and enacted).

42. See, e.g., GOV'T OF IR., ALL-PARTY OIREACTHAS COMM. ON THE CONSTITUTION, TENTH PROGRESS REPORT: THE FAMILY, at 77–87 (2006), <http://archive.constitution.ie/reports/10th-Report-Family.pdf>; WORKING GROUP ON DOMESTIC PARTNERSHIP, OPTIONS PAPER, at 4 (2006), <http://www.justice.ie/en/JELR/OptionsPaper.pdf/Files/OptionsPaper.pdf>.

43. [2008] 2 IR 417 (H. Ct.) (2006) (Ir.).

44. *Id.* at 505.

45. *Id.* at 504–05. See O'Mahony, *supra* note 38, at 204–05 (providing a critique of the reasoning provided in this part of the judgment).

sex) to reject the plaintiffs' argument.⁴⁶ It is clearly possible to read the decision as suggesting that the meaning of marriage under Article 41.3 is determined by prevailing consensus, as reflected in the most recent legislation on point; indeed, multiple legal commentators have taken this view.⁴⁷ Moreover, there is a general trend in the Irish courts of deference to legislative judgment on matters of social policy, with recent examples including decisions declining to strike down or reinterpret the law governing the age of consent,⁴⁸ the legality of assisted suicide,⁴⁹ and the allocation of parentage in surrogacy arrangements.⁵⁰ In each of these cases, the Supreme Court, having reviewed the law, declared the matter a policy choice that was for the Oireachtas and not the courts to make. Accordingly, it seems reasonable to suggest that had the Oireachtas chosen to enact legislation extending access to marriage to same-sex couples, such legislation would have been unlikely to have been struck down as unconstitutional by the courts.

But, for reasons that will be explored further in Part IV, this was not the view the political and legal establishment took of the decision. On the contrary, the Attorney General and politicians from all the major parties read the decision as creating a constitutional impediment to the introduction of marriage equality, meaning that a referendum (a prerequisite to amending the Irish Constitution) would be the only route through which marriage equality could be achieved.⁵¹ Thus, as a practical political matter (if not necessarily a legal one), the legislative route was not a viable route to marriage equality in Ireland. The paragraphs below will argue that constitutional history was a significant factor in creating the conditions that led to a referendum becoming politically inevitable, in spite of being legally avoidable.

The above analysis shows that there were reasons militating against the use of legislation for introducing marriage equality in each country. National legislation introducing marriage equality was not within the powers of the U.S. Congress, and while it is arguable that it would have

46. *Zappone and Gilligan*, 2 IR at 505–06 (2008) (“Is that not of itself an indication of the prevailing idea and concept in relation to what marriage is and how it should be defined? I think it is.”).

47. See, e.g., Eoin Carolan, *Committed Non-Marital Couples and the Irish Constitution*, in COMMITTED RELATIONSHIPS AND THE LAW 239, 263–66 (Oran Doyle & William Binchy eds., 2007); O'Mahony, *supra* note 38, at 203–04; Brian Tobin, *Law, Politics and the Child-Centric Approach to Marriage in Ireland*, 47 IRISH JURIST 210, 221–22 (2012); Tobin, *supra* note 24, at 118–19.

48. *MD (a minor) v. Ireland*, [2012] 1 IR 697, 719 (Ir.) (“This was a choice of the Oireachtas. Even in a time of social change, it is a policy within the power of the legislature The Oireachtas could have applied a different social policy but s. 5, the policy which they did adopt, was within the discretion of the Oireachtas, and it was on an objective basis, and was not arbitrary.”).

49. *Fleming v. Ireland*, [2013] 2 IR 417, 441, 447–48 (Ir.) (“The presumption [of constitutionality] may be regarded as having particular force in cases where the legislature is concerned with the implementation of public policy in respect of sensitive matters of social or moral policy.”).

50. *M.R. v. An Tard-Chláraitheoir*, [2014] IESC 60 ¶¶ 96, 113 (Ir.) (“As a significant social matter of public policy it is clearly an area for the Oireachtas, and it is not for this Court to legislate on the issue Any law on surrogacy affects the status and rights of persons, especially those of the children; it creates complex relationships, and has a deep social content. It is, thus, quintessentially a matter for the Oireachtas.”).

51. See, e.g., O'Mahony, *supra* note 38, at 205–06; MULLALLY, *supra* note 11, at 99, 142.

been legally possible for the Oireachtas in Ireland, the political reaction to the High Court decision on point made this impossible. With legislation off the table, marriage equality became squarely a constitutional issue in each country. This left two choices for resolving the debate: court decision or constitutional amendment. Why did the U.S. choose the former, while Ireland chose the latter? Constitutional history provides a helpful explanation.

B. Why Was a Court Decision Chosen in the U.S. and a Referendum Chosen in Ireland?

In some ways, constitutional structures in the U.S. and Ireland are very different. The U.S. is a huge federation consisting of fifty states, with significant powers of government existing at both state and federal levels. Ireland is a small unitary republic (slightly smaller in both size and population than South Carolina) with a highly centralized government. The U.S. model of the separation of powers, with completely separate executives and legislatures at both state and federal level and features such as executive veto, differs from Ireland's Westminster-style integrated parliament and executive.⁵² The combined effect of these differences is that the normal, everyday politics of the two countries have relatively few similarities.

There are far fewer differences, however, when it comes to major national disputes that affect religious-moral questions with implications for constitutional rights. A number of the fundamental features of the constitutional structures of the U.S. and Ireland are very similar. Both are liberal democracies, both systems operate under entrenched written constitutions that are the supreme source of law, and both have full-blown judicial review, under which judges may strike down legislation by reference to vague language in constitutional rights provisions (or, indeed, by reference to unenumerated rights not even specified in the text of the constitution itself). Each country has a history of significant matters of religious-moral controversy resulting in landmark Supreme Court decisions, with numerous such decisions (for example on sodomy laws,⁵³ contraception,⁵⁴ and assisted suicide⁵⁵) containing distinctly similar reasoning.

52. See Bruce Ackerman, *The New Separation of Powers*, 113 HARV. L. REV. 633, 710 (2000); John F. Manning, *The New Separation of Powers as Ordinary Interpretation*, 124 HARV. L. REV. 1939, 1942 (2011).

53. Compare *Bowers v. Hardwick*, 478 U.S. 186 (1986) (holding that Georgia's sodomy statute was not unconstitutional as the right to engage in the practice was not deeply rooted in the nation's history and tradition), with *Norris v. Attorney General*, [1984] IR 36 (Ir.) (finding that the criminalization of sodomy between two males was not unconstitutional as it upheld public morality).

54. Compare *Griswold v. Connecticut*, 381 U.S. 479 (1965) (holding that the Connecticut law banning contraceptive use is an unconstitutional infringement on marital privacy rights), with *McGee v. Atty Gen.* [1974] IR 284 (1973) (Ir.) (holding that the prohibition of contraceptives violated the constitutional right of married couples to make decisions concerning their marital affairs).

When it comes to resolving matters of deep controversy, perhaps the most pertinent difference between the political-constitutional dynamics of the two systems relates to the mechanism for constitutional amendment. As outlined by Article V of the U.S. Constitution, proposed amendments must be approved by a two-thirds majority of both houses of Congress and subsequently ratified by the legislatures of three-quarters of the fifty states.⁵⁶ By contrast, in Ireland, amending of the Constitution requires a simple majority vote in both Houses of the Oireachtas followed by a simple majority of votes cast in a referendum.⁵⁷

It is clear that the U.S. Constitution is far more deeply entrenched than the Irish Constitution. From a political perspective, there is near universal consensus that Article V is effectively defunct. As long ago as 1985, Stephen Carter argued that the amendment process of Article V was “very nearly a dead letter.”⁵⁸ Bruce Ackerman has written about how constitutional change is now achieved almost entirely through political movements and transformative judicial appointments, observing that this strategy is employed by Republicans as well as Democrats, notwithstanding the former’s avowed preference for originalism.⁵⁹ He cautions that, “[w]hatever the future may hold, don’t expect big changes through formal amendments. We the People can’t seem to crank out messages in the way described by Article V of our Constitution.”⁶⁰ Accordingly, a successful constitutional amendment was not a realistic goal for either side of the marriage-equality debate. Proponents of marriage equality never even considered it; and while it has been attempted more than once by opponents, all such attempts have fallen well-short of success.⁶¹

This contrasts significantly with Ireland, where constitutional amendments are quite commonplace. The last time the U.S. Congress submitted an amendment to the states that was successfully ratified was 1971.⁶² Since then, only two amendments have secured a two-thirds majority in Congress—the last in 1978—and neither was ratified by the states.⁶³ In the same period of time in Ireland, thirty-five constitutional

55. Compare *Washington v. Glucksberg*, 521 U.S. 702 (1997) (holding that the Due Process Clause does not give the right to assistance in committing suicide), with *Fleming v. Ireland* [2013] 2 IR 417 (Ir.) (finding that the Constitution does not give the right to commit suicide).

56. U.S. CONST. art. V.

57. Constitution of Ireland 1937 art. 46, http://www.irishstatutebook.ie/eli/cons/en/html#article41_4.

58. Stephen L. Carter, *Constitutional Adjudication and the Indeterminate Text: A Preliminary Defense of an Imperfect Muddle*, 94 YALE L.J. 821, 842 (1985).

59. Bruce Ackerman, *The Living Constitution*, 120 HARV. L. REV. 1737, 1741–42 (2007).

60. *Id.* at 1742–43.

61. See H.R.J. Res. 32, 114th Cong. (2015); S.J. Res. 32, 114th Cong. (2015); H.R.J. Res. 88, 109th Cong. (2006); H.R.J. Res. 106, 108th Cong. (2004). See also KLARMAN, *supra* note 32, at 105, 115–16.

62. The Twenty-Sixth Amendment to the U.S. Constitution: submitted for ratification on March 23, 1971; ratified on July 1, 1971. U.S. CONST. amend. XXVI.

63. The Equal Rights Amendment was passed by Congress in 1972. The initial ratification period ended March 22, 1979, and the extension period ended June 30, 1982. See, e.g., Steve Mount, *The Failed Amendments*, U.S. CONST. ONLINE, <http://www.usconstitution.net/constamfail.html> (last visited

amendments have been passed by the Oireachtas, and twenty-seven of these have been approved in the subsequent referendum. That is not to say that it is easy to amend the Constitution in Ireland; in fact, several amendments that were expected to pass have been rejected,⁶⁴ and the political establishment is quite wary of referendums for this reason. The comparison is used simply to point out that the amendment process is less demanding in Ireland than in the U.S., and that amendments are far more commonplace as a result. This impacts the dynamic in constitutional politics, in that a constitutional amendment is a realistically available solution to disputes in a way that cannot be said of the U.S. Part IV will argue that there are additional reasons why this solution is often availed of in particular types of disputes.

The other difference between the political-constitutional dynamics in the U.S. and Ireland that impacts the resolution of constitutional controversies is that the U.S. Supreme Court is significantly more politicized than its Irish counterpart. Members of the court are nominated by the executive in each country; the requirement in the U.S. that the nomination be approved by the Senate following a confirmation hearing is not replicated in Ireland. But the real difference relates to what happens after appointment. It is now trite to observe that the U.S. Supreme Court is a political institution as much as it is a legal one; the only real point of disagreement relates to the extent to which this is a bad thing.⁶⁵ Some scholars argue that the Supreme Court was always intended to be a political institution⁶⁶ or that there is nothing surprising about its politicization.⁶⁷ Others take a more pessimistic view: Eric Segall argued that the politicization has reached the point where the Court is not really a court, and the justices are not really judges.⁶⁸ On any account, it is clear that the U.S. Supreme Court has been more than willing to play a key role in shaping the law on matters of political controversy.

By contrast, while the Irish Supreme Court has gone through periods of being more or less activist or restrained, it has never been overtly

Dec. 27, 2016). Congress passed The District of Columbia Voting Rights Amendment in 1978; the ratification period ended August 22, 1985. *Id.*

64. See, e.g., R. Darcy & Michael Laver, *Referendum Dynamics and the Irish Divorce Amendment*, 54 PUB. OPINION Q. 1, 2 (1990) (noting the 1986 divorce referendum); Muiris MacCarthaigh & Shane Martin, *Bicameralism in the Republic of Ireland: The Seanad Abolition Referendum*, 30 IR. POL. STUD. 121, 125 (2015) (explaining the 2013 Referendum to abolish Seanad Éireann); Jane Suiter & Theresa Reidy, *It's the Campaign Learning Stupid: An Examination of a Volatile Irish Referendum*, 68 PARLIAMENTARY AFFS. 182, 188 (2013) (referencing the 2011 Referendum on Houses of Oireachtas Inquiries).

65. See generally Brandon L. Bartels et al., *Lawyers' Perceptions of the U.S. Supreme Court: Is the Court a "Political" Institution?*, 49 L. & SOC'Y REV. 761 (2015) (providing evidence on the range of perceptions held by lawyers on this point).

66. See generally Maeva Marcus, *Is the Supreme Court a Political Institution?*, 72 GEO. WASH. L. REV. 95 (2004).

67. See generally Ezra Klein, *Of Course the Supreme Court is Political*, WASH. POST (June 21, 2012), https://www.washingtonpost.com/news/wonk/wp/2012/06/21/of-course-the-supreme-court-is-political/?utm_term=.d14d56fdc929.

68. See generally ERIC J. SEGALL, SUPREME MYTHS: WHY THE SUPREME COURT IS NOT A COURT AND ITS JUSTICES ARE NOT JUDGES 1 (2012).

political in the way that the U.S. Supreme Court is. Ronan McCrea has observed that “Irish judges are not public figures in the same way as their American colleagues . . . and judges’ decisions cannot be predicted by the political complexion of the government that nominated them.”⁶⁹ In recent years, the general trend has been one of consistent deference to the legislative branch on matters of social controversy (as noted above).⁷⁰ Thus, while Irish courts have accepted that constitutional interpretation should be informed by prevailing ideas and standards in society, and that legislation considered constitutional at one point might be considered unconstitutional later on,⁷¹ the likelihood of a future Supreme Court declaring unconstitutional a law that excluded same-sex couples from marriage was not a strong one. It was far more likely that future courts would follow the approach adopted in *Zappone and Gilligan* and defer to legislative judgment on the issue.

All of the above has a significant impact on the incentives surrounding political activism in each country. In the U.S., constitutional amendments at the national level are an implausible goal, whereas the Supreme Court provides fertile ground in which political claims can be cultivated as constitutional arguments. The multiple layers of state and federal courts that must be navigated *en route* to the Supreme Court make it possible to fight the litigation battle on a broad front and to secure some (perhaps many) minor victories or tentative answers that help shape the argument before final judgment. No pragmatic interest group would target a constitutional amendment ahead of strategic litigation. Since strategic litigation is a more attractive option, a constitutional amendment only really becomes relevant as a means for opponents of those pursuing strategic litigation to preclude or reverse a court decision, as the marriage-equality debate has repeatedly shown. Thus, while a constitutional amendment might be targeted as a response to strategic litigation, it would rarely (if ever) be pursued as a substitute for it. Even if strategic litigation fails at first, it makes more sense to try again than to move onto the even steeper hill of a constitutional amendment.

In Ireland, the situation is directly reversed: the Supreme Court is often at pains to avoid (or at least to be seen to avoid) deciding political questions, making strategic litigation more challenging than in the U.S. Thus, proponents of marriage equality attempted it and failed.⁷² Being a

69. Ronan McCrea, *We Should Avoid Politicising Our Supreme Court*, IRISH TIMES (Oct. 16, 2015), <http://www.irishtimes.com/news/crime-and-law/we-should-avoid-politicising-our-supreme-court-1.2390310>. See also Jennifer Carroll, *You Be the Judge: A Study of the Backgrounds of Superior Court Judges in Ireland in 2004 Part I*, 10 BAR REV. 153, 167 (2005) (citing empirical evidence that Irish superior court judges are reluctant to self-identify as holding a political ideology, and that they believe ideology has no place in the judiciary).

70. See *supra* notes 48–50.

71. See *A v. Governor of Arbour Hill Prison*, [2006] 4 IR 88, 129–30 (2006) (Murray, C.J.) (stating that the Constitution has a “dynamic quality” and must be “interpreted in accordance with contemporary circumstances including prevailing ideas and mores,” such that “[i]t is entirely conceivable therefore that an Act found to be unconstitutional in this, the 21st century might well have passed constitutional muster in the 1940s or 50s.”).

72. See *Zappone and Gilligan v. Revenue Commissioners*, [2008] 2 IR 417 (H. Ct.) (2006) (Ir.).

small country, there is only one set of courts in which to pursue litigation, and so there was little else that could be done by way of litigation in the short term. On the other hand, constitutional amendments are a familiar feature of the political scene in Ireland. They might not be an everyday occurrence, but referendums on constitutional amendments have been an almost annual event since the early 1990s,⁷³ making an amendment a realistic (if ambitious) target on issues where politics and constitutional law become entangled. Knowing that success was unlikely in either the legislature or the courts, proponents of marriage equality instead targeted a constitutional amendment, with some groups campaigning for civil partnership legislation as a stepping-stone.⁷⁴

IV. POLITICAL CULTURE

Understanding why the marriage-equality debate was settled by a Supreme Court decision in the U.S. and by a referendum in Ireland, and assessing the appropriateness of these processes, requires more than an understanding of the prevailing political-constitutional dynamics; it also requires an understanding of the prevailing political landscape and political culture. Similar to a small number of other issues, marriage equality is not just an ordinary political dispute in the U.S. and Ireland. Marriage equality raises particular religious-moral issues, with the result that political disagreement runs deeper than usual and transcends ordinary politics. This Part will explain how disputes of this nature interact with the political-constitutional dynamic existing in the U.S. and Ireland, impacting ordinary politics, judicial appointments, and constitutional amendments. It also demonstrates that on certain fundamental points of disagreement, the loss of a battle tends to be seen as a waypoint rather than an endpoint; each side of the debate will continuously seek to trump the other until a decisive victory can be secured.

A. *Religious-Moral Disputes*

In many ways, politics in Ireland and the U.S. bear little resemblance to each other. The U.S. has long operated a two-party system with a clear left-right divide, whereas Ireland has a multiplicity of political parties, the two largest of which are both center-right. Voting in the U.S. operates most commonly on a first-past-the-post basis (which lends itself to clear majorities, especially in light of the two-party system), whereas Ireland uses proportional representation by single transferable vote

73. See e.g., *Referendum Results, 1937–2015*, Dep't of Housing, Planning, Community & Local Gov't (Aug. 23, 2016), http://www.housing.gov.ie/sites/default/files/migrated-files/en/Publications/LocalGovernment/Voting/referendum_results_1937-2015.pdf.

74. See generally MULLALLY, *supra* note 11. The Civil Partnership and Certain Rights and Obligations of Cohabitants Act was enacted in 2010. See Civil Partnership and Certain Rights and Obligations of Cohabitants Act of 2010 (Act No. 24/2010) (Ir.), <http://www.irishstatutebook.ie/eli/2010/act/24/enacted/en/html>.

(“PR-STV”) (which lends itself to coalition governments, especially in light of the multiplicity of parties).⁷⁵

For all of these differences, the two countries share one very significant commonality in their political landscape: in each case, there is a tendency for particularly deep-seated political disagreement over a small number of issues that have religious or moral implications. In the U.S., this has often been characterized as a “culture war.”⁷⁶ Some scholars argue that the extent of this culture war is exaggerated, and some even question whether it actually exists.⁷⁷ To the extent that it does exist, however, it is clear that it is at its most intense on a small number of specific issues with explicit religious-moral implications,⁷⁸ and issues like abortion and marriage equality are, according to constitutional scholar Michael Perry, at the epicenter of the culture war.⁷⁹ Indeed, the culture war has been expressly referenced in Supreme Court jurisprudence around equal protection for gay people.⁸⁰ The idea of a culture war is less prevalent in Ireland, but nonetheless, the existence of what has been termed a “religious-conservative versus secular-liberal cleavage” in Irish politics⁸¹ has featured prominently in Irish political-science literature, and its impact on constitutional politics has been particularly noted.⁸²

While the so-called culture war has transferred to party politics to a reasonably identifiable degree in the U.S., the ballot box is neither the only nor the decisive battleground. Staggered elections make it extremely difficult for one party, at the federal level, to hold all of the levers of power at the same time.⁸³ Consequently, even if legislation is enacted advancing the worldview of one side or the other, it is susceptible to being vetoed by the executive branch⁸⁴ or being invalidated by the courts.⁸⁵ In

75. *Single Transferable Vote*, ELECTORAL REFORM SOCIETY, <http://www.electoral-reform.org.uk/single-transferable-vote> (last visited Dec. 27, 2016).

76. William G. Jacoby, *Is There a Culture War? Conflicting Value Structures in American Public Opinion*, 108 AM. POL. SCI. REV. 754, 755 (2014).

77. *Id.* at 755–56.

78. See Nancy J. Davis & Robert V. Robinson, *Are the Rumors of War Exaggerated? Religious Orthodoxy and Moral Progressivism in America*, 102 AM. J. SOC. 756–58 (1996).

79. MICHAEL J. PERRY, CONSTITUTIONAL RIGHTS, MORAL CONTROVERSY, AND THE SUPREME COURT 48 (2009). See also Robert P. George, *Gay Marriage, Democracy and the Courts*, WALL ST. J. (Aug. 3, 2009, 11:22 AM), <http://www.wsj.com/articles/SB10001424052970204619004574322084279548434>.

80. *Romer v. Evans*, 517 U.S. 620, 652 (1996) (Scalia, J., dissenting).

81. Richard Sinnott, *Cleavages, Parties and Referendums: Relationships Between Representative and Direct Democracy in the Republic of Ireland*, 41 EUR. J. POL. RES. 811, 815 (2002).

82. See, e.g., Michael Gallagher, *Ireland: The referendum as a conservative device?*, in THE REFERENDUM EXPERIENCE IN EUROPE 101–102 (Michael Gallagher & Pier Vincenzo Uleri eds., 1996); Conor O'Mahony, *Falling Short Expectations: The 2012 Children Amendment, from Drafting to Referendum*, 31 IR. POL. STUD. 252, 272 (2016).

83. Ackerman, *supra* note 59, at 1810.

84. For example, in 2009, when Vermont became the first state to announce marriage equality through the legislative process, the governor vetoed it. See KLARMAN, *supra* note 32, at 129. There are multiple examples of abortion legislation being vetoed by the executive branch. See, e.g., Partial-Birth Abortion Ban Act of 1997, H.R. 1122, 105th Cong. (1997) (vetoed Oct. 10, 1997); Partial-Birth Abortion Ban Act of 1995, H.R. 1833, 104th Cong. (1996) (vetoed Apr. 10, 1996).

the long run, the only branch of government that can make a decision that is relatively durable is the U.S. Supreme Court.⁸⁶ In theory, its decisions can be set aside by a constitutional amendment, but, as shown in Part III, amending the federal constitution is next to impossible in practice (especially on an issue of religious-moral controversy).⁸⁷ It may sometimes be possible to recast invalidated legislation so as to comply with or circumvent the Court's decision,⁸⁸ but this clearly does not apply to a black-and-white question like whether same-sex couples have the right to legally marry. The only realistic way of setting aside a definitive Supreme Court ruling is for a later court to overturn it; but this takes significant time, as well as consistently favorable developments in electoral politics.⁸⁹ Thus, while religious-moral controversies will play themselves out at lower levels of government, both sides will have one eye on an eventual victory in the U.S. Supreme Court as an endgame that is likely to endure for some time. The politicized nature of the Court, described in Part II above, provides further incentive for this strategy.

Meanwhile, in Ireland, the religious-conservative versus secular-liberal cleavage has not translated into party politics to any great extent, and it has become increasingly difficult for either side of the divide to secure a majority through electoral politics. The PR-STV voting system makes outright majorities for individual parties a rarity;⁹⁰ even when a party goes into Government with a clear manifesto position on a religious-moral issue, it has to negotiate a Programme for government with a party that may have a different position. There is also limited scope for the religious-conservative versus secular-liberal cleavage to play out in the courts. As already noted, the Irish Supreme Court is significantly less politicized than its U.S. counterpart. Supreme Court judges are political appointees, but the religious-conservative versus secular-liberal cleavage

85. The courts have invalidated abortion legislation on multiple occasions since *Roe v. Wade*. See JON O. SHIMABUKURO, CONG. RESEARCH SERV., RL33467, ABORTION: JUDICIAL HISTORY AND LEGISLATIVE RESPONSE 2–3 (2016), <https://www.fas.org/sfp/crs/misc/RL33467.pdf>.

86. *But see* Barry Friedman, *The Importance of Being Positive: The Nature and Function of Judicial Review*, 72 U. CIN. L. REV. 1257, 1295–96 (2004) (arguing that a Supreme Court decision is not the final say, but part of a dialogue in which the Court fulfills the function of focusing and sustaining a debate, couching it in constitutional terms, and synthesizing the views of society on the matter at hand).

87. *See supra* Part III.

88. *See* J. MITCHELL PICKERILL, CONSTITUTIONAL DELIBERATION IN CONGRESS: THE IMPACT OF JUDICIAL REVIEW IN A SEPARATED SYSTEM 31–61 (2004) (examining the response of Congress where federal legislation was invalidated by the Supreme Court between 1953 and 1997).

89. *See* Bruce Ackerman, *Higher Lawmaking*, in RESPONDING TO IMPERFECTION: THE THEORY AND PRACTICE OF CONSTITUTIONAL AMENDMENT 63, 82–84 (Sanford Levinson ed., 1995); Neal Devins, *Through the Looking Glass: What Abortion Teaches Us About American Politics*, 94 COLUM. L. REV. 293, 302, 305, 323–24 (1994) (reviewing BARBARA HINKSON CRAIG & DAVID M. O'BRIEN, ABORTION AND AMERICAN POLITICS (1993), and discussing the use of judicial appointments to influence constitutional interpretation, particularly in the context of abortion); Robert Post & Reva Siegel, *Roe Rage: Democratic Constitutionalism and Backlash*, 42 HARV. C.R.-C.L. L. REV. 373, 381 (2007).

90. The last single-party government was from 1987–1989; but this did not hold an outright majority and depended on support from independent members. The last outright majority held by a single party was from 1977–1981.

has not translated into judicial appointments or judicial ideology.⁹¹ Thus, unlike in the U.S., there is no incentive for either side of the cleavage to seek to advance their worldview by securing constitutional change through the vehicle of judicial appointments.

On the other hand, the process of amending the constitution by referendum has proven to be especially well-suited to the resolution of major controversies situated on the religious-conservative versus secular-liberal cleavage. This process has the obvious appeal of being a decisive victory that cannot be amended by legislation or overturned by the courts, but there are other reasons as well. Richard Sinnott argues that the religious-conservative versus secular-liberal cleavage in Irish politics finds greater expression in referendums than in party politics.⁹² The referendum offers the possibility for the final decision on a religious-moral controversy to be made directly by the people, without partisan disagreement among the political parties.⁹³ This serves to insulate the political parties against the impact of a contentious debate. Parties are all too eager to avail of this insulating effect, as was particularly evident on the issue of marriage equality. Not content with leaving the decision to the people, Fine Gael (the larger party in the coalition government) sought to further distance itself by insisting that the issue be referred to, and agreed by, the Constitutional Convention before committing to holding a referendum.⁹⁴ (Notably, the same approach has now been adopted on the issue of abortion).⁹⁵ It is common for Irish referendums on religious-moral issues to proceed on a consensus basis;⁹⁶ by avoiding partisan disagreement, political parties can avoid being targeted for electoral retribution for their stance on the referendum, since all of the parties' stance was the same.

While the existence of specific constitutional provisions on point means that social reforms, such as the introduction of divorce⁹⁷ or the liberalization of abortion laws,⁹⁸ clearly could not occur without a referendum, it was noted earlier that there were good grounds for believing that a referendum on marriage equality was not legally necessary. That all political parties were so quick to take the view that a referendum was una-

91. See, e.g., Carroll, *supra* note 69, at 166.

92. Sinnott, *supra* note 81, at 815.

93. *Id.* at 817.

94. Tobin, *supra* note 24, at 123; see also MULLALLY, *supra* note 11, at 84–86, 233–45.

95. Noel Baker, *Frances Fitzgerald Tells UN a Citizens' Assembly Will Consider the Eighth Amendment on Abortion*, IRISH EXAM'R (May 12, 2016), <http://www.irishexaminer.com/ireland/frances-fitzgerald-tells-un-a-citizens-assembly-will-consider-the-eighth-amendment-on-abortion-398937.html>.

96. Sinnott, *supra* note 81, at 817. See also Gallagher, *supra* note 82, at 99.

97. As originally enacted, Article 41.3 of the Irish Constitution prohibited divorce; this prohibition was removed following a referendum in 1995. Fifteenth Amendment of the Constitution Act 1995 (Ir.), <http://www.irishstatutebook.ie/eli/1995/ca/15/schedule/enacted/en/html#sched> (allowing for the dissolution of marriages).

98. The Eighth Amendment to the Irish Constitution in 1983 inserted a new provision, Article 40.3.3°, recognizing the right to life of the unborn. Eighth Amendment of the Constitution Act 1983 (Ir.), <http://www.irishstatutebook.ie/eli/1983/ca/8/schedule/enacted/en/html>; *infra* Part V.

voidable, in spite of voluminous legal commentary to the contrary, arguably reflects an underlying preference in Irish politics for controversies of this sort to be dealt with through the referendum process. In line with the consensus approach described above, all parties agreed to support the amendment.

The flipside of this is that religious-conservative groups have gained more influence than they have in the legislative process. While such groups may not have been happy with all aspects of how the marriage referendum was conducted, the reluctance of political parties to adopt clear competing positions on religious-moral issues leaves them feeling even more voiceless and disenfranchised in electoral politics at present.⁹⁹ On the other hand, international evidence shows that where all political parties are in agreement on a referendum proposal, the issue becomes less of a partisan one and voters are inclined to take their cues from other factors or groups.¹⁰⁰ As a result, the record shows that religious-conservative groups have succeeded in exerting significant influence on the referendum process in Ireland, notwithstanding their comparative lack of influence on electoral politics.¹⁰¹ This helps explain why only a handful of Oireachtas members voted against the passage of the marriage-equality amendment through parliament, but over one-third of Irish voters voted “No” in the referendum itself. It also illustrates how the referendum process acts as something of a safety valve through which the political parties allow disagreement along this political cleavage to be ventilated without interfering with everyday politics.

B. *Fundamental Commitments and Constitutional Politics*

Certain political disputes—like the issues at the heart of America’s culture wars, or those situated on the religious-conservative versus secular-liberal political cleavage in Ireland—go beyond ordinary politics. They do not relate to people’s shallow, short-term commitments, which might change rapidly and are expressed through laws that are easy to change. By contrast, fundamental disagreements on issues like abortion and marriage equality relate to people’s deep, fundamental commitments to the kind of society they want to live in. These are the kind of commitments that tend to find their way into a country’s constitution.¹⁰² Laws

99. See, e.g., David Quinn, *Micheál Martin Should Talk to the Orphaned Conservative Voters*, IRISH INDEP. (May 29, 2015), <http://www.independent.ie/opinion/columnists/david-quinn/michel-martin-should-talk-to-the-orphaned-conservative-voters-31262388.html>; David Quinn, *The Next Goal for Liberals Will be Referendum on Abortion*, IRISH INDEP. (May 25, 2015, 2:30 AM), <http://www.independent.ie/irish-news/referendum/the-next-goal-for-liberals-will-be-referendum-on-abortion-31250555.html>.

100. Lawrence Leduc, *Opinion Change and Voting Behaviour in Referendums*, 41 EUR. J. POL. RES. 711, 722–24 (2002). See also Darcy & Laver, *supra* note 64, at 15–17; Jane O’Mahony, *Ireland’s EU Referendum Experience*, 24 IR. POL. STUD. 429, 432 (2009); Michael Gallagher, *Parties and Referendums in Ireland 1937-2011*, 26 IR. POL. STUD. 535, 540–42 (2011).

101. Gallagher, *supra* note 100, at 101–02.

102. See, e.g., Walter F. Murphy, *Constitutions, Constitutionalism, and Democracy*, in CONSTITUTIONALISM AND DEMOCRACY: TRANSITIONS IN THE CONTEMPORARY WORLD 3, 10 (Doug-

based on these fundamental commitments are made more difficult to change to ensure that any amendments to them are also based on deep, fundamental commitments, not just shallow, short-term ones. Ordinarily, constitutional change can only be brought about by a particularly serious political effort. The nature of the effort involved makes it clear to everyone that the decision being made is a particularly serious one and sets it apart from ordinary politics.¹⁰³ Arguably, when law reform takes place that touches on issues at the epicenter of the culture wars in the U.S. or situated on the fault line of the religious-conservative versus secular-liberal cleavage in Ireland, ordinary politics would not suffice, even if (strictly speaking) the debates on issues like abortion and marriage equality could have been resolved without any recourse to the Constitution.

Moreover, on issues of fundamental disagreement on deeply held beliefs, it is inevitable that each side of the debate will utilize every possible forum with the aim of securing a decisive victory. Interest groups with deep-seated commitments on either side of the debate on issues like abortion or marriage equality will not lightly abandon their pursuit of victory and will explore every possibility of reversing any success achieved by the other side. Nancy Knauer has likened the struggle over marriage equality in the U.S. to a game of “paper, scissors, rock.”¹⁰⁴ Proponents sought to use litigation in state courts to invalidate legislation; whereupon opponents sought to use state constitutional amendments to reverse or preclude court decisions; and finally, proponents used litigation in the federal courts to invalidate state constitutional amendments.¹⁰⁵

The intensity of the struggle is a function of the intensity of the disagreement. The final goal towards which the struggle is orientated is a product of the political-constitutional dynamics described in Part III above: a politicized Supreme Court is, in practice, the final arbiter of fundamental disputes in the U.S., whereas a referendum on a constitutional amendment plays that role in Ireland. It is easy to be cynical about the factors that have led to fundamental disputes being resolved in these ways, but constitutional history shows that the practices are well-established. Moreover, on disputes over deeply held views on issues like abortion and marriage equality, there are good reasons for relying on these established practices.

Because constitutional change is all but impossible by way of amendment in the U.S., it is mostly achieved through Supreme Court decisions. But this does not mean that change comes about easily: on the

las Greenberg et al. eds., 1993); Conor O'Mahony, *If a Constitution is Easy to Amend, Can Judges be Less Restrained? Rights, Social Change, and Proposition 8*, 27 HARV. HUM. RTS. J. 191, 196–205 (2014).

103. See Friedman, *supra* note 86, at 1297; see also Donald S. Lutz, *Toward a Theory of Constitutional Amendment*, in RESPONDING TO IMPERFECTION, *supra* note 89.

104. Nancy J. Knauer, *The Recognition of Same-Sex Relationships: Comparative Institutional Analysis, Contested Social Goals, and Strategic Institutional Choice*, 28 U. HAW. L. REV. 23, 76 (2006).

105. See, e.g., *id.* at 26.

contrary, it is often the product of a sustained political effort over a lengthy period of time. An increasing number of prominent scholars argue that developments in the Supreme Court's rights jurisprudence are strongly influenced by developments in electoral politics. Jack Balkin has argued that popular opinion, as expressed through elections, legislation, and judicial appointments, influences the Supreme Court's interpretation of the U.S. Constitution over time.¹⁰⁶ Similarly, Bruce Ackerman argued that the interpretation of the Constitution is shaped over time by political movements that bring about landmark statutes and "superprecedents."¹⁰⁷ Barry Friedman characterized Supreme Court decisions as part of a dialogue in which the Court fulfils the function of focusing and sustaining a debate, couching it in constitutional terms, and synthesizing the views of society on the matter at hand.¹⁰⁸ No matter how the process is described, the point is the same. A landmark Supreme Court decision on a fundamental dispute, such as abortion or marriage equality, is not ordinary politics—it is constitutional politics, through which the American people resolve disputes over their deepest commitments. Everyone understands that the stakes are high and that the effort involved in changing direction is considerable; the final result will reflect both the depth of this effort and (most likely) the views of the majority. People will disagree as to the appropriateness of resolving disputes in this way, but for now, it is how these things are done, and everyone understands this. Since the Supreme Court is, in practice, the means through which constitutional change is achieved, it can be argued that it is appropriate that it should adjudicate disputes that relate to people's fundamental commitments.

Similarly, in Ireland, reliance on a constitutional referendum as the means to resolve fundamental disagreements related to the People's fundamental commitments serves the function of setting the issue apart as constitutional rather than ordinary politics, and it requires a special effort over time in order to achieve change. The vehicle is different in the U.S., but the journey and the destination are the same. A constitutional amendment is a relatively durable way of settling the debate, but can only be achieved if a sustained effort over time can produce the necessary ingredients of consensus among the political parties and a majority in the referendum itself. While the process is more democratic than reliance on the Supreme Court in the U.S., it is less well suited to the protection of minority rights; but for good or for ill, it is how these things are done, and everyone understands this. Again, since a referendum is the means through which constitutional change is achieved in Ireland, it can be argued that it is appropriate that disputes that transcend ordinary politics be settled by referendum.

106. See generally JACK M. BALKIN, *LIVING ORIGINALISM* (2011).

107. See generally Ackerman, *supra* note 59.

108. See Friedman, *supra* note 86, at 1290–91.

V. SETTLING THE ABORTION DEBATE (AT LEAST FOR NOW)

The clearest illustration of why the marriage-equality debate was settled by a Supreme Court decision in the U.S. and by a referendum in Ireland can be provided by examining of the constitutional history of the abortion debate in each country. This closely related (if not quite identical) religious-moral controversy has been addressed using the same mechanisms, for the same reasons. In many countries, the legal position on abortion is set out in ordinary legislation.¹⁰⁹ A brief examination of the constitutional history of the U.S. and Ireland, however, shows how the search for a decisive victory in a political dispute over a religious-moral issue caused that issue to become constitutionalized. In the U.S., the combination of a deeply entrenched constitution and a politicized Supreme Court led to the legal position being settled by a series of Supreme Court decisions.¹¹⁰ In Ireland, the reluctance of the courts to get involved, coupled with the relative ease of constitutional amendment and the preference of politicians to allow the people to directly decide the issue, meant that the legal position has been settled by a series of referendums.¹¹¹

In the U.S., abortion has long been a flashpoint in the so-called “culture wars.” Up to the 1970s, the regulation of abortion was considered to be a matter for state law.¹¹² Some states allowed it, while the majority did not (unless necessary to save the life of the mother).¹¹³ In 1973, the Supreme Court ruled in *Roe v. Wade* that the right to privacy under the U.S. Constitution precluded the enactment of laws prohibiting abortion during the first or second trimester.¹¹⁴ Of course, *Roe* did not entirely settle the matter. The decision in *Roe* is probably the most controversial decision ever handed down by the U.S. Supreme Court. Unlike decisions in which the Supreme Court has reflected a trend in national consensus and merely suppressed outliers,¹¹⁵ the decision in *Roe* was handed down at a time when the majority of states had laws similar to that which were struck down.¹¹⁶ Thus, rather than settling the abortion debate, *Roe* became a point of departure.¹¹⁷

In spite of the continuing controversy over *Roe*, Justice Ruth Bader Ginsburg has opined that the Court’s error was one of timing rather than

109. See Louise Finer & Johanna B. Fine, *Abortion Law Around the World: Progress and Pushback*, NAT’L CTR. FOR BIOTECHNOLOGY INFO. (Apr., 2013), <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC3673257/>.

110. See generally Devins, *supra* note 89.

111. See Tobin, *supra* note 24, at 127.

112. Fiona de Londras, *Constitutionalizing Fetal Rights: A Salutory Tale from Ireland*, 22 MICH. J. GENDER & LAW 243, 252–62 (2015).

113. See *Abortion*, SUP. CT. REV., <http://supremecourtreview.com/default/issue/> (last visited Dec. 27, 2016).

114. 410 U.S. 113, 153–54 (1973).

115. See, e.g., BALKIN, *supra* note 106; Ackerman, *supra* note 59 (documenting this general tendency of the U.S. Supreme Court).

116. 410 U.S. at 118.

117. Devins, *supra* note 89, at 293–94.

of substance.¹¹⁸ *Roe* may have gotten ahead of public opinion when it was decided, but opinion polls in subsequent years have consistently shown that a majority of Americans believe that the decision should not be overturned.¹¹⁹ Countless state and federal legislative enactments have attempted to limit its scope, and presidential candidates and judicial nominees alike are routinely interrogated as to their views on the decision. Nonetheless, its central finding—that the decision as to whether to have an abortion is a private matter between a woman and her physician that attracts constitutional protection—has survived intact. Its trimester framework was later modified in *Planned Parenthood of Southeastern Pennsylvania v. Casey* so as to allow for greater state regulation of abortion, but its central finding was reaffirmed.¹²⁰

In effect, *Casey* became the decision that settled the debate (at least for the time being). Neal Devins has argued that it stabilized state abortion politics by providing a template that helps states determine what types of abortion regulations can be constitutionally pursued, and establishing a standard sufficiently malleable that it can be applied to either uphold or invalidate nearly any law that a state is likely to pass.¹²¹ Devins concluded that “forty years after *Roe* and twenty years after *Casey*, it seems unlikely that there will be a fundamental political and popular realignment on abortion.”¹²² In such a politically contested space, this is quite a statement.

The history of the U.S. abortion debate illustrates the points made in Part IV. The depth of disagreement caused the issue to transcend ordinary politics, and it ensured that both sides would pursue victory in every possible forum. The debate has raged at all levels of government, with bills being vetoed or struck down by courts on a regular basis, but the principles established in *Roe* (as later modified by *Casey*) have remained constant. Given that a constitutional amendment was not a viable prospect, a Supreme Court decision reflecting an emerging national consensus was the only realistic means through which such a lasting solution could have been reached in U.S. law.

118. David Crary, *Ruth Bader Ginsburg Questions Timing of Roe v. Wade, Gives Hint on Same-Sex Marriage Issue*, HUFFINGTON POST (Feb. 10, 2012, 6:16 PM), http://www.huffingtonpost.com/2012/02/10/ruth-bader-ginsburg-roe-v-wade-gay-marriage_n_1269399.html [https://perma.cc/TH8B-L9MP].

119. Gallup polls show that between 1989 and 2012, the number of Americans who believed that *Roe* should not be overturned has ranged between 52% and 68%, while the number that believed it should be overturned has ranged between 25% and 36%. See generally *Abortion*, GALLUP, <http://www.gallup.com/poll/1576/abortion.aspx> (last visited Dec. 27, 2016). Similar findings have been made by the Pew Research Center. See *Roe v. Wade at 40: Most Oppose Overturning Abortion Decision*, PEW RES. CTR. (Jan. 16, 2013), <http://www.pewforum.org/2013/01/16/roe-v-wade-at-40/>.

120. 505 U.S. 833 (1992). Again, the position stated in *Casey* has subsequently been supported by a majority of Americans. See *Majority of Americans Still Support Roe v. Wade Decision*, GALLUP (Jan. 22, 2013), <http://www.gallup.com/poll/160058/majority-americans-support-roe-wade-decision.aspx>.

121. See generally Neal Devins, *How “Planned Parenthood v. Casey” (Pretty Much) Settled the Abortion Wars*, 118 YALE L.J. 1318, 1334–38 (2009).

122. *Id.* at 1351–52.

The history of the abortion debate in Ireland is inextricably linked to *Roe*. The privacy dimension of *Roe* built directly on the earlier decision in *Griswold v. Connecticut*, in which the Supreme Court first recognized the unenumerated constitutional right to (marital) privacy and used it to strike down state laws limiting access to contraceptives.¹²³ An almost identical decision was reached by the Irish Supreme Court in *McGee v. Attorney General*¹²⁴ in 1974, just one year after the U.S. Supreme Court's decision in *Roe*. Immediately, pro-life activists in Ireland perceived the possibility that a later Supreme Court decision could follow the lead of the U.S. and extend the right to privacy to invalidate Irish laws prohibiting abortion.

What differed in the Irish context was the means chosen for settling the matter. Unlike in the U.S., the Irish Constitution is comparatively easy to amend.¹²⁵ The Pro-Life Amendment Campaign ("PLAC") was established to bring about a constitutional amendment that would expressly protect the right to life of the unborn and preclude the legalization of abortion by court decision.¹²⁶ While political parties in Ireland are generally eager to avoid the abortion debate as much as possible, PLAC was able to exploit a period of political instability to secure reluctant election commitments to put the amendment to a referendum.¹²⁷ This occurred in 1983 and, following a divisive campaign,¹²⁸ the Eighth Amendment was approved by 67% of voters, inserting a provision reading: "[t]he State acknowledges the right to life of the unborn and, with due regard to the equal right to life of the mother, guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate that right."¹²⁹

In a striking parallel to *Roe*, the Eighth Amendment did not bring an end to the abortion debate in Ireland, but instead became the point of departure. The political parties, having seen the toxic atmosphere prevailing during the 1983 referendum, chose to avoid the issue as much as possible for the next thirty years. No legislative framework was enacted to clarify how the mother's right to life (stated in the Eighth Amendment to be "equal" to that of the unborn) was to be protected in cases where the mother's life was at risk. In the *X Case* in 1992, the Supreme Court had to decide whether a fourteen-year-old rape victim who became pregnant and was suicidal could terminate her pregnancy.¹³⁰ The Court's decision holding that termination was permissible immediately led to

123. 381 U.S. 479, 499 (1965).

124. [1974] IR 284 (1973) (Ir.).

125. See O'Mahony, *supra* note 40, at 72.

126. Ursula Barry, *Abortion in the Republic of Ireland*, 29 FEMINIST REV. 57, 58 (1988).

127. See TOM HESKETH, *THE SECOND PARTITIONING OF IRELAND?* 58 (1990).

128. See generally *id.*

129. Constitution of Ireland 1937 art. 40.3.3, http://www.irishstatutebook.ie/eli/cons/en/html#article41_4.

130. *Att'y Gen. v. X* [1992] 1 IR 1, 1 (Ir.).

referendums on three separate constitutional amendments.¹³¹ One of these amendments (proposed to remove threat of suicide as grounds for an abortion) was rejected and subsequently put to the people a second time in 2002 (when it was again rejected).¹³² The legislative void saw a variety of issues relating to abortion and reproductive technology find their way to the courts, who repeatedly expressed dissatisfaction at being called upon to resolve issues that should have been resolved through legislation.¹³³

Eventually, the European Court of Human Rights found that the lack of clarity in Irish law surrounding the circumstances in which abortion was legal violated Article 8 of the European Convention on Human Rights,¹³⁴ and this led to the enactment of legislation in 2013 which created a framework in which the *X Case* principles could be applied by medical professionals.¹³⁵ Flashpoint controversies surrounding a number of tragic cases have seen pressure mount for a new referendum on the repeal of the Eighth Amendment.¹³⁶ It remains to be seen whether such a referendum will be held. What seems reasonably clear is that the advent of a liberal abortion regime in Irish law seems no more likely at present than the reversal of *Roe v. Wade* is in the U.S. Opinion polls show support for wider access to abortion (for example, in cases of fatal fetal abnormality or rape), but not for abortion on demand.¹³⁷ Thus, the Eighth Amendment and the referendums that followed it have—in much the same way as *Roe* and *Casey*—combined to settle the basic legal position, even if (like in the U.S.) the associated debate has continued. The main difference (aside from the fact that the debate has been settled in opposite directions) is that it has been settled using very different means (*i.e.*, a series of national referendums rather than a series of Supreme Court decisions). Of course, if a changed consensus emerges, the position in either country may change. The key point for the purposes of this Article is that it is beyond question that if, and when, change does come, it will come via the same means used to date—*i.e.*, a Supreme Court decision in the U.S. and a referendum on a constitutional amendment in Ireland.

What all of the above illustrates is that the U.S. and Ireland have a common experience of political controversies with a religious-moral dimension, with disagreement being at its deepest on the issue of abortion.

131. Twelfth Amendment of the Constitution 1992 (Ir.), <http://www.irishstatutebook.ie/eli/1992/act/22/section/3/enacted/en/html> (failed); Thirteenth Amendment of the Constitution Act 1992 (Ir.), <http://www.irishstatutebook.ie/eli/1992/ca/13/enacted/en/html>; Fourteenth Amendment of the Constitution Act 1992 (Ir.), <http://www.irishstatutebook.ie/eli/1992/ca/14/enacted/en/html>.

132. Twelfth Amendment of the Constitution 1992, *supra* note 131.

133. *See, e.g.*, *Roche v. Roche* [2010] 2 IR 321, 395 (2009) (Ir.) (Fennelly, J.); *Roche*, 2 IR at 383 (Hardiman, J.); *X*, 1 IR at 82–83 (Ir.) (McCarthy, J.).

134. *A, B & C v. Ireland*, 25579/05 Eur. Ct. H.R. 1, 75 (2010).

135. *See generally* Protection of Life During Pregnancy Act 2013 (Act No. 35/2013) (Ir.), <http://www.irishstatutebook.ie/eli/2013/act/35/enacted/en/html?q=Protection+of+Life+During+Pregnancy&years=2013>.

136. *See de Londras, supra* note 112, at 267–87.

137. *See, e.g.*, *8th Amendment Poll*, NEWSTALK, <http://www.redcresearch.ie/wp-content/uploads/2016/01/137015-Newstalk-Poll-8th-Amendment-Press-Release-Version.pdf> (last visited Dec. 27, 2016).

The intensity of the disagreement has caused the abortion debate to transcend ordinary politics and become a central issue in constitutional politics. As such, the legal position has been settled, at least for now, by the means used for settling constitutional controversies in each country. In the U.S., this has taken the form of a series of Supreme Court rulings that a woman's decision as to whether to have an abortion is a liberty interest that attracts constitutional protection and stipulating the permissible range of state regulation of this decision.¹³⁸ In Ireland, it has taken the form of a constitutional amendment specifying that the unborn child has a right to life that is equal to that of the mother and a series of subsequent referendums on amendments clarifying the scope of the provision on a number of discrete issues.¹³⁹ What is relevant in the context of the marriage-equality debate is not the substance of the decisions reached, but the mechanism used. Each country has a distinctive experience of matters of deep religious-moral controversy becoming central issues in constitutional politics and being settled by means of constitutional law, using the prevailing mechanism for securing decisive resolution. The similarities with the debate over marriage equality are such that it is unsurprising that the same mechanisms were ultimately used in that debate.

VI. DISCUSSION

The criticisms levied at the means used for resolving the marriage equality debate in the U.S. and Ireland are, in many ways, quite understandable. Viewed in isolation, it seems wholly undemocratic to resolve a controversy with such deep religious-moral implications by way of a majority vote among nine unelected judges. At the same time, it seems counter-intuitive and excessively majoritarian to decide by national referendum whether a minority group should enjoy access on an equal basis to a particular constitutional right and legal institution. If one were designing a decision-making process for an issue like this from scratch, it probably would not look like either of these processes.

But the U.S. and Ireland were not designing the process from scratch. On the contrary, they were deciding the issue within long-established constitutional frameworks where there are deeply embedded practices. As such, constitutional history shows that the debate in each country was always likely to be resolved in the way it was. The criticisms outlined in Part II fail to take adequate account of this history, and those criticisms become less compelling in light of the deeply embedded practices of resolving certain categories of disputes either by Supreme Court decision or by referendum. These practices reflect a combination of the

138. See, e.g., *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 869–70 (1992); *Roe v. Wade*, 410 U.S. 113, 153–54, 165 (1973).

139. Twelfth Amendment of the Constitution 1992, *supra* note 131; Thirteenth Amendment of the Constitution Act 1992, *supra* note 131; Fourteenth Amendment of the Constitution Act 1992 (Ir.), <http://www.irishstatutebook.ie/eli/1992/ca/14/enacted/en/html>.

intensity of the disagreement and the political-constitutional dynamics at play.

The U.S. Supreme Court has been the decisive battle-ground in American culture wars for some time, and there seems to be little chance of this changing anytime soon. Deep down, people know this, and their political actions and responses are shaped by this knowledge. Justice Scalia and others may have decried the *Obergefell* decision as activist, but as Kermit Roosevelt III has noted, “in practice ‘activist’ turns out to be little more than a rhetorically charged shorthand for decisions the speaker disagrees with.”¹⁴⁰ In an empirical study conducted in 2010, David Fontana and Donald Braman found that Americans responded no differently to the prospect of marriage equality becoming the law of the land because of a decision by the Court than if it came from Congress.¹⁴¹ Writing in 2012, Michael Klarman accurately predicted that in the short term, the Supreme Court would possibly refuse to grant review in a marriage-equality case, but that once public opinion shifted and a clear emerging consensus could be identified, it was “almost certain” to rule in favor of marriage equality.¹⁴² Both of his predictions came to pass within just three years. As Klarman noted, “[t]hat is simply how constitutional law works in the United States.”¹⁴³

Thus, constitutional history always suggested that a Supreme Court decision on whether gay couples had a right to marry was inevitable; and it can also be argued that it was appropriate, as it settled a religious-moral debate over the people’s fundamental commitments using the *de facto* mechanism for achieving constitutional change. Many people don’t like the politicization of the Supreme Court, but the very fact of its politicization lessens the extent to which decisions on religious-moral controversies can really be said to be undemocratic. Supreme Court decisions don’t happen by accident—they happen because the Court, due to its democratic pedigree¹⁴⁴ and dialogue with the other branches of government¹⁴⁵ and political movements,¹⁴⁶ tracks developments in ordinary politics over time.¹⁴⁷ When a constitutional amendment is off the table, the

140. KERMIT ROOSEVELT III, *THE MYTH OF JUDICIAL ACTIVISM: MAKING SENSE OF SUPREME COURT DECISIONS* 3 (2006).

141. David Fontana & Donald Braman, *Judicial Backlash or Just Backlash? Evidence From a National Experiment*, 112 COLUM. L. REV. 731, 787–88 (2012) (finding, however, that a court decision would be more polarizing). See also KLARMAN, *supra* note 32, at 168–69; Jane S. Schacter, *Courts and the Politics of Backlash: Marriage Equality Litigation, Then and Now*, 82 S. CAL. L. REV. 1153, 1218–19 (2009).

142. KLARMAN, *supra* note 32, at 207.

143. *Id.*

144. CHRISTOPHER L. EISGRUBER, *CONSTITUTIONAL SELF-GOVERNMENT* 4, 64–68, 130 (2001).

145. See generally Barry Friedman, *Dialogue and Judicial Review*, 91 MICH. L. REV. 577 (1993) (theorizing that constitutional interpretation includes a dialogue of the three branches of government).

146. See generally Ackerman, *supra* note 59 (noting the political undertone affecting Constitutional law and court decisions).

147. See generally BALKIN, *supra* note 106 (explaining how the Constitution adapts to changes over time).

sustained effort involved in securing a favorable Supreme Court decision marks the issue out as constitutional politics rather than ordinary politics.

The same argument holds true in Ireland; constitutional history shows that the resolution of the marriage equality debate by way of constitutional referendum was both inevitable and appropriate to that country. The constitutionalization of religious-moral controversies in Ireland separates them out from ordinary politics in a way that reflects the intensity of disagreement based on fundamental commitments. The need for an extraordinary and sustained political effort over time before change can be made ensures significant political legitimacy for the eventual decision reached. Maria Cahill observed that “even though our constitutional democracy is not perfect, and even though the constitutional amendability procedure that we use has some significant drawbacks, we do see the referendum as part of the constitutional bargain”¹⁴⁸ She argued that there is a difference between a referendum as a device of direct democracy (allowing the people to directly decide on a proposed law or policy) and as a mechanism for constitutional amendment. When used as the latter,

the chosen amendability procedure is not agreed in isolation from the rest of the constitutional bargain, but rather as an essential element of it; as part of the carefully-orchestrated balance established in the constitution that is designed to address the various political, institutional, and social tensions which are intrinsic and unique to the particular polity.¹⁴⁹

As such, a referendum may be the appropriate way of deciding an issue in one country, if not necessarily in others.¹⁵⁰

The human cost of imposing a referendum on a minority group seeking equal rights has been acknowledged above, and, doubtless, there are supporters of marriage equality in Ireland who would prefer that the issue had not been decided by referendum. However, the referendum is here to stay in Ireland. The incidence of referendums is the second-highest in the EU¹⁵¹ and their frequency has remained consistently high—a rate of 1.1 per year—since 1992. Like it or not, the referendum is a hurdle that will occasionally have to be negotiated by minority groups. By comparison with popular initiatives, the requirement for a constitutional amendment to be approved by both Houses of the Oireachtas prior to the referendum mitigates the majoritarian tendencies of the Irish referendum process.¹⁵² Unlike the experience of initiatives in ju-

148. Maria Cahill, *Ireland's Constitutional Amendability and Europe's Constitutional Ambition: The Lisbon Referendum in Context*, 9 GER. L.J. 1191, 1207 (2008).

149. *Id.* at 1196.

150. *Id.* at 1199–1200.

151. Gallagher, *supra* note 100, at 540–41. See also Johan Elkink et al., *supra* note 25, at 18.

152. On the logic of the filtering process provided by representative democracy, see Gamble, *supra* note 17, at 247–48. See also Donald P. Haider-Markel et al., *Lose, Win or Draw? A Reexamination of Direct Democracy and Minority Rights*, 60 POL. RES. Q. 304, 307 (2007) (presenting evidence that minority rights, and the rights of the LGBT community in particular, fare better in representative than in direct democracy).

risdictions like California¹⁵³ or Switzerland,¹⁵⁴ there has been little experience of a referendum being used to target particular groups for less favorable treatment.¹⁵⁵ Conversely, referendums have been used on several occasions to bolster the rights of groups lacking independent political power, including children generally,¹⁵⁶ unborn children in particular,¹⁵⁷ and the LGBT community in the marriage-equality referendum. At least some members of the LGBT community have acknowledged the added value of having secured change by way of a national ballot rather than by court decision or legislative action.¹⁵⁸ Conversely, opponents of marriage equality, notwithstanding any dissatisfaction on their part with aspects of the referendum process, would certainly have been even more dissatisfied if no referendum had been held. For all of these reasons, a referendum on a constitutional amendment on marriage equality was both inevitable and appropriate in light of Ireland's constitutional history and its prevailing political-constitutional dynamics.

This does not mean that marriage equality (or other divisive issues such as abortion) should be constitutionalized in every country. This Article argued above that where the use of Supreme Court decisions or referendums are deeply embedded practices, the criticisms of them described above are less compelling. The converse of this is that those criticisms become more compelling where a country has a history of dealing with contentious issues through the ordinary legislative process or where an issue is not especially contentious and does not touch on deep, fundamental commitments. Hence, I have argued elsewhere that it would have been inappropriate for Australia to resolve the marriage-equality debate by plebiscite.¹⁵⁹ This argument is comparative in nature: namely, that the appropriate means for settling a contentious political debate over a religious-moral issue like abortion or marriage equality will differ from one country to another. Doubtless, other countries have resolved these and related issues by way of ordinary legislation, and legislation has

153. See Gamble, *supra* note 17, at 255–61. See also Zoltan L. Hajnal et al., *Minorities and Direct Legislation: Evidence from California Ballot Proposition Elections*, 64 J. OF POL. 154, 174 (2002) (acknowledging that “on the few occasions when initiatives sought to undermine the rights of minority group members, majorities of at least some minority groups ended up on the losing side of the vote”); Caroline J. Tolbert & Daniel A. Smith, *Representation and Direct Democracy in the United States*, 42 REPRESENTATION 25, 30–31 (2006) (arguing the same).

154. See, e.g., Daniel Moeckli, *Of Minarets and Foreign Criminals: Swiss Direct Democracy and Human Rights*, 11 HUM. RTS. L. REV. 774 (2011).

155. The only clear example is the Twenty-Seventh Amendment of the Constitution Act 2004, which amended the Constitution so as to remove the automatic entitlement to Irish citizenship of children born in Ireland who do not have, at the time of birth, at least one parent who is an Irish citizen or entitled to be an Irish citizen. Twenty-Seventh Amendment of the Constitution Act 2004 (Ir.), <http://www.irishstatutebook.ie/eli/2004/ca/27/enacted/en/html>.

156. Thirty-first Amendment of the Constitution (Children) Act 2012 (Ir.), <http://www.irishstatutebook.ie/eli/2012/ca/31/enacted/en/html>.

157. Eighth Amendment of the Constitution Act 1983 (Ir.), <http://www.irishstatutebook.ie/eli/1983/ca/8/schedule/enacted/en/html>.

158. MULLALLY, *supra* note 11, at 247–48.

159. Conor O'Mahony, *Ireland's Vote on Marriage Equality Holds Many Lessons—But Are Any Relevant to Australia?*, THE CONVERSATION (Sep. 27, 2016), <https://theconversation.com/irelands-vote-on-marriage-equality-holds-many-lessons-but-are-any-relevant-to-australia-65872>.

the advantage of navigating a middle road between the contrasting disadvantages of court decisions and referendums. This may well have been appropriate to those countries and would be appropriate to others like them in the future.

In the U.S. and Ireland, however, disputes over fundamental commitments have a history of transcending ordinary politics and being elevated to the constitutional level. Their constitutional histories make it arguable that in those countries, ordinary legislation and ordinary politics would have failed to treat the issue with the seriousness that it deserved. Even if relied on, constitutional politics would probably have been turned to in the search for a decisive victory. Where this is the case, it is appropriate that legal change should only be brought about using the means ordinarily used for achieving constitutional change, so as to ensure that the change in question reflects a genuine shift in the people's fundamental commitments. In the U.S., the Supreme Court has become the *de facto* vehicle for constitutional change, whereas in Ireland, the referendum is a necessity to constitutional amendment and a familiar feature on the political landscape. Therefore, notwithstanding the criticisms discussed in Part II, the means used for settling the marriage-equality debate in the U.S. and Ireland were both inevitable and appropriate *to those particular countries*.

