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I AMEND THEREFORE I AM? DISCRETIONARY REFERENDA AND THE IRISH CONSTITUTION

INTRODUCTION

On July 1, 1937, the people of the Republic of Ireland approved a new constitution¹ by a plebiscite.² The public's consent "rooted [the constitution] in the will of the people"³ and put it "beyond challenge,"⁴ except via amendment by the people.⁵ Specifically, Article 46 of the new constitution provided that, in addition to being passed in both houses of the Oireachtas (the Irish parliament),⁶ prospective amendments must also "be submitted by Referendum to the decision of the people"⁷ in accordance with the current referendum law.⁸ Since the adoption of the Constitution in 1937, there have been thirty⁹ amendment proposals submitted to the people by referendum.¹⁰ Of these, twenty-one have been approved.¹¹

Meanwhile, regular bills that do not propose amendments to the Constitution may be put to referendum at the discretion of the executive branch. This is according to Article 27 of the Constitution of Ireland,¹² which states:

1. JOHN MAURICE KELLY, *FUNDAMENTAL RIGHTS IN THE IRISH LAW AND CONSTITUTION* 8 (1961). The 1937 Constitution (Bunreacht na hÉireann) replaced the 1922 Constitution (Saorstát Éireann) which was a product of the 1921 Anglo-Irish Treaty with Great Britain. JAMES CASEY, *CONSTITUTIONAL LAW IN IRELAND* 23–26 (1987).

2. CASEY, *supra* note 1, at 23.

3. *Id.*

4. *Id.*

5. Ir. CONST., 1937, art. 46, available at http://www.taoiseach.gov.ie/attached_files/Pdf%20files/Constitution%20of%20IrelandNov2004.pdf [hereinafter Ir. CONST., 1937].

6. The Oireachtas is split into two houses: the Dáil Éireann and the Seanad Éireann. *Id.* art. 15.

7. *Id.* art. 46. Any citizen who has the right to vote at an election for members of the Dáil Éireann may vote in a referendum. *Id.* art. 47.

8. *Id.* art. 46; see Referendum Act, 2001 (Act No. 53/2001) (Ir.) available at <http://www.oireachtas.ie/documents/bills28/acts/2001/a5301.pdf>.

9. This number does not include the 1937 plebiscite on the constitution.

10. See Elections Ireland, Referendums, <http://electionsireland.org/results/referendum/index.cfm>. The First and Second Amendments did not require referendums. Article 51 of the Constitution allowed for a transitional period of three years in which the government could pass amendments without actually putting them to a referendum. After the three year period was over, Article 51 was deleted from the Constitution pursuant to Article 51.4. J.M. KELLY, *THE IRISH CONSTITUTION* 716–17 (2d ed. 1984)

11. Elections Ireland, Referendums, *supra* note 10.

12. See Ir. CONST., 1937, art. 27. Article 27 applies to bills that have already been approved by both the Seanad Éireann and the Dáil Éireann. *Id.*

A majority of the members of Seanad Éireann and not less than one-third of the members of Dáil Éireann may by a joint petition addressed to the President by them under this Article request the President to decline to sign and promulgate as a law any Bill [other than a Bill expressed to be a Bill containing a proposal for the amendment of this Constitution] on the ground that the Bill contains a proposal of such national importance that the will of the people thereon ought to be ascertained.¹³

If the President decides that the contents of a bill are “of such national importance that the will of the people thereon ought to be ascertained,” he will decline to sign the bill until it has been approved by the people, either by referendum within eighteen months, or by a resolution of the Dáil Éireann (The House of Representatives of the Irish parliament) within eighteen months of a new election.¹⁴ To date no bill has been referred to the people under Article 27.¹⁵

Having a direct say in amending their constitution is of great importance to the Irish people,¹⁶ but recent referendums reveal flaws in the practice.¹⁷ The integrity of a referendum does not stem from its mere inclusion in the constitutional structure¹⁸ but from the fact that it requires and, thus, reflects the people’s approval or disapproval.¹⁹ However, the decisions of under-informed or misinformed voters may produce misleading results.²⁰ And such ambiguities may jeopardize a referendum’s integrity.²¹

13. *Id.*

14. *Id.*

15. *Id.*

16. In her support of the Irish referendum system, Maria Cahill writes:

The very holding of a referendum on a proposal to amend the constitution is testament to the fact that what is at stake in the proposal is not something about which we can be casual; not something that costs us nothing; not something about which we can delegate our decision-making role, but rather something that goes to the heart of who we are, something that changes fundamentally those things that we take most seriously, something that has deep and enduring ramifications for our project of living-in-common.

Maria Cahill, *Ireland’s Constitutional Amendability and Europe’s Constitutional Ambition: The Lisbon Referendum in Context*, 9 GERMAN L.J. 1191, 1200 (2008).

17. This note does not attempt to argue either side of the proposals at issue, but instead intends to offer them as evidence that the constitutional amendment referendum system is flawed.

18. *Contra* Cahill, *supra* note 16, at 1201.

19. IR. CONST., 1937, art. 47.

20. John Gastil, Justin Reedy, & Chris Wells, *When Good Voters Make Bad Policies: Assessing and Improving the Deliberative Quality of Initiative Elections*, 78 U. COLO. L.

Referendums, especially on social issues, may have effects that go beyond the substance of the proposals at stake. For instance, the vote may be perceived as a statement of majority sentiment toward certain individuals or groups within the community.²² Because a referendum is *required* once a proposal to amend the constitution has been passed by both houses of the Oireachtas, the current system does not allow for considerations regarding fairness, equality, or complexity of the issues.²³

This Note argues that recent referendums on constitutional amendments regarding citizenship and European Union (“EU”) treaties suggest the government should be granted discretion to identify whether a proposal to amend the Constitution should be put to the people. Part I examines Ireland’s 2004 citizenship referendum, which was problematic because the vote could have been seen as indicating racist or anti-immigration sentiments,²⁴ especially in light of the events leading up to it (the Belfast Agreement of 1998,²⁵ the economic boom of the late twentieth century, and the consequent influx of immigrants to Ireland, among others). Part II considers the referendums on the ratification of the most recent EU agreement, the Treaty of Lisbon,²⁶ in order to criticize the government’s inability to provide voters with adequate information explaining the complexities of the proposals at stake,²⁷ and to argue that EU

REV. 1435, 1441 (2007) (“The public may show strong support for a *concept*, but reject the actual *policy* because they cannot connect the two.”).

21. *Id.*

22. Michael L. Ferguson, *Initiatives, Referenda, and the Problem of Democratic Inclusion: A Reply to John Gastil and Kevin O’Leary*, 78 U. COLO. L. REV. 1537, 1539 (2007).

23. IR. CONST., 1937, art. 46. One would assume that considerations of fairness, equality, and the probability of passing a referendum are considered by the Dáil Éireann and the Seanad Éireann when debating the substance of the amendment, but the legislature is under no constitutional obligation to consider the fairness of the actual referendum. *See* Part II, *infra*.

24. *See infra* Part I.

25. Agreement Reached in the Multi-Party Negotiations, U.K.–Ir., Apr. 10, 1998, 37 I.L.M. 751 [hereinafter Belfast Agreement].

26. Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community, Dec. 13, 2007, 2007 O.J. (C 306) 1 [hereinafter Lisbon Treaty].

27. It is important to note that this discussion is not insinuating that the people of Ireland are incapable of understanding complex legislation and treaties. As John Gastil points out while discussing voters’ confusion during referendums and initiatives in the United States:

[V]oters have had good reason to be confused or mistaken about a pending ballot measure. . . . [L]egislative language is often archaic and complicated, filled with legal or bureaucratic jargon, and difficult for the average citizen to under-

treaty ratification referendums ultimately place excessive burdens on both the government and the voters. Finally, Part III explains the particulars of this Note's overall proposal that the government should only be required to order a referendum when the matter at stake is of the utmost importance, and, even then, the government must carefully consider its ability to educate the voters on the issues. By ensuring an informed electorate, such a system would protect the right of the people to participate in their government without sacrificing the integrity of the referendum as a tool of democracy.

I. THE 2004 REFERENDUM ON CITIZENSHIP

In 1998, the Irish and British governments and a group of political parties from Northern Ireland²⁸ met in Belfast to negotiate an agreement on control of the six counties in Northern Ireland.²⁹ As part of this "Belfast Agreement,"³⁰ Ireland amended its Constitution to afford Irish citizenship to all persons born on the island of Ireland, including those born in Northern Ireland.³¹ Such an automatic entitlement to citizenship based on

stand. . . . Another common problem . . . is the counterintuitive nature of the ballot questions, which often seek to repeal or overturn existing laws or regulations, setting up a situation in which a "Yes" vote is a vote *against* a policy, and a vice-versa for a "No" vote.

Gastil, Reedy, & Wells, *supra* note 20, at 1441–42. Such was the case in Ireland's 2004 Citizenship Referendum. A "yes" vote was a vote against the existing policy of birthplace citizenship and a "no" vote affirmed the current policy. However, given the highly publicized debate over the referendum, this problem may not have been an issue in this instance.

28. The political parties included the Alliance Party, the Progressive Unionist Party, Sien Fein, the Social Democratic Labour Party, the Ulster Unionist Party, and the Women's Coalition. Belfast Agreement, *supra* note 25.

29. Belfast Agreement, *supra* note 24.

30. The Belfast Agreement is also known as the "Good Friday Agreement." David Williams, *Ireland 1880–2005: A Constitutional Perspective*, 41 U. RICH. L. REV. 345, 365 (2007).

31. Belfast Agreement, *supra* note 25; *see* Ir. CONST., 1937, art. 2:

It is the entitlement and birthright of every person born in the island of Ireland, which includes its islands and seas, to be part of the Irish Nation. That is also the entitlement of all persons otherwise qualified in accordance with law to be citizens of Ireland. Furthermore, the Irish nation cherishes its special affinity with people of Irish ancestry living abroad who share its cultural identity and heritage.

Ir. CONST., 1937, art. 2

birthplace is referred to as *jus soli* (or, “law of ground”).³² Since the right to *jus soli* had become part of Ireland’s Constitution after the Belfast Agreement,³³ an amendment—and, thus, an Article 46 referendum—were required before *jus soli* could be modified.³⁴ Six years after the Belfast Agreement, however, the people of Ireland pass another referendum³⁵ allowing the government to amend the constitution:

Notwithstanding any other provision of this Constitution, a person born in the island of Ireland, which includes its islands and seas, who does not have at the time of the birth of that person, at least one parent who is an Irish citizen or entitled to be an Irish citizen is not entitled to Irish citizenship unless provided for by law.³⁶

Furthermore, The Irish Nationality and Citizenship Act of 2004 states that:

A person born in the island of Ireland shall not be entitled to be an Irish citizen unless a parent of that person has, during the period of 4 years immediately preceding the person’s birth, been resident in the island of Ireland for a period of not less than 3 years or periods the aggregate of which is not less than 3 years.³⁷

By adding the parental requirements to the citizenship laws, Ireland significantly curtailed its birthplace citizenship policy.

Proponents of the citizenship referendum, including the government,³⁸ pointed to the influx of immigrants to Ireland,³⁹ abuses of the Irish Constitution,⁴⁰ and pressure from other EU members⁴¹ as grounds for the

32. Bernard Ryan, *The Celtic Cubs: The Controversy over Birthright Citizenship in Ireland*, 6 EUR. J. MIGRATION & L. 173, 173 (2004).

33. See Ir. CONST., 1937, art. 2; Ryan, *supra* note 32, at 177–78.

34. Ir. CONST., 1937, art. 46.

35. Elections Ireland, Referendums, *supra* note 10.

36. Ir. CONST., 1937, art. 9.

37. Irish Nationality and Citizenship Act, 2004 (Act No. 38/2004) (Ir.) §4 available at <http://www.oireachtas.ie/documents/bills28/acts/2004/a3804.pdf>.

38. “Government” means the controlling parties in the Oireachtas, Fianna Fáil, and the Progressive Democratic Party, at the time. Úna Crowley, Mary Gilmartin & Rob Kitchen, “Vote Yes for Common Sense Citizenship”: *Immigration and the Paradoxes at the Heart of Ireland’s ‘Céad Mile Fáilte’* 3 (Nat’l Inst. for Regional and Spatial Analysis, Working Paper Series No. 30, 2006), available at <http://www.nuim.ie/nirsa/research/documents/WPS30.pdf>.

39. Jason DeParle, *Born Irish, but with Illegal Parents*, N.Y. TIMES, Feb. 25, 2008, at A.1.

40. John A. Harrington, *Citizenship and the Biopolitics of Post-nationalist Ireland*, 32 J.L. & SOC’Y 424, 438–39 (2005).

41. Karolina Rostek & Gareth Davies, *The Impact of Union Citizenship on National Citizenship Policies*, 22 TUL. EUR. & CIV. L.F. 89, 129–30 (2007).

amendment. Opponents claimed that it gave force to racial prejudices.⁴² Furthermore, it was argued that “the existing terms of the Constitution helped define Ireland as a compassionate and welcoming country.”⁴³ The following section will argue that the citizenship referendum, in light of the events that led to it, created a unique constitutional problem; the people were put in the position in which they were asked to vote not only on the constitutional amendment, but also, implicitly, on race, immigration, and equality.⁴⁴

A. Events Leading to Citizenship Referendum

1. The Belfast Agreement of 1998

The Belfast Agreement was meant to provide a “new beginning” for the relationships among Northern Ireland, the Republic of Ireland, and Great Britain, which had been strained during years of violent dispute over control of the six counties in Northern Ireland.⁴⁵ One way the Belfast Agreement attempted to achieve this goal was to address constitutional ambiguities.⁴⁶ The Belfast Agreement included a provision that Ireland rewrite Article 2 of its constitution. The revised Article 2 reads, in part:

It is the entitlement and birthright of every person born in the island of Ireland, which includes its islands and seas, to be part of the Irish Nation. That is also the entitlement of all the persons otherwise qualified in accordance with law to be citizens of Ireland.⁴⁷

This new language clarified that those born in Northern Ireland, which remained united with Great Britain, were entitled to citizenship in the Republic of Ireland because they were born on the “island of Ireland.”⁴⁸ The amended Article 2 also enshrined in the Constitution the concept of

42. Brian Lavery, *Voters Reject Automatic Citizenship for Babies Born in Ireland*, N.Y. TIMES, June 13, 2004, at 1.7.

43. Ryan, *supra* note 32, at 192 (“The principle of unconditional *jus soli* has been central to Irish nationality law for most of the period since the Irish state came into being.”); Lavery, *supra* note 42.

44. *See infra* Part I.B.

45. Belfast Agreement, *supra* note 25, Declaration of Support.

46. David Trimble, *The Belfast Agreement*, 22 FORDHAM INT’L L.J. 1145, 1152 (1999).

47. Ir. CONST., 1937, art. 2; Belfast Agreement, *supra* note 25.

48. *See* Belfast Agreement, *supra* note 25.

birthright citizenship,⁴⁹ which had been part of Irish law, but not part of the Constitution since the 1950s.⁵⁰

Despite the Agreement's intent, the "entitlement" language of Article 2 may have curtailed Ireland's birthplace citizenship laws by using the term "entitlement," rather than "*automatic*."⁵¹ This significance, however, was most likely not understood at the time of the Agreement. It seemed to be a prudent measure by the Irish government to help further the peace process in Northern Ireland and bolster the possibility of uniting Ireland.⁵² Inserting this law into the Constitution meant that it could only be changed by re-amending the Constitution with a referendum.⁵³ Due to changes in the Irish economy that were beginning to take place,⁵⁴ however, the country's focus on the application of *jus soli* changed, from those born in Northern Ireland, to children being born to the large numbers of immigrants entering Ireland.

2. Inequality and the Celtic Tiger

Inequality is a problem that has existed in Ireland since the adoption of the 1937 Constitution;⁵⁵ however, as John A. Harrington describes in *Citizenship and the Biopolitics of Post-Nationalist Ireland*, the inequality

49. Sara Catherine Barnhart, Note, *Second Class Delivery: The Elimination of Birthright Citizenship as a Repeal of "The Pursuit of Happiness"*, 42 GA. L. REV. 525, 544–45 (2008).

50. See Irish Nationality and Citizenship 1956 (No. 26/1956) (Ir.) available at <http://www.inis.gov.ie/en/INIS/consolidationINCA.pdf/Files/consolidationINCA.pdf>.

51. Bernard Ryan observes:

[The principle of unconditional *jus soli*] attained the rare status of having been constitutionally entrenched as a consequence of the Belfast Agreement in 1998 The move away from that approach to Irishness had already been seen in the Belfast Agreement: the 'birthright' clauses treated Irish citizenship as an entitlement rather than as automatic, while the new Article 2 deliberately substituted a personal entitlement for the previous territorial claim.

Ryan, *supra* note 32, at 192–93.

52. According to the Belfast Agreement, both the Republic of Ireland and Great Britain recognize the status of Northern Ireland as chosen by the majority of its people. Belfast Agreement, *supra* note 25. At the time of the Agreement and still today, that majority wishes to remain united with Great Britain. Should that majority change its stance and allow Northern Ireland to become part of the Republic of Ireland, then, under the Agreement, complications would be avoided as all those born in Northern Ireland would already be entitled to Irish citizenship. Ir. CONST., 1937, art. 3; Trimble, *supra* note 46, at 1152–53.

53. Ir. CONST., 1937, art 46.

54. See *infra* Part II.B.

55. Harrington, *supra* note 40, at 435.

of post-constitutional Ireland “was often obscured by the language of nationalism and . . . Roman Catholic ideas of charity.”⁵⁶ Despite any social inequalities that existed, the Irish did not have a defined hierarchy similar to that of the English.⁵⁷ In fact, legal equality for citizens is explicitly provided for by the Irish constitution.⁵⁸ Birthright citizenship was an example of this legal equality because every child born in Ireland was equal to any other child born in Ireland in that they were all entitled to be Irish citizens.⁵⁹

As the Irish economy began to improve toward the end of the twentieth century, inequality of wealth became more noticeable.⁶⁰ After two decades of stagnant economic growth and development,⁶¹ Ireland experienced an economic boom in the late twentieth century.⁶² Harrington describes the situation as follows:

Ireland’s largely well-educated, relatively low-wage workforce, along with the lowest rate of corporation tax in Europe, attracted US firms seeking a manufacturing platform inside the European Union. Information technology, chemicals, and pharmaceuticals led the boom, known to posterity as the ‘Celtic Tiger’. Gross Domestic Product . . . increased by 9 per cent per annum in the second half of the 1990s. Irish Gross National Product . . . had reached 100 per cent of the EU average in 2000, where it had been 60 per cent at the time of joining in 1973.⁶³

The results of the economic boom, however, did not benefit all of Ireland.⁶⁴ Harrington points out that “[t]he fruits of the Tiger period have

56. *Id.*

57. *Id.*

58. See Ir. CONST., 1937, art. 40 (“All citizens shall, as human persons, be held equal before the law.”).

59. Crowley, *supra* note 38, at 19.

60. Harrington, *supra* note 40, at 435.

61. *Id.* at 433 (labeling the 80s in Ireland as “yet another ‘lost decade’ characterized by jobless growth and a dramatic return to emigration”).

62. See *id.* at 434. See generally Róisín Ní Mháille Battel, *Ireland’s “Celtic Tiger” Economy*, 28 SCI. TECH. & HUM. VALUES 93, 94 (2003).

63. Harrington, *supra* note 40, at 434.; see also Battel, *supra* note 62, at 94 (comparing Ireland’s Gross Domestic Product growth for 1999 (10.4 percent) with that of the United Kingdom (2.1 percent) and the United States (3.6 percent)); Alan Cowell, *Ireland, Once a Celtic Tiger, Slackens Its Stride; Technology Collapse Drains a Town’s Valued Jobs*, N.Y. TIMES, Feb. 19, 2003, <http://www.nytimes.com/2003/02/19/business/ireland-once-celtic-tiger-slackens-its-stride-technology-collapse-drains-town-s.html?sec=&spon=&pagewanted=1>.

64. Battel, *supra* note 62, at 104 (“There are major reservations about the social consequences of such sudden wealth, with deepening social divisions between those who are benefiting from the Celtic tiger and those still excluded from prosperity.”); Crowley, *supra* note 38, at 11–13; Harrington, *supra* note 40, at 434;.

been largely distributed in the form of tax cuts rather than social spending with predictably negative consequences for equity.”⁶⁵ It was believed that inequality created by this imbalanced disbursement of the benefits of the Celtic Tiger helped drive the growing free-market economy through individualism and competition.⁶⁶ Inequality seemed to be a necessary evil in order to feed the Celtic Tiger.

3. Citizenship Tourism, Anchor Babies and the Common Sense Campaign

The increase in inequality took an even more drastic turn when Ireland began to experience large amounts of immigration as a result of its economic success.⁶⁷ “In the boom years, some 40,000 foreigners from outside the European Union secured work permits each year to fill a shortage of labor.”⁶⁸ However, the increase in immigrants brought problems for Ireland too. For instance, there was backlash from citizens, and the immigrants were subjected to discrimination and violence.⁶⁹ Meanwhile, though the immigration population participated in sustaining the Celtic Tiger economy by supplementing the workforce, many of the resulting economic benefits were denied to immigrants.⁷⁰ Moreover, because immigration was a fairly new phenomenon for modern Ireland, it presented constitutional problems lawmakers and the Constitution’s drafters had not foreseen.⁷¹

Many Irish citizens focused their growing anti-immigration sentiments around the notion that immigrants were taking advantage of Ireland’s birthright citizenship laws via so-called “citizenship tourism.”⁷² To engage in “citizenship tourism” is to purposely travel to a country that

65. Harrington, *supra* note 40, at 435.

66. *Id.*

67. DeParle, *supra* note 39 (“Years of Irish prosperity have drawn Polish plumbers, Lithuanian nannies, Latvian farm workers, Filipino nurses, Chinese traders, and sub-Saharan asylum seeker.”).

68. Cowell, *supra* note 63; *see also* DeParle, *supra* note 39. Immigrants share 11% of the population, which is almost as high as the United States. *But see* Harrington, *supra* note 40, at 437 (noting that some believe Ireland’s immigration volume was exaggerated). When a country allows immigration it appears “passive and vulnerable. Thus, the entry of relatively small numbers of asylum seekers is accounted a ‘flood’ or an ‘influx[]’” so that the immigration “problem” is not a product of the county’s ability to handle the immigrants, but is instead due to the vast number of immigrants. *Id.*

69. Harrington, *supra* note 40, at 437.

70. Crowley, *supra* note 38, at 13. (“Indeed, the system is set up so that migrant workers can give to the state, and contribute to its social and economic life, but are entitled to nothing beyond a wage.”).

71. *Id.* at 9 (“For the two centuries prior to the present period of immigration, Ireland has been a net exporter of people.”).

72. Harrington, *supra* note 40, at 438.

grants *jus soli* citizenship solely to give birth to a child so that the child will be entitled to citizenship in that country.⁷³ The tourists (parents) then rely on the child's citizenship to gain residency in the country for themselves.⁷⁴ Ireland was a particularly desirable destination for citizenship tourism not only because of its grant of *jus soli* citizenship but also because of the special protection the Constitution of Ireland provides for families.⁷⁵ The Irish-born children of these foreign-born parents were referred to as "anchor babies" because they could secure the parents' residency in Ireland.⁷⁶ As a result of citizenship tourism and anchor babies, Ireland's government reported that hospitals were becoming overwhelmed by non-Irish women showing up during late-term pregnancy.⁷⁷ Eventually, the news media began to report on the issue.⁷⁸ In 2003, around twenty percent of babies born in Ireland were born to non-Irish mothers, with seventy percent of those mothers coming from sub-Saharan Africa.⁷⁹ Those opposed to the referendum, however, argued that the government's numbers were misleading because they did not differentiate between non-Irish women who were legal residents of Ireland and those seeking asylum.⁸⁰

The government argued that it was "common sense" for the people of Ireland to want to close the loophole in the Constitution that allows for

73. *Id.*

74. *Id.*

75. Ir. CONST., 1937, art. 41 ("The State . . . guarantees to protect the Family in its constitution and authority, as necessary basis of social order and as indispensable to the welfare of the Nation and the State."); see also Harrington, *supra* note 40, at 438 (noting that the Constitution of Ireland gives a special protection to families).

76. Barnhart, *supra* note 49, at 543.

77. Ryan, *supra* note 32, at 188. The difficulties that the hospitals faced included language barriers and lack of information regarding the medical histories of the expecting mothers. *Id.*

78. Harrington, *supra* note 40, at 444; *Irish Baby Laws Attract Africans*, BBC NEWS, Oct. 16, 2003, <http://news.bbc.co.uk/2/hi/europe/3199024.stm>.

79. *Irish Baby Laws Attract Africans*, *supra* note 78.

80. Mark Brennock, 'Citizenship Tourists' a Tiny Group, Statistics Indicate, IR. TIMES, Apr. 22, 2004, available at http://www.uniset.ca/naty/maternity/it_tinygroup.htm. Harrington provides these statistics:

The precise numbers of non-EU nationals arriving unannounced or late in pregnancy at Dublin in 2003 was put at 548 or just 2.4 per cent of the total. But, as critics pointed out, both percentages included non-EU nationals lawfully resident in Ireland and non-nationals with an asylum application still pending, as well as alleged "citizenship tourists."

Harrington, *supra* note 40, at 446.

citizenship tourism and anchor babies,⁸¹ and the government also argued that the Constitution must be amended in order to protect the “integrity” of Irish citizenship.⁸² Meanwhile, Professor of Geography, Úna Crowley outlines a number of reasons why “there is nothing commonsensical about the complex issues on which the electorate were being asked to vote.”⁸³ Perhaps one weakness of the government’s “common sense” argument was that it grouped all immigrants in the “citizenship tourist” category regardless of their intentions of coming to Ireland. According to Crowley:

[A] commonsense understanding of immigration worked to undermine the legitimacy of a range of immigrants—guest workers, asylum seekers[,] and refugees—by questioning their authenticity and by generalizing their motivations and experiences. The discursive construction and denigration of refugees, asylum seekers[,] and economic migrants’ as bogus, spongers, or economic parasites cast doubt on their right to stay in Ireland and claim citizenship for themselves and their children.⁸⁴

By generalizing, the government’s campaign spurned those immigrants who were legal residents.⁸⁵ Opponents of the referendum considered this generalization racist⁸⁶ and insulting to the immigrants who were legitimately in Ireland.⁸⁷

The common sense campaign exemplified the contours of the unique constitutional issue facing both the government and the voters. The government wanted to close the Constitution’s citizenship loophole but without being perceived as anti-immigration and racist.⁸⁸ By framing the argument as a matter of the voters’ common sense, the government attempted to separate the discussion from considerations of alienage and race.⁸⁹ Presumably, the government reasoned that, if voters believed they were using their common sense, their fears of being labeled “racist” would be less likely to dissuade them from supporting the referendum.⁹⁰

81. Crowley, *supra* note 38, at 6.

82. Ryan, *supra* note 32, at 189. This argument also took the focus away from the number of citizenship tourists, which was being disputed, *see* Brennock, *supra* note 80; Harrington, *supra* note 40, at 446, and placed it squarely on the abuse of the Constitution. Ryan, *supra* note 32, at 189.

83. Crowley, *supra* note 38, at 7.

84. *Id.* at 6.

85. *Id.*

86. *Id.* at 15–17.

87. *Id.* at 6.

88. Harrington, *supra* note 40, at 444.

89. *Id.*

90. *Id.*

The voters were put in an even more precarious position because the decision was ultimately in their hands; they could either fix the Constitution's loophole and risk being perceived as xenophobic and racist, or they could continue to allow the Constitution to be used in a way it was not intended.

4. Pressure from the European Union and the *Chen* Case

At the time of the citizenship referendum, Ireland was the only EU member state to allow *jus soli* citizenship,⁹¹ and this discrepancy with the rest of the EU members was an embarrassment to the Irish government because it created a possible loophole for EU residency for non-EU citizens.⁹² If a child was born in Ireland and granted Irish citizenship, and then the child's parents used the child's citizenship to gain residency in Ireland, they might be eligible under EU law to gain residency in any EU country.⁹³

The government's fear that Ireland's unique citizenship laws would lead to such a situation were played out in *Chen v. Secretary of State for the Home Department*.⁹⁴ In 2000, Man Chen, a Chinese national, traveled to Northern Ireland to give birth to her second child, Catherine.⁹⁵ Since Catherine was born on the island of Ireland she was considered an Irish citizen under the law at the time.⁹⁶ Catherine, however, was not granted citizenship of the United Kingdom despite the fact that Northern Ireland is a part of the United Kingdom, because the United Kingdom does not grant automatic *jus soli*.⁹⁷ Additionally, Catherine had lost her right to obtain Chinese citizenship because she was born in Northern Ireland, and

91. *Id.* at 446.

92. *Id.*

93. Rostek & Davies, *supra* note 41, at 130 (“[Ireland’s pre-referendum citizenship policies] limited the effects of . . . efforts [of EU countries with strict immigration policies] “because third-country citizens can gain access to their countries, exercising the right to free movement inherent in EU citizenship In this context, easiness to obtain Irish citizenship caused apprehension among other EU states.”).

94. Case C-200/02, *Chen v. Sec’y of State for the Home Dep’t*, 2004 E.C.R. I-9925 ; Rostek & Davies, *supra* note 41, at 130.

95. David H. King, Note & Comment, *Chen v. Secretary of State: Expanding the Residency Rights of Non-Nationals in the European Community*, 29 LOY. L.A. INT’L & COMP. L. REV. 291, 293–94 (2007).

96. *See* Ir. CONST., 1937, art. 2 (“It is the entitlement and birthright of every person born in the island of Ireland . . . to be part of the Irish Nation. That is also the entitlement of all persons otherwise qualified in accordance with law to be citizens of Ireland.”); *supra* Part I.A.

97. *Chen*, 2004 E.C.R. at para. 10.

she could not enter China without a visa and, then, with a visa, only for thirty days.⁹⁸

Ms. Chen had travelled to Belfast to give birth on the advice of her attorneys in order to avoid China's policies dissuading families from having a second child.⁹⁹ Ms. Chen and her daughter then moved to Wales and applied for long-term residency, which the Secretary of State for the Home Department denied.¹⁰⁰ The Department reasoned that Catherine, as an infant, could not consciously exercise any of the rights granted by the EU governing treaties, including the right of freedom of movement within the EU.¹⁰¹ With limited options, Ms. Chen appealed the decision of the Department to the European Court of Justice ("ECJ").¹⁰²

Although the ECJ would not decide the case until after the citizenship referendum in Ireland,¹⁰³ the ECJ Advocate General gave a preliminary opinion one month prior to the referendum that upheld Catherine's "right to residence in the United Kingdom as long as she was not a financial burden on that state. Since [Catherine] would be provided for by her mother, she met the condition. Furthermore, [Ms.] Chen benefited from a right of residence derived from her daughter's primary right."¹⁰⁴ Supporters of the referendum seized upon this outcome and "predicted that the ECJ would follow the ruling of the Advocate General,"¹⁰⁵ which it did in October of 2004.¹⁰⁶

Because a loophole in the Irish citizenship law was the catalyst for the *Chen* case,¹⁰⁷ the referendum's supporters used the case to fortify their argument that Ireland has a responsibility to the other EU members to update its Constitution.¹⁰⁸ However, the crux of the *Chen* decision was not the determination regarding Catherine's citizenship but the ECJ's

98. *Id.* para. 13.

99. *Id.* para. 7. Although it is unclear if having the child would have been illegal, the Chens wanted to avoid any complications they would have faced with the birth control laws in China and, at the advice of their attorneys, planned to have the baby in Northern Ireland. King, *supra* note 95, at 293–94.

100. *Chen*, 2004 E.C.R. at para. 14. Although Catherine, as an Irish national, could move freely within the United Kingdom, she was not entitled to reside in the United Kingdom. *Id.* para 12.

101. *Id.* para. 14.

102. King, *supra* note 95, at 295.

103. *Chen* was decided in October 2004, and the referendum had taken place in June of that year. Elections Ireland, Referendums, *supra* note 10.

104. Harrington, *supra* note 40, at 446–47.

105. *Id.* at 447.

106. *Id.*

107. *Chen*, 2004 E.C.R. at para. 9.

108. Harrington, *supra* note 40, at 446.

liberal expansion of the right of freedom of movement in the EU and the “grant[ing of] a ‘derivative’ right of residency to Ms. Chen.”¹⁰⁹ It is unclear whether the Irish were influenced by pressures from EU members prior to voting in the referendum, especially considering that Irish voters have been willing to defy EU member interests in referendums on EU treaties.¹¹⁰ However, the concerns of Ireland’s fellow EU members were a likely motivation for the government’s zeal in pushing the “[vote] yes” and “commonsense citizenship” campaigns even harder.¹¹¹ Because Ireland was the only member state to grant automatic birthright citizenship, the rest of the EU was watching the *Chen* case and the referendum.¹¹²

B. The Referendum and its Effects

An unusually large number of voters turned out for the 2004 referendum—almost sixty percent of those eligible.¹¹³ The large turnout was presumptively a result of the public debate leading up to the referendum,¹¹⁴ the government’s “commonsense citizenship” campaign,¹¹⁵ and the fact that the referendum was held on the same day as local and European parliamentary elections.¹¹⁶ Ultimately, the referendum passed with nearly eighty percent voting in favor.¹¹⁷

Still, despite the wide margin of support, the issue of birthright citizenship arguably may not have been ripe for a referendum.¹¹⁸ Even before the proposed change in the law, family members could not rely on a child’s Irish citizenship to avoid deportation; thus, the referendum was

109. King, *supra* note 95, at 295–96.

110. See *infra* Part II. Additionally, whether or not the government’s motivation of alleviating the pressure from other EU members was appropriate or not is outside the scope of this discussion.

111. Rostek & Davies, *supra* note 41, at 131.

112. *Id.* at 129 (“[A]fter introducing Union citizenship, all [Member State]’s nationality policies became highly interdependent. Therefore, [other EU countries] started to pay attention to particular citizenship legislations.”)

113. Elections Ireland, Summary of Referendums, <http://electionsireland.org/results/referendum/summary.cfm> (last visited October 15, 2009). Compare the results of the referendums on the ratification of the Nice treaties I and II, 38.4% and 48% participation, respectively, with the more recent referendums on the ratification of the Lisbon treaty, 53% and 59% participation. *Id.*

114. *Supra* Part I.C.

115. *Supra* Part I.C.

116. Lavery, *supra* note 42. (“The referendum was held on the same day as elections for representatives to local councils and to the European Parliament, which also encouraged a high percentage of the electorate to vote.”)

117. Elections Ireland, Summary of Referendums, *supra* note 113.

118. See *Ireland Votes to End Birth Right*, BBC NEWS, June 13, 2004, <http://news.bbc.co.uk/2/hi/europe/3801839.stm>; see also Ryan, *supra* note 32, at 187.

potentially unnecessary because Ireland would technically not be a very desirable location for citizenship tourists if they knew they could still get deported.¹¹⁹ Furthermore, if claims of citizenship tourism overburdening hospitals had been exaggerated,¹²⁰ then perhaps a solution less drastic than a referendum on constitutional amendment could have been found. More debate and investigation into citizenship tourism and its actual effects would have made the residency requirement for non-Irish parents seem less arbitrary.¹²¹ According to Bernard Ryan, Senior Lecturer at the Kent Law School:

It was widely argued that a fundamental reform of nationality law should not occur without a thorough process of consultation and debate on the whole subject [T]he requirement of a connection with Ireland was not being pursued systematically, given the possibility of acquiring citizenship through descent for a minimum of two generations, and given the lack of any proposal that an Irish-born child should be able to obtain citizenship through their own residence in Ireland.¹²²

Had the government allowed more time for debate, then perhaps the people could have reached a more creative and comprehensive solution.¹²³ But, given the pressure from the media¹²⁴ and the EU,¹²⁵ it seems understandable that the government wanted to address the issue as soon as possible. And, considering that the citizenship problem stemmed from a provision in the Constitution (as a result of the Belfast Agreement),¹²⁶ an amendment was probably a necessary solution.¹²⁷

Many Irish referendums have focused on social issues such as marriage, divorce, and abortion; only on rare occasions have the voters been asked to limit the rights of members of the community.¹²⁸ Meanwhile,

119. Ryan, *supra* note 32, at 180–85, 187.

120. See Harrington, *supra* note 40, at 446.

121. Ryan, *supra* note 32, at 189; *Minister Right to Act on Citizenship*, IR. INDEP., Mar. 14, 2004, available at <http://www.independent.ie/opinion/editorial/minister-right-to-act-on-citizenship-478339.html> (“The public must know how the proposed change may affect the Good Friday Agreement. The referendum does not necessarily have to be held in June [2004] to coincide with the local and European elections. It can wait.”).

122. Ryan, *supra* note 32, at 189.

123. *Id.*

124. See *supra* Part I.A.3.

125. See *supra* Part I.A.4.

126. See *supra* Part I.A.1.

127. IR. CONST., 1937, art. 46.

128. One exception was the referendum on the Sixteenth Amendment proposal: “Provision may be made by law for the refusal of bail by a court to a person charged with a serious offence where it is reasonably considered necessary to prevent the commission of a serious offence by that person.” *Id.* art. 40.

most past Irish referendums have expanded the rights of community members. For example, the Fourth Amendment lowered the minimum age for voting from twenty-one to eighteen;¹²⁹ the Fifth Amendment removed the State's recognition of the "special position" of the Roman Catholic church¹³⁰ and guaranteed free exercise of all religions;¹³¹ and the Ninth Amendment extended the right to vote in the Dáil elections to non-Irish citizens.¹³² The citizenship referendum, however, asked the Irish people to curtail citizenship rights of a minority group to which they had consented just six years prior. For example, if a baby was born the day the new citizenship law went into effect (January 1, 2005)¹³³ in a Dublin hospital, to non-Irish parents, and both parents had not been residing in Ireland for three of the previous four years, the baby would not have the same rights as a baby born under identical circumstances on December 31, 2004.

Indeed, the citizenship referendum was unlike most previous referendums on individual rights; it created a situation where the voters' had the opportunity to send current immigrants and future would-be immigrants the message that they would no longer be welcomed.¹³⁴ According to Harrington, "A third of 'yes' voters interviewed stated they 'were motivated by anti-immigrant feelings,' 36 per cent felt the country was being exploited by immigrants and 27 per cent felt there were too many immigrants in the country."¹³⁵ Although most voters merely intended to fix the Constitution's loophole, these statistics provide evidence that the referendum could quite plausibly be perceived as an anti-immigration statement.¹³⁶ When the results of a referendum can be "interpreted by some as a statement by the majority that a particular minority is undeserving of

129. *See id.* art. 16.

130. CASEY, *supra* note 1, at 550.

131. Ir. CONST., 1937, art. 44.

132. *See id.* art. 16.

133. Rostek, *supra* note 41, at 134.

134. Lavery, *supra* note 42. ("Opponents of constitutional change said it would stir up latent racist tendencies.")

135. Harrington, *supra* note 40, at 448.

136. As Una Crowley notes:

While Michael McDowell, the Minister for Justice, Equality and Law Reform who introduced the referendum, claimed it was not racist, the coordinating body for groups opposed to the referendum disagreed. [The] Campaign Against the Racist Referendum, argued that if the referendum was passed "some children born here will be less equal than others because of their parents' origins. Racial discrimination will be put into the constitution."

Crowley, *supra* note 38, at 19.

full inclusion in the community,” there is reason for concern.¹³⁷ This is especially true where the particular minority does not have a chance to vote.¹³⁸ Unfortunately, the current procedure for referendums does not allow the government to take such factors into account when deciding whether to put an issue to the people.¹³⁹ The responsibility—and, thus, the culpability for unfavorable results—are then transferred to the voters because they are the ultimate decision-makers.

Referendums require voters to balance the advantages and disadvantages of a given proposal. Voters must trade-off the disadvantages of their choice for its advantages. But when voters are asked to amend a law they had already approved and the disadvantages of doing so include the potential for severe tension, if not hostile interaction, between majority and minority,¹⁴⁰ the government should be afforded more latitude than the Irish Constitution currently provides in deciding whether the issue should go to a referendum.¹⁴¹

II. THE LISBON TREATY REFERENDUM

The EU is governed by treaties that are signed and ratified by its member states.¹⁴² In order to provide for its continued growth and integration, the EU has had to amend these treaties.¹⁴³ When an EU treaty is amended, it must be signed and ratified by each member state in accordance with that state’s procedures.¹⁴⁴ In ratifying an EU treaty, the member states transfer powers that belong to their respective national gov-

137. Ferguson, *supra* note 22, at 1539.

138. “Every citizen who has the right to vote at an election for members of Dáel Éireann shall have the right to vote at a Referendum.” Ir. CONST., 1937, art. 47. “All citizens . . . without distinction of sex who have reached the age of eighteen years who are not disqualified by law and comply with the provisions of the law relating to the election of members of Dáel Éireann, shall have the right to vote at an election for members of Dáel Éireann.” *Id.* art. 16.

139. *Id.* art. 46.

140. See Ferguson, *supra* note 22, at 1539.

141. See Steven J. Johansen, *Clearly Ambiguous: A Visitor’s View of the Irish Abortion Referendum of 2002*, 25 LOY. L.A. INT’L & COMP. L. REV. 205, 239 (2005) (“Perhaps foremost among these lessons is that swift legal solutions to difficult and divisive social issues are rarely successful.”).

142. See generally Treaty of Nice Amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain Related Acts, Feb. 26, 2001, 2001 O.J. (C 80) 1. [hereinafter Treaty of Nice].

143. See Patricia Roberts-Thompson, *EU Treaty Referendums and the European Union*, 23 J. EUR. INTEGRATION 105, 106 (2001) (“The ratification of new treaties is vital to the European Union as it establishes new patterns of institutional behavior and new legal relationships, thus shaping the development of integration.”).

144. *Id.* at 114.

ernments and “delegate [them] to the European Union.”¹⁴⁵ When Ireland decided to join the European Communion,¹⁴⁶ the Oireachtas delegated some of its constitutionally-vested rights to the EU.¹⁴⁷ Because these rights were vested by the Constitution, an amendment¹⁴⁸—and, thus, a referendum¹⁴⁹—were necessary. Subsequent Irish Supreme Court cases have held that, under the Constitution, both the ratification of amendments to EU treaties and the ratification of new treaties require referendums.¹⁵⁰ Such referendums, which propose to amend or replace EU treaties, have been categorized by Patricia Roberts-Thompson as “EU treaty referendums.”¹⁵¹ In light of the recent EU treaty referendums on the Lisbon treaty,¹⁵² however, the law that ratification of EU treaties requires a referendum¹⁵³ may need to be reexamined, not because of the referendums’ outcome, but because the gravity of the referendum hinges on the importance of the decision¹⁵⁴ and on whether people can be properly informed about the issue.¹⁵⁵ If the decision is important but the people cannot be properly informed about the merits and limitations of the treaty, then the people’s acquiescence is either unnecessary or inappropriate, and the decision to ratify should be left to the government.

This section will explore the efforts taken by the Irish government to inform the voters about the Lisbon treaty and how, despite these efforts,

145. Cahill, *supra* note 16, at 1211.

146. See Ir. CONST., 1937, art. 29.

147. Roberts-Thompson, *supra* note 143, at 114.

148. Ir. CONST., 1937, art. 46.

149. *Id.*

150. See *Crotty v. An Taoiseach*, [1987] I.R. 713 (Ir.).

151. Roberts-Thompson, *supra* note 143, at 9. Referendums that deal with the EU and are held within an individual state have been divided into five categories: (1) accession, in which a nonmember votes on whether to join the EU; (2) withdrawal, in which a member state votes on whether to leave the EU; (3) special purpose, in which an individual member holds a vote to decide “unique national political or legal circumstances surrounding membership”; (4) treaty referendums, in which a member state votes on whether to ratify a new treaty; and (5) quasi-treaty, in which a member state votes on a specific aspect of a new treaty. *Id.* at 107–19.

152. Lisbon Treaty, *supra* note 26.

153. Ir. CONST., 1937, art. 46.

154. See Cahill, *supra* note 16, at 1200. The reasoning argued in this section, however, strays from that of Ms. Cahill, who argues that the importance of a referendum to amend the constitution comes from the mere fact that it amends the constitution. This section argues that the substance of referendum, as well as the voters’ ability to understand the issues, should be the measurements of significance.

155. Gastil, Reedy, & Wells, *supra* note 20, at 1438–39. Using data from U.S. presidential elections, “[T]he best informed voters can consistently connect their underlying values and policy views to their voting choices; under-informed voters can do so only most of the time, and the least informed vote haphazardly.” *Id.*

many voters still claimed they lacked sufficient information.¹⁵⁶ In addition, this section will suggest that the difficulties posed by EU treaties are just another indication that it is necessary for Ireland to rethink its amendment process.

A. The Referendum Commission

In order to better inform the voting public on the issues presented at a referendum, the government of Ireland established the Referendum Commission in the Referendum Act of 1998.¹⁵⁷ The Referendum Commission was an independent body that “initially had the role of setting out the arguments for and against referendum proposals”¹⁵⁸ However, the Referendum Act of 2001¹⁵⁹ amended the 1998 Act and the current primary functions of the Referendum Commission are:

To prepare one or more statements containing a general explanation of the subject matter of the proposal and of the text thereof in the relevant Bill [;] to publish and distribute those statements in such manner and by such means including the use of television, radio and other electronic media as the Commission considers most likely to bring them to the attention of the electorate [; and] to promote public awareness of the referendum and encourage the electorate to vote at the poll.¹⁶⁰

Apparently, by creating the Referendum Commission, the Irish government acknowledged its duty to inform the voters about the proposals at referendum.¹⁶¹

It is unrealistic to assume that the voting public will become experts in the treaties proposed for ratification,¹⁶² but it is necessary that a voting public at least be informed on the basic issues surrounding the treaty,¹⁶³

156. *Post-Referendum Survey in Ireland: Preliminary Results* (European Commission: Flash Eurobarometer No. 245, 2008) at 2, available at http://ec.europa.eu/public_opinion/flash/fl_245_en.pdf.

157. Referendum Act, 1998, (Act No. 1/1998) (Ir.), available at <http://www.oireachtas.ie/documents/bills28/acts/1998/a198>.

158. The Referendum Commission, About Us, <http://www.refcom.ie/en/AboutUs/BackgroundandRole/>.

159. Referendum Act, 2001 (Act No. 53/2001) (Ir.) available at <http://www.oireachtas.ie/documents/bills28/acts/2001/a5301.pdf>.

160. *Id.* § (1)(a).

161. *Id.*

162. Cahill, *supra* note 16, at 1200.

163. Gastil, Reedy, & Wells, *supra* note 20, at 1437 (“To make a sound decision reflective of his or her core values, a voter faced with a initiative, referendum, or ballot measure must self-educate. . . . [V]oters need to develop a basic grasp of the proposed law, consider the strongest arguments for and against it, and take into account relative pieces of information.”).

especially considering the importance and historical significance of many referendums.¹⁶⁴ Despite the efforts of the Referendum Commission, the voters at past referendums on EU treaties were not always equipped with enough information to make informed decisions.¹⁶⁵ But, governments can only do so much to prepare the voters.¹⁶⁶ Roberts-Thompson explains, “Treaty referendums are the most problematic of all referendums for governments to conduct . . . their source is largely external to the national political system, they are held more frequently than other [EU] referendums, and governments find themselves with little control over their conduct or timing.”¹⁶⁷ Meanwhile, the normal difficulties the government inevitably faces in informing the citizens about *anything*,¹⁶⁸ are further complicated by EU treaty referendums because of the separation between the voters and the EU treaties.¹⁶⁹ Unlike referendums on the national government and social issues, it may be difficult for voters to understand how the ratification actually affects them, and this can lead to apathy¹⁷⁰ regardless of the government’s efforts.

B. The Referendums on the Lisbon Treaty

1. Background

On December 13, 2007, the member states of the EU signed a treaty in Lisbon¹⁷¹ that was to amend the treaties governing the EU at that time.¹⁷²

164. Cahill, *supra* note 16, at 1200.

165. See *Post-Referendum Survey in Ireland: Preliminary Results*, *supra* note 156, at 2.

166. Roberts-Thompson, *supra* note 143, at 130.

167. *Id.*

168. See generally Gastil, Reedy, & Wells, *supra* 20, at 1438–40 (focusing on the problem of voters’ knowledge).

169. A common argument against the EU by citizens of the Member States is that the EU is too detached from the citizens. Sarah Lyall & Stephen Castle, *Ireland Derails a Bid to Recast Europe’s Rules*, N.Y. TIMES, June 14, 2008, at A1 (“For all its benefits, many people in Ireland and in Europe feel that the union is remote, undemocratic and ever more inclined to strip its smaller members of the right to make their own laws and decide their own futures.”).

170. Roberts-Thompson, *supra* note 143, at 130 (“[S]hort-term expediencies dominate the conduct of [treaty] referendums and national attitudes towards the European Union and European integration remain ambivalent.”). The short-term expediencies are due to the fact the groups concerned with specific issues of the Treaty will cooperate efforts with other similarly interested groups. Michael Holmes, *The Referendum on the Treaty of Lisbon in the Republic of Ireland* (Eur. Parties Elections and Referendums Network, Referendum Briefing No. 16, 2008), available at http://www.sussex.ac.uk/sei/documents/epern_no_16_ireland_08.pdf. These groups only argue their specific issue and the voter is not provided with a broader prospective of the treaty as a whole. *Id.*

171. Lisbon Treaty, *supra* note 26.

The Lisbon treaty was also intended to “replace the draft European constitution, which was thrown out by voters in France and the Netherlands in 2005.”¹⁷³ In addition, the treaty was to improve the EU’s effectiveness and efficiency by reorganizing the EU governing bodies in order to change the way the EU makes laws.¹⁷⁴ Currently, some of the proposed EU laws are decided jointly by the Council of Ministers (composed of the ministers from each member state who are charged with overseeing issues of the type under consideration)¹⁷⁵ and the European Parliament (composed of representatives elected by the citizens of each member state).¹⁷⁶ Other decisions are made exclusively by the Council of Ministers.¹⁷⁷ The Treaty of Lisbon proposed to expand the range of issues for which decisions must be approved by both the Council of Ministers and the European Parliament.¹⁷⁸ The treaty also proposed an allowance for citizen initiatives¹⁷⁹ and sought to clarify, in specific areas of law and policy, whether the EU, the national governments, or both, have the authority to act.¹⁸⁰

172. Treaty of Amsterdam Amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain Related Acts, Nov. 10, 1997, 1997 O.J. (C 340) 3 [hereinafter EC Treaty].

173. Sally Marthaler, *The French Referendum on the Ratification of the Constitutional Treaty* (Eur. Parties Elections and Referendums Network, Referendum Briefing No. 12, 2005), available at http://www.sussex.ac.uk/sei/documents/epern_rb_france_2005.pdf; Paul O’Neill & Susan R. Sandler, *The EU Citizenship Acquis and the Court of Justice: Citizenship Vigilante or Merely Vigilant Treaty Guardian?*, 7 RICH. J. GLOBAL L. & BUS. 205, 243 (2008). (“The Lisbon Treaty, like the Constitution Treaty on which it is extensively based, reflects the political will of the European Council . . .”).

174. REFERENDUM COMMISSION, THE LISBON TREATY: YOUR GUIDE 2, available at http://www.lisbontreaty2009.ie/lisbon_treaty_guide.pdf.

175. *Id.* at 3. For example, if the proposal was on agriculture, then each member would be represented by their Ministers of Agriculture. *Id.* Some of the decisions by the Council must be unanimous such as decisions on foreign policy. Decisions on other matters require a qualified majority. *Id.* Under this system, each member state is given a weighted vote that is in relation to, but not proportional to, its population. *Id.* The Treaty of Lisbon would increase the number of issues that require a qualified majority thus decreasing the number of issues one country can veto. *Id.*

176. While the Council of Ministers represents the member states’ executive branches, the European Parliament represents the citizens of the member states. Aida Torres Pérez, *The Internationalization of Lawmaking Processes: Constraining or Empowering the Executive?*, 14 TULSA J. COMP. & INT’L L. 1, 11 (2006).

177. REFERENDUM COMMISSION, *supra* note 174, at 3.

178. Lisbon Treaty, *supra* note 26.

179. *Id.*

180. REFERENDUM COMMISSION, *supra* note 174, at 6–9.

2. Rejection of the Lisbon Treaty

All twenty-seven members of the EU have signed the Lisbon treaty, but it cannot take force until it is ratified by each member state in accordance with their national procedures.¹⁸¹ Ireland is the only member of the EU that required a referendum to ratify the treaty,¹⁸² and, on June 13, 2008, the people voted against ratification.¹⁸³ The rejection disappointed the Irish government, which had signed and supported the treaty,¹⁸⁴ and it frustrated the other members of the EU.¹⁸⁵

Statistical evidence supports the theory that, despite the efforts of the Referendum Commission, many voters did not feel as if they were properly informed about the treaty prior to the vote.¹⁸⁶ According to a post-referendum survey conducted by Eurobarometer, which regularly conducts surveys on behalf of the European Commission, over half of the eligible voters who did not vote abstained because they “did not fully understand the issues raised by the referendum” and over forty percent felt they “were not informed about the issues at stake.”¹⁸⁷ Among the reasons that voters voted “no,” the most common was, “Because I do not know enough about the Treaty and would not want to vote for something I am not familiar with[.]”¹⁸⁸ Dr. Michael Holmes, Senior Lecturer at Liverpool Hope University, asserts that the number of voters claiming they did not know enough about the treaty “could be a reflection of the fact that there was a multiplicity of reasons for voting ‘No’, rather than any single dominant narrative.”¹⁸⁹ For instance, special interest groups each

181. *Q&A: The Lisbon Treaty*, BBC NEWS.COM, Feb. 5, 2010, <http://news.bbc.co.uk/2/hi/europe/6901353.stm>.

182. Dr. Holmes relays an interesting analogy regarding the referendum in Ireland and the Iowa caucus of the 2008 United States presidential primary. An Irish radio announcer had commented that during the referendum, “All of Europe will be watching, just like we’re a caucus, Europe’s Iowa.” Holmes, *supra* note 170, at 1–2. Since Ireland was the only country having a referendum, as Dr. Holmes points out, it would be as if Iowa were deciding the entire election. *Id.* Cahill points out, however, that considering the constitutional configuration from which the Irish referendum system belongs, it is not “ridiculous” to have a referendum on a treaty, which “materially alters the ‘essential scope and objectives’ of the previous treaties,” even if Ireland was the only country to require such a treaty. Cahill, *supra* note 16, at 1199–1200.

183. O’Neill & Sandler, *supra* note 173, at 242.

184. Lyall & Castle, *supra* note 169.

185. *Id.*

186. O’Neill & Sandler, *supra* note 173, at 243.

187. *Post-referendum survey in Ireland: Preliminary Results*, *supra* note 156, at 3.

188. *Id.* at 2.

189. Holmes, *supra* note 170 at 8.

offered the public a variety of different reasons for opposing ratification of the treaty.¹⁹⁰

Holmes's proposition suggests that voters had multiple reasons for voting against the treaty but simply failed to articulate one definitive reason. Although this is surely possible, an alternative conclusion can be drawn from Dr. Holmes's assertion. The multiple sources of the opposition campaign and the different issues they opposed may have confused the voters as to what the issues actually were.¹⁹¹ This is supported by the fact that different members within the opposition offered reasons for rejecting the treaty that contradicted others' reasons.¹⁹² For example, the Socialist party believed that the treaty did not properly support workers' rights and was "fundamentally pro-business;"¹⁹³ meanwhile businesses and business leaders claimed the treaty "would permit EU interference in Ireland's highly pro-business tax rates."¹⁹⁴ Based on the conflicting information that was being provided to the voters, it is unsurprising that many did not feel comfortable voting for the treaty.

Although it appears that the Referendum Commission failed in its duty to provide the voters with adequate information on the issues,¹⁹⁵ it could also be argued that the nature of the Lisbon treaty actually made it too difficult for the Referendum Commission to fulfill its responsibility. This theory seems particularly compelling, considering the Lisbon treaty was not the first treaty the Irish people had rejected, and there were legitimate questions as to the adequacy of the information the voters took to the polls. In a 2001 referendum, the majority of voters rejected the ratification of the Treaty of Nice,¹⁹⁶ which would have allowed the EU to expand to twenty-seven members.¹⁹⁷ Those in favor of the treaty felt that the spreading of misconceptions by the opposition as to the treaty's purpose—the opposition claimed the purpose focused on defense rather

190. See, e.g., *id.* at 4 (The Catholic groups claimed that the Treaty "would lead to an undermining of Ireland's laws on abortion.").

191. Proponents of the referendum accused opponents of misrepresenting the issues leading voters to vote against the Lisbon treaty for reasons that had nothing to do with the actual treaty. *Ireland Rejects EU Reform Treaty*, BBC NEWS, June 13, 2008, <http://news.bbc.co.uk/2/hi/europe/7453560.stm>.

192. Holmes, *supra* note 170, at 4.

193. *Id.*

194. *Id.*

195. See *Post-referendum survey in Ireland: Preliminary Results*, *supra* note 156, at 2.

196. Peter Katz, Comment, *The Treaty of Nice and European Union Enlargement: The Political, Economic, and Social Consequences of Ratifying the Treaty of Nice*, 24 U. PA. J. INT'L ECON. L. 225, 226 (2003).

197. Treaty of Nice, *supra* note 142.

than expansion)¹⁹⁸—and low voter turnout¹⁹⁹ together evinced that the voters were either uninformed or confused about the issues.²⁰⁰ A year later, another referendum was held on the Treaty of Nice and the people approved ratification.²⁰¹

As with the Treaty of Nice, the number of voters and nonvoters who felt they were not adequately informed about the Lisbon treaty²⁰² suggests there was a disconnect between the information being provided and the information the voters received. Meanwhile, the Referendum Commission spent €5 million during the Lisbon treaty referendum to provide the voters with information on the issues and encourage them to vote.²⁰³ The Referendum Commission's expectation is that it can provide an explanation of the issues in simple and understandable language,²⁰⁴ but EU treaties and the issues surrounding them are far from simple.²⁰⁵ Providing minimal explanations or merely conveying the "gist" of the treaty may be insufficient because such approaches weaken the significance of the

198. A common argument by those opposed to the Treaty of Nice was that it jeopardized Ireland's neutral position regarding defense because it set up a common defense committee for international crisis, even though the main purpose of the Treaty was to provide for the expansion of the EU. Katz, *supra* note 196, at 257.

199. Only just under thirty-five percent of voters voted in the 2001 referendum. Karin Gilland, *Ireland's Second Referendum on the Treaty of Nice* (Opposing Eur. Research Network, Referendum Briefing No. 1, 2002), available at http://www.sussex.ac.uk/sei/documents/epern_no_16_ireland_08.pdf.

200. See *Post-referendum survey in Ireland: Preliminary Results*, *supra* note 156, at 7 (noting that the leading reason for voters to vote "no" was a lack of information); Brian Lavery, *World Briefing, Europe: Ireland: Confusion Over Europe Treaty*, N.Y. TIMES, Sept. 19, 2002, at A12 ("Only 16 percent of Irish people polled understand the Treaty of Nice. . . . More than 40 percent of people could not state a single issue related to the treaty . . .").

201. To get the second referendum on the Treaty of Nice approved by the people, the government campaigned to inform the public as to the expansion aspect of the Treaty. Katz, *supra* note 196, at 257–58. The government also presented a National Declaration to the European Council clarifying its retention of the right to decide on whether to commit military personnel. *Id.* at 258. This declaration, however, did not change the stance of Ireland or the EU. *Id.*

202. *Post-referendum survey in Ireland: Preliminary Results*, *supra* note 156, at 3, 7.

203. Aine Kerr, *Simplicity the Best Way Forward for Commission*, IR. INDEP., Aug. 27, 2008, available at <http://www.independent.ie/national-news/simplicity-the-best-way-forward-for-commission-1463851.html>

204. *Id.*

205. Even those who supported the referendum admitted that it was "largely incomprehensible" and that "no sane or sensible person could be expected to read the document." Holmes, *supra* note 170, at 5. Even the President of the Referendum Commission said, "[I]t certainly would not be your favourite holiday reading. It is a dense legal document." *Id.*

referendum by failing to truly require the acquiescence of the people. If the voters are unfamiliar with *actual* issues surrounding the treaty then they are not voting on the treaty itself—rather, they are merely voting on which campaign was more effective.²⁰⁶ It is worth mentioning again that the average voter is not expected to be extensively familiar with the treaty,²⁰⁷ but, when the issues are so complex that voters are voting on the basis of misconceptions or factors irrelevant to the treaty,²⁰⁸ then it must be questioned whether a vote to approve ratification can actually be taken as legitimate acquiescence of the people is obtained.

3. The Second Referendum on the Lisbon Treaty

On October 2, 2009, Ireland held a second referendum on ratification of the Lisbon treaty.²⁰⁹ The referendum passed with over sixty-seven percent voting in favor.²¹⁰ With another year to “digest” the treaty,²¹¹ it is reasonable to assume that the electorate developed a better understanding of the issues. However, there was still confusion as to the effect the treaty would have on social issues in Ireland.²¹² The New York Times reported that “[s]ome ‘no’ campaigners worry that [the treaty] could usher in legalized abortion. . . . Others have played up fears that the treaty could undermine Ireland’s military neutrality and drive down pay. Supporters say that neither policy will change.”²¹³ Although the treaty itself was not changed,²¹⁴ the European Council and the Referendum Commission did attempt to clarify these issues²¹⁵ and to clarify the treaty’s exact affect on the nomination of Commissioners to the European Commis-

206. Ferguson, *supra* note 22, at 1539 (“[V]otes on initiatives and referend[ums] are the aggregation of individual opinions that often seem to be influenced by well-financed campaigns appealing to base fears and self-interest, rather than reflecting the will of a rationally deliberative public.”).

207. Cahill, *supra* note 16, at 1200.

208. Holmes, *supra* note 170, at 8 (“[M]ost people on both sides of the argument concur that Lisbon does not pose a threat to Ireland’s constitutional restriction on abortion, but that did not stop a considerable amount of people from believing the opposite.”).

209. Eric Pfanner, *E.U. Vote in Ireland Hangs on the Economy*, N.Y. TIMES, Oct. 2, 2009, <http://www.nytimes.com/2009/10/02/world/europe/02iht-irish.html>.

210. Irish Times Reporters, *Lisbon Treaty Passes With Decisive 67% in Favour*, IR. TIMES, Oct. 3, 2009, available at http://www.irishtimes.com/newspaper/breaking/2009/1003/breaking1_9f.html.

211. Pfanner, *supra* note 209.

212. *Id.*

213. *Id.*

214. The Lisbon Treaty Referendum Commission, <http://www.lisbontreaty2009.ie/>.

215. REFERENDUM COMMISSION, *supra* note 174, at 6. (“The Lisbon Treaty proposes no changes in relation to abortion or family rights.”).

sion.²¹⁶ Furthermore, based on earlier reactions to the 2009 referendum, it seems the most significant change between the 2008 and 2009 referendums was the depletion of Ireland's economy.²¹⁷ Concerns about the economy and unemployment²¹⁸ most likely explain the increase of five percent in voter turnout.²¹⁹ Whether the "yes" vote was a result of assurances as to what was *not* in the treaty or concerns over the economy, it remains unclear whether the voters' understanding of how the treaty would actually affect Ireland had improved for the 2009 referendum.

4. The Lisbon Treaty Difficulties

Based on the difficulties faced by the government, the Referendum Commission, and the voters during the Lisbon treaty referendums, it is appropriate to consider whether a referendum is the most effective way to ratify an EU treaty.²²⁰ If a referendum is required solely to fulfill its

216. Originally, the Treaty was to reduce the number of Commissioners appointed to the European Commission, which "propose[s] policies and laws, implement[s] EU decisions[,] and ensure[s] that EU law is respected by Member States." REFERENDUM COMMISSION, THE LISBON TREATY: GET THE COMPLETE PICTURE 4-6, available at <http://www.lisbontreaty2008.ie/HandBookEng.pdf>. Currently, each member state is allowed to nominate one member of the European Commission; therefore, there are twenty-seven Commissioners. Originally, the number of Commissioners was to be reduced by two-thirds to eighteen, if the number of member states remains the same. Member states would be able to nominate their Commissioners on a rotating basis. Every member state would therefore be able to nominate a Commissioner for two out of every three Commissions. Each Commission lasts five years. *Id.* at 5. After the 2008 Treaty of Lisbon referendum, the European Council decided that if the Lisbon treaty is ratified, the number of Commissioners will remain consistent with the number of member states and each member state would continue to elect its own Commissioner. REFERENDUM COMMISSION, *supra* note 174, at 2.

217. Pfanner, *supra* note 209. In its 2009 Employment Outlook for Ireland, the Organisation for Economic Co-operation and Development ("OECD") stated, "From December 2007 to July 2009 . . . the unemployment rate [in Ireland] rose by 7.8 percentage points to reach 12.5%, the second-highest level in the OECD after Spain and the highest percentage increase in the unemployment rate witnessed during the current crisis." Organisation for Economic Co-operation and Development [OECD], *Employment Outlook 2009 – How Does Ireland Compare?*, <http://www.oecd.org/dataoecd/61/55/43707134.pdf>.

218. Pfanner, *supra* note 209.

219. Elections Ireland, Summary of Referendums, *supra* note 113.

220. Because the referendum system only allows for a "yes" or "no" decision, it does not provide the appropriate forum for discussion on the issues; the only way to change the treaty is to reject it and hope to renegotiate. Gráinne de Búrca & Jo Beatrix Aschenbrenner, *The Development of European Constitutionalism and the Role of the EU Charter of Fundamental Rights*, 9 COLUM. J. EUR. L. 355, 359 (2003); see also Holmes, *supra* note 170, at 9 ("The EU has failed to find an effective way of allowing its citizens to engage with its process.").

constitutional role,²²¹ then it can be reduced to a mere procedure and can be seen as actually compromising its intended significance rather than as “something that goes to the heart of who [the Irish people] are, something that changes fundamentally those things that we take most seriously. . . .”²²² Alternatively, if the government is allowed the discretion to decide which amendment proposals should be put to referendum, then the government could evaluate case-by-case whether the proposal rises to the level of national importance requiring the voters’ permission and is of such a nature that the voters will be able to make an informed decision on the actual issues presented. The government, therefore, would be able to protect the integrity of the referendum as a democratic tool.

III. A PROPOSED REVISION TO THE AMENDMENT REFERENDUM SYSTEM

The citizenship referendum and the recent referendums on the ratification of the Treaty of Lisbon provide evidence that the referendum system in Ireland should be revised. Under the Irish Constitution, if a bill contains an amendment to the Constitution then it must be submitted to the people at a referendum.²²³ For those bills that do not require amendment, the President, with the recommendation of the Oireachtas, decides if the issue is “of such national importance that the will of the people thereon ought to be ascertained.”²²⁴ This Note proposes that in order to ensure, or, at least, improve the chances that a proposal actually deserves the people’s approval, the referendum process for regular bills should apply to amendment proposals and treaty approval referendums as well. Article 27 should continue to govern decisions as to whether a proposal is “of such national importance that the will of the people thereon ought to be ascertained.”²²⁵ The President should have discretion after receiving the recommendation of the Seanad Éireann and Dáil Éireann.²²⁶

A danger to any referendum system or popular voting system in general is that misguided voters—ill-equipped with incorrect or insufficient information—may not be voting in line with their personal beliefs and values with respect to the proposal at issue and are instead voting on the basis of the information they have been provided.²²⁷ Again, this is not to say that all voters must be political experts aware of every nuance of any

221. Cahill, *supra* note 16, at 1200–01.

222. *Id.* at 1200.

223. Ir. CONST., 1937, art. 46.

224. *Id.* art. 27.

225. *Id.*

226. *See id.*

227. *See* Ferguson, *supra* note 22, at 1539.

given proposal—that would be an unrealistic burden.²²⁸ “A more modest goal . . . is that voters must at least be able to follow reliable cues that guide them to a voting choice consistent with their deeper values and understanding.”²²⁹ An alternative amendment system would allow the government to account for these concerns.

The revised system would not undermine democracy; it would instead ensure that the voters’ participation in their democracy is legitimate and fair. In support of the current system, Dr. Maria Cahill, Lecturer of Law at the University College Cork, argues that drawbacks in the referendum system are balanced out by the constitutional system and its history, which provides for the referendum in the first place.²³⁰ According to Cahill, the value of an amendment referendum stems from the magnitude of the constitutional system in which the referendum functions.²³¹ Therefore, the referendum should “not be judged on its own merits.”²³² However, following Cahill’s logic may lead us in the opposition direction. If we assume that the constitutional system bears significance, then a referendum to amend the constitution is not necessarily significant solely because it exists. This would make it merely a procedure. Conversely, because a referendum to amend the constitution plays such a significant role in the constitutional system, the referendum must be substantially worthy of its role on its own merits.

Moreover, the constitutional amendment referendum does not exist in a vacuum;²³³ it must be viewed in terms of its circumstances and effects.²³⁴ Michael Ferguson, Assistant Professor of Political Science, recognizes how “a concern for democratic inclusion demands broader attention, not only to the fairness of procedures relating to the crafting and debating of initiatives and referend[ums] *prior* to an election, but also—in certain cases—to perceptions of fairness and their consequences for democratic participation *after* an election.”²³⁵ The citizenship proposal illustrated an instance where issues of fairness and equality should at least have been considered before the referendum. Changing the amendment referendum system will assist the government in protecting the voters should another constitutional problem arise that is as unpredictable as the citizenship

228. Gastil, Reedy, & Wells, *supra* note 20, at 1439.

229. *Id.*

230. Cahill, *supra* note 16, at 1196.

231. *Id.* at 1200.

232. *Id.*

233. *Contra id.*

234. Ferguson, *supra* note 22, at 1539.

235. *Id.*

tourism problem and just as likely—if not more likely—to compromise fairness and equality.

Ironically, implementation of the amendment system suggested here would, in and of itself, require an amendment to the Irish Constitution,²³⁶ thus, a referendum would be necessary.²³⁷ In the end, though, the new amendment system would likely result in a significant reduction in overall referendums as a result of its new discretionary standard. All in all, to assume that the Irish would not at least entertain the prospect of such a revision to the system would be an underestimation of the Irish people and the importance they place on participation in their democracy.²³⁸ By giving the government discretion to choose which amendment proposals are appropriate to offer to the people for their assent, the suggested system would protect the integrity of the referendum process and the people's participation in the most important decisions that face their country.

CONCLUSION

The most recent referendums illustrate why a more conservative approach to referendums is necessary in Ireland. The citizenship referendum proved that constitutional problems and loopholes are unpredictable,²³⁹ and the effect or message that the vote sends can be almost as important as the substance of the referendum itself.²⁴⁰ Future constitutional problems may require creative and sometimes difficult decisions. Allowing the government some discretion over whether to put an amendment proposal to the people allows the government to protect the public if such a procedure would be inappropriate in light of the considerations discussed above.

In addition, if the EU wishes to continue to grow and integrate, then the member states can expect more treaties to be ratified.²⁴¹ And, unless the EU develops its own system for member state treaty ratification,²⁴² Ireland will likely face another EU treaty referendum soon.²⁴³ The Treaty of Lisbon and the Treaty of Nice both provide evidence of the difficulties EU treaty referendums present for both the government and the voters,

236. Articles 27, 46, and 47 would need to be revised accordingly.

237. Under the current Irish Constitution, all amendments must be approved by a majority of the people by referendum. Ir. CONST., 1937, art. 46.

238. Cahill, *supra* note 16, at 1200.

239. *See supra* Part I.

240. *Supra* Part I.

241. Roberts-Thompson, *supra* note 143, at 131.

242. *Id.*

243. *Id.*

and they perhaps prove that, in certain instances, ratification of an EU treaty should not be decided by referendum.

The referendum system in Ireland has served the State well since the 1937 Constitution was approved.²⁴⁴ However, the recent referendums have shown that the referendum system itself needs to be amended. In order to protect the integrity of the referendum as a tool of democracy, and in order to be sure that the issues that truly require the assent of the people are not passed without the assent of the people, the decision to hold a referendum should always be made at the discretion of the members of the legislative and executive branches.

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244. Elections Ireland, Referendums, *supra* note 10.

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