

**THE USES AND ABUSES OF
REFERENDUMS**

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ABSTRACT

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Referendums, especially referendums with constitutional content, are often treated as exceptional acts. They are treated as exceptional in a democratic sense, because they are thought to go beyond the usual democratic processes and institutions. Since referendums are thought to be exceptional in a democratic sense they are treated as exceptional in a constitutional sense too. The political and legal significance attributed to votes in referendums far surpasses that of elections, protests, or votes in legislatures. The aim of this thesis is to challenge this approach to referendums. I will argue that referendums, even referendums with constitutional content, are democratic processes like any other. This thesis interrogates the treatment of referendums in theory and practice. It challenges the ideas that inform the view of referendums as exceptional democratic processes. This is not an argument against the use of referendums. Far from it. Instead, it is an argument for the normalization of referendums. To argue for the normalization of referendums is to say that referendums are not higher-order decision-making processes that operate on a distinct democratic plane. Referendums are just one of many ways that direction is given to representatives in a democracy. Certain features of referendums distinguish them from other democratic processes. In particular, they give more specific direction to representatives than elections do. There are features of referendums that are significant and distinctive, but nothing places them above –or apart from– other democratic processes.

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Chapter One: Introduction

1. The Normalization of Referendums

Referendums, especially referendums with constitutional content, are often treated as exceptional acts.¹ Referendums are treated as exceptional in a democratic sense because they are thought to be apart from, or prior to, everyday democratic processes and institutions. Since referendums are thought to be exceptional in a democratic sense, they are treated as exceptional in a constitutional sense too. The political and legal significance attributed to votes in referendums far surpasses that of elections, protests, or votes in legislatures. The aim of this thesis is to challenge this approach to referendums. Referendums may be distinguished from elections and protests in some ways, but they are not in a different democratic category altogether. Further, by placing referendums on a higher plane of existence, the case for referendums is made weaker; not stronger. The aim of this thesis is to argue for the normalization of referendums, which is to say treating them as democratic processes like any other. Even when referendums have constitutional content, the referendum process and

¹ What it means to think of referendums as exceptional will be introduced in section three of this chapter, and defended throughout this thesis, but central to the view that referendums are exceptional is the view that referendums with constitutional content are instances of higher-order law-making. The case for referendums with constitutional content as instances of higher-order law-making is a complex claim which will be explained in Chapter Two, but many express versions of this view. For instance: ‘...Constitutional referendums are used to produce higher-order law, which in turn makes it a very different animal from referendums engaged in ordinary law-making.’ Stephen Tierney, ‘Constitutional Referendums: A Theoretical Enquiry’ (2009) 72 MLR 360. 363; Similarly, Ackerman says that constitutional referendums ‘When successful, culminate[e] in the proclamation of higher law in the name of We the People.’ Bruce Ackerman, *We the People, Volume 1: Foundations* (Belknap Press 1993). 7; The view that the referendum is an exceptional democratic process is found in the political science literature too. As Qvortrup says, ‘Traditionally, the referendum has been seen as an exceptional democratic process.’ Matt Qvortrup (ed), *Referendums Around the World: The Continued Growth of Direct Democracy* (Palgrave MacMillan 2014). 14

outcome should not be characterized as constitutional or exceptional. A risk of treating referendums as exceptional is in seeing their use as disconnected from the rest of democracy.

It is impossible to argue about referendums without arguing about democracy. The case for referendums will inevitably be informed by the case for democracy.² To that end, the challenge made here to the view of referendums as exceptional is not only about referendums, but also about the view of democracy that informs this approach. The approach to democracy that will be challenged here is that democracy has two tracks: one for The People³ and one for representatives. Two-track democracy holds that The People, or people, transfer their power to representatives on a limited basis. When the terms of that relationship are changed The People must give their consent directly. On this two-track view, almost all decisions can be made by representatives, but the most important are reserved for The People to make directly.⁴ Two-track democracy is informed by two further ideas: direct democracy and the social contract. The idea of direct democracy is significant because it is the decision-making mechanism for the higher-order of democracy, where decisions are made by The People instead of representatives. The social contract is significant because it is the aim of exercises in direct democracy to amend it. In this thesis I challenge a connected set of philosophical

² ‘Arguments against the referendum are also arguments against democracy, while acceptance of the referendum is but a logical consequence of accepting a democratic form of government. Vernon Bogdanor, *The People and the Party System* (CUP 1981). 93

³ I capitalize ‘The People’ to distinguish between instances where it is claimed that The People make decisions collectively from those where individual people make decisions that are then aggregated together. This distinction is tricky because sometimes The People is capitalized in the literature and sometimes it is not. In making my own arguments, I use the word public or the electorate because I am doubtful about the possibility of a clearly defined people making decisions together, and so resist the idea that referendums refer questions back to a unified corporate body. Further, one purpose of expanding referendums beyond voting is to capture members of political communities who cannot vote. The People will not be capitalized, however, when the argument being cited does not; even when the theorist in question does think that decisions are made collectively.

⁴ Qvortrup does not himself make a case for two-track democracy, but he expresses an intuition behind it well when he says: ‘On matters of minor importance only the chiefs debate; on major matters the whole community.’ Qvortrup (n 1). 3

presuppositions that inform this picture of referendums: (i) the view of referendums as exceptional democratic processes, (ii) the idea that democracy has two tracks, (iii) the ideal of direct democracy, and (iv) that the social contract is the justification for democratic authority. I will instead suggest that (i) referendums are a way of referring questions back to voters to provide specific direction to representatives, and (ii) that a piecemeal account of democracy where different democratic decisions and systems are justified for different reasons provides a better philosophical foundation for thinking about referendums.

This thesis is not an argument against the use of referendums. The aim of this thesis is to persuade readers that the challenges and opportunities of referendums (especially constitutional referendums) cannot be addressed legally, politically, or philosophically, by thinking about referendums as exceptional democratic processes. Ackerman says, for instance, that referendums are times of transformation and that ‘apathy will give way to concern, ignorance to information, selfishness to serious reflection on the country’s future.’⁵ Ackerman is optimistic because he thinks that referendums can engage people in democracies ways that political parties, leaders, and movements cannot. I worry a lot about thinking about referendums in this way. I worry about the idea that referendums are justified on a different set of democratic principles and that a different set of political rules govern their use. Referendums should not be understood as exceptional, *sui generis* democratic processes that are apart from representative democracy. This way of thinking about referendums has undermined representative institutions rather than causing voters to engage with them. It is right to say that referendums are a remedy insofar as they are safety valves in a democratic system,⁶ but they are a safety valve that should be built into a democratic system, not independent of that system.

⁵ Ackerman (n 1). 287

⁶ ‘From a theoretical point of view, referendums can provide a democratic safety valve and mechanism for letting out political steam.’ Qvortrup (n 1). 12

Rather than referendums being remedies for the failings of representative democracy, representative democracy is a remedy for the failings of referendums.

One caveat before proceeding about different types of referendums. In both the literature and practice of referendums, a distinction is drawn between constitutional referendums and ‘ordinary legislative referendums.’⁷ This distinction is drawn because of the claim that referendums with constitutional content are of a different order of decision-making. Referendums with constitutional content are taken to be instances of higher-order decision-making. Tierney captures this by saying that constitutional referendums, and only constitutional referendums, are instances of direct democracy because only constitutional referendums are instances where The People displace representatives and intervene directly in the terms of their governance.⁸ Similarly, Galligan makes the claim that referendums are most appropriately used for constitutional questions and only constitutional questions, because decisions about the organization of constitutional authority cannot be made by representatives.⁹ I do not distinguish between constitutional and legislative referendums in this thesis because I do not think that the processes are different. I will argue that referendums with constitutional content are not themselves constitutional processes, or at least not constitutional in a way that separates them from other democratic processes. The view that constitutional referendums are a distinct type of referendums reflects the idea that there are two tracks in democracy: one for people and one for politicians where referendums are processes of higher-order lawmaking. I do not use the distinction between constitutional and legislative referendums, because it is the

⁷ Tierney (n 1). 360

⁸ *ibid.* 364

⁹ Brian Galligan, ‘Amending Constitutions Through the Referendum Device’ in Matthew Mendelsohn and Andrew Parkin (eds), *Referendum democracy: citizens, elites, and deliberation in referendum campaigns* (Palgrave 2001). 110

aim of this thesis to challenge the view of referendums and democracy that the distinction rests on.

2. The Aims of the Thesis

2.1 The Five Aims of the Thesis

This thesis has five connected aims: (i) to identify and challenge the philosophical presuppositions that inform the treatment of referendums in theory, law, and politics, (ii) to put forward an alternative definition of referendums that holds in general, (iii) to normalize referendums with constitutional content, (iv) to understand the implications in practice of the philosophical presuppositions that inform the treatment of referendums, and (v) to offer the strongest possible justification for the use of referendums. Pursuing these different aims requires employing different theoretical tools for different purposes. Overall, this thesis is an exercise in legal philosophy. It challenges the philosophical presuppositions about referendums in theory. Although referendums have been of less interest to philosophers, referendums raise questions that philosophers have been very interested in about democracy, authority, collective action, and the relationships between different democratic institutions. There is, however, compelling literature on referendums in political science as well as in constitutional law and theory. The aim of these two bodies of literature is of course not to make philosophical claims, but it is nevertheless necessary to consider the philosophical presuppositions that inform these bodies of literature.

2.2 Methodology and Referendums in General

The philosophical presuppositions I will challenge in this literature are that referendums are: (i) synonymous with votes, (ii) instances of direct democracy, (iii) votes for issues instead of representatives, (iv) moments when The People come together as a collective body, (v) to make decisions and (vi) express consent to propositions. There is a further presupposition about a certain type of referendum which is (vii) that referendums with constitutional content are themselves constitutional processes. Taken together these presuppositions inform a view and a treatment of referendums as exceptional democratic processes. The sort of methodological approach taken here risks being uncharitable because it evaluates literature from constitutional theory and political science from a philosophical perspective. It criticizes bodies of literature for asking questions that it is not the object of those bodies of literature to address. For instance, this thesis challenges in great detail phrases such as ‘The People decide,’ when those sorts of statements in political science and constitutional theory were never made with the intention of making philosophical claims about people or decisions. The political science literature sets out to describe and compare referendum processes, and the constitutional theory literature to justify constitutional processes and arrangements. It is right that these bodies of literature do not take on these massive philosophical questions. They, correctly, address pressing questions of how and why referendums should be used. Further, I will show in this thesis how in some of the best literature in constitutional theory and political science reflects concerns with the philosophical presuppositions that trouble me too. The aim of this thesis is to interrogate the philosophical presuppositions that underlie the thinking about referendums mainly in theory, but also in law and practice. This interrogation is a constructive endeavor to establish a philosophical basis for thinking about referendums; it is not a critical endeavor to dismiss bodies of literature in an unfair way.

As an exercise in analytic philosophy, this thesis will provide an account of referendums in general. This is a controversial approach given the experience of referendums is highly contingent, and some argue that there is no common experience of referendums at all.¹⁰ Indeed, it is sometimes argued that there is nothing that can be said about referendums in general because there are no features of democracy and representation that hold in general.¹¹ The claim here, by contrast, is that there are claims about referendums that can be made in general because there are features of democracy and representation that hold in general. There are relationships that are necessary to democracy, such as the indispensability of representatives, and these necessary features of the relationship between referendums and the represented provide the foundation for a general account of referendums. A general account of referendums does not seek to say everything about referendums. Much about the use of referendums in practice is contingent. A general account of referendums is helpful for the reasons that a general account of elections is helpful. It is useful to know what a democratic process is in order to set a standard that it must meet. Does a process qualify as an election, or was it so corrupted that it does not deserve the name? This is important because terms such as election and referendum lend legitimacy to democratic processes, so it is useful to know in general what a process is when evaluating it. For a range of reasons that I will explain throughout the thesis, the democratic standard for what qualifies as a referendum has been set far too low. A vote by citizens on a matter of policy is the standard approach to referendums, and this defines their use by their lowest common denominator. One aim of providing a general account of referendums is to establish what the purpose of a referendum is and to deny a process

¹⁰ Michael Gallagher and Pier Uleri, *The Referendum Experience in Europe* (Macmillan 1996). 2 citing Arend Lijphart, *Patterns of Democracy: Government Forms and Performance in Thirty-Six Countries* (Yale University Press 1984). 206

¹¹ 'The "referendum" label includes a variety of situations and usages which bear only a superficial similarity to one another.' Gordon Smith, 'The Functional Properties of the Referendum' (1976) 4 *European Journal of Political Research* 1. 5-6

the label referendum if it does not meet that standard. The philosophical presuppositions that inform terms like referendums have political implications too.

2.3 Conceptual Analysis and its Political Implications

It is not only the idea of a referendum that is being challenged in this thesis, but the ideas that referendums are defined in relation to too. Often referendums and direct democracy are even used synonymously. But what sort of term is direct democracy? Do specialists use it only as a technical, shorthand designation for specific processes, or is it also an idea that helps to justify particular democratic exercises? Direct democracy is a term that is used both to explain and to justify democratic processes. By misunderstanding the term direct democracy, the justifications for referendums have been undermined too. This is because arguments for referendums often go like this: (i) certain questions (usually constitutional questions) require bypassing representatives and going directly to The People, (ii) referendums put questions directly to The People, (iii) therefore referendums are either the best or only democratic device to be used to answer these questions, and (iv) the act of answering these questions through referendums is a constitutional process. In this way, the descriptive and justificatory cases for referendums are connected; changing how referendums are defined changes how they are justified. In particular, challenging the characterization of referendums as devices of direct democracy results in different answers the questions of how, when, and why referendums should be used.

It is necessary to understand referendums and direct democracy both for conceptual and political reasons. This is true for many terms. Consider a few examples. In *Self-Ownership, Freedom, and Equality*, Cohen argues that a particular view of freedom –that any government

regulations are a constraint on freedom— has been used to justify a particular version of free-market capitalism. He rightly argues that this approach to freedom has serious political consequences. Cohen says:

My zeal on behalf of...clear-mindedness...prompts me to comment on a well-known sequence of political debate, which runs as follows. The right extols the freedom enjoyed by all in a liberal capitalist society where...freedom is taken to be the absence of interference.¹²

Similarly, Berlin reminds his readers that the manipulation of definitions has political consequences, in ‘Two Concepts of Liberty’ he says:

The ‘positive’ conception of freedom as self-mastery, with a suggestion of a man divided against himself, as in fact, and as a matter of history, of doctrine, of practice, lent itself more easily to this splitting of the personality into two...this demonstrates (if demonstration of so obvious a truth is needed) that conceptions of freedom directly derive from views of what constitutes a man. Enough manipulation of the definition of man, and freedom can be made to mean whatever the manipulator wishes. Recent history has made it only too clear that this issue is not merely academic.¹³

Cohen and Berlin demonstrate that clearer conceptual understanding is important and illuminating in itself, but it also has political implications. The way that terms are understood conceptually shapes their use politically. The conceptual analysis undertaken in this thesis about referendums and direct democracy is useful in itself, but it is also a means to an end. The directness in direct democracy, for instance, has shaped how referendums are used and justified. Dictators use referendums to establish a *direct* link with The People, to promote their personal legitimacy, and undermine democratic institutions.¹⁴ The abuse of referendums is not

¹² GA Cohen, *Self-Ownership, Freedom, and Equality* (Cambridge University Press 1995). 57-58

¹³ Isaiah Berlin, ‘Two Concepts of Liberty’, *Four Essays on Liberty* (Oxford University Press 1958). 10

¹⁴ Setälä says that referendums were ‘handy tools for dictators in boosting their legitimacy, and were used to consolidate the powers of the Nazis, and among former communist countries in Eastern Europe. Maija Setälä, *Referendums and Democratic Government* (Macmillan 1999). 1-2

confined to dictators. Well-meaning governments too have used referendums to replace representatives rather than to seek additional direction from voters, undermining democratic institutions in the process. Leyland expresses this worry when he says that there is a danger that democracy ‘Is being defined by the growing use of referendums as a substitute for traditional politics under the banner of popular sovereignty.’¹⁵ The aim of this thesis is to challenge the directness of referendums and direct democracy in order to challenge the idea that they can be a substitute for representative processes and traditional politics, and that as processes they can be characterized as constitutional. This challenge is not made to oppose the use of referendums. Instead, it offers a stronger, alternative justification for their use. Normality offers a stronger foundation for the justification of referendums than exceptionality does. Having explained the methodology of the thesis, I will now briefly sketch the moves in the argument itself before going on to define its terms.

3. Summary of the Argument and Stipulating Terms

This argument for the normalization of referendums falls into five stages and five substantive chapters. The first substantive chapter, Chapter Two, is a literature review situating the thesis in relation to different debates about referendums. Chapter Two identifies the philosophical presuppositions that inform thinking about referendums in theory, and in law and politics. Chapters Three and Four then challenge these different presuppositions. Chapter Three focuses on challenging the idea of direct democracy, and Chapter Four on voting and decision-making. Chapter Five builds on these challenges to make the case against two-track democracy, and for the normalization of referendums. Chapter Six then moves from challenging the

¹⁵ Peter Leyland, ‘Referendums, Popular Sovereignty, and the Territorial Constitution’, *Sovereignty and the Law: Domestic, European and International Perspectives* (OUP 2014). 145

presuppositions that inform the standard review of referendums and offers an alternative. I argue that: (i) referendums are instances of referring back questions to voters to provide more specific direction to representatives, (ii) referendums are instances of directed rather than direct democracy, and that (iii) referendums demonstrate the importance of a piecemeal account of democracy where different decisions and systems are justified for different reasons. The concluding chapter shows why the alternative account of referendums offered here makes the case for their use stronger, not weaker. The account of referendums offered here, however, requires carving up the democratic landscape differently. To clarify some of these argumentative moves up front, I will now stipulate and explain the most important terms used in the thesis and why they matter for purposes of my arguments.

3.1 Referendums, Initiatives, and Plebiscites

The confusion over referendums starts with the term itself. How to distinguish referendums from other processes such as plebiscites, polls, and initiatives? There are different ways to carve up the definition. A referendum is usually defined as a vote by citizens on a matter of policy.¹⁶ A matter of policy can be a weighty moral question or a constitutional question too. A referendum is thought to ‘take [the] power of decision over a specific question back from the elected representatives and return it to the people who decide a matter directly.’¹⁷ Qvortrup suggests a narrower definition for referendums arguing that they are votes by citizens on bills before they become laws;¹⁸ but most theorists take a wider view arguing that a referendum can

¹⁶ Setälä (n 14). 4

¹⁷ Richard Jones and Roger Scully, *Wales Says Yes: Devolution and the 2011 Welsh Referendum* (University of Wales Press 2012). 4-5

¹⁸ Qvortrup (n 1). 1

occur at different stages in a legislative process. That referendums are initiated by legislatures distinguishes them from initiatives. Setälä and Qvortrup both take initiatives to be ‘popular votes on laws proposed by citizens,’¹⁹ as opposed to referendums that are proposed by legislatures. Sometimes referendums are distinguished from other democratic processes through the use of the word plebiscite, or a plebiscite is used to indicate a referendum that is not legally binding as in the case of s 128 of the Australian Constitution which defines referendums as binding votes and plebiscites as advisory votes.²⁰ I will not use the term plebiscite here because, as Setälä says, the term has an ‘ambiguous meaning and negative connotation,’²¹ and so is unhelpful.

This thesis will challenge the standard definition of referendums. I will argue that rather than defining referendums as a vote on a matter of policy initiated by a legislature, it is better to define referendums broadly as the process of referring a question back to the public to provide specific direction to representatives. This will almost always include a vote, but not necessarily. My alternative definition is different than the standard definition in two ways. First, on my alternative account, a referendum necessarily includes more than a vote. It will very likely include a vote, but to treat a referendum as synonymous with a vote is to isolate one part of the referendum process from the others. This is a dangerous way to think about referendums. Tierney demonstrates that the agenda-setting stage of a referendum is essential

¹⁹ Setälä (n 14). 3-4; Qvortrup (n 1). 1

²⁰ The Australian Constitution s 128

²¹ Setälä (n 14). 3-4; And sometimes the term plebiscite is used to refer to votes just about territorial boundaries: ‘The term plebiscite...is probably the oldest of the three terms...general agreement on the distinction between plebiscite and referendum is lacking...the term plebiscite has been used, -particularly after World War I- to denote popular votes held to solve sovereignty conflicts over territories and boundaries....However in some countries, the term still has a negative connotation: it generally means something that is not democratic.’ Gallagher and Uleri (n 10). 3

in shaping the referendum process.²² Tierney is right about this: the voting stage of a referendum is shaped by, and inextricably connected to, what comes before. Defining referendums as votes on matters of policy risks equating the voting stage of the referendum with the entire decision-making process. It is better to define referendums broadly to capture the different parts of the decision-making process. The second way in which my alternative definition is different from the standard definition is that a referendum process might be initiated by representatives who are not legislators, for instance by constitutional conventions. This distinction between representatives and legislators is crucial. Representatives are required for referendums, but legislators are not. More on the definition of representatives below.

3.2 Democracy and Direct Democracy

There is, as Manin says, a ‘poverty of terminology’¹²³ with respect to democracy. This poverty of terminology, combined with the evolution of political institutions, has led to confusion.

Manin explains:

Contemporary democratic governments have evolved from a political system that was conceived by its founders as opposed to democracy. Current usage distinguishes between “representative” and “direct” democracy, making them varieties of one type of government. However, what today we call representative democracy has its origins in a system of institutions (established in the wake of the English, American, and French revolutions) that was in no way initially perceived as a form of democracy or of government by the people.²⁴

²² ‘This...requires that the referendum be broken down into a number of process components: the initiation stage begins the process, but we must also consider a second agenda-setting stage, which encompasses question-formation and process planning and including timing issues; and, third, the campaign process itself, embracing the campaign rules, provision of information to voters, funding and expenditure rules etc.’ Stephen Tierney, *Constitutional Referendums: The Theory and Practice of Republican Deliberation* (OUP 2012). 99

²³ Bernard Manin, *The Principles of Representative Government* (CUP 1997). 6

²⁴ *ibid.* 1

There are three important points in this passage. The first is that the institutions defined as democratic today were not conceived that way. This was by design. The meaning of democracy has changed over time. This evolution has created all sorts of conceptual confusion, and the poverty of terminology is as serious as Manin suggests. Among other ambiguities, it is not clear what makes direct democracy direct and how it is related to representative democracy. Consider now some different potential meanings of the word ‘direct’ in direct democracy.

Different theorists distinguish between representative and direct democracy differently. Some, like Barber, think that only direct democracy is strong democracy and that there should be a minimal role for representatives if any. He says:

Strong democracy requires unmediated self-government by an engaged citizenry. It requires institutions that will involve individuals at both the neighbourhood and the national level in common talk, common decision-making and political judgement and common action.²⁵

Barber’s claim is a familiar one. The distinction between representative and direct democracy is thought to be that direct democracy is unmediated. To say it is unmediated is to say that people, or The People, make decisions rather than their representatives: or that The People participate directly in the decision-making process.²⁶ Madison makes the point differently.

²⁵ Benjamin Barber, *Strong Democracy: Participatory Politics for a New Age* (University of California 1984). 261

²⁶ Markku Suksi, *Bringing in the People: A Comparison of Constitutional Forms and Practices of the Referendum* (Nijhoff 1993). 1, 3, 71

Madison says that what makes direct democracy direct is that The People exercise their ‘collective capacity’ to govern.

It is clear that the principle of representation as neither unknown to the ancient nor wholly overlooked in their political constitutions. The true distinction between these and the American governments, lies IN THE TOTAL EXCLUSION OF THE PEOPLE, IN THEIR COLLECTIVE CAPACITY, from any share in the LATTER, and not in the TOTAL EXCLUSION OF THE REPRESENTATIVES OF THE PEOPLE from the administration of the former.²⁷

The idea that The People exercise their collective capacity to govern is at the heart of at least some accounts of direct democracy, and it is an ideal that continues to shape arguments for democracy and referendums today. This thesis, particularly Chapter Four, challenges the idea that there can be any exercises of collective capacity in democracies today.

There are two further important points in the passages from Manin and Madison above. Neither Manin nor Madison says that direct democracy means the absence of representatives. Mill makes a similar point by emphasizing the necessity of representatives in maintaining coherence in Athenian Democracy.

Even in the Athenian Democracy, where, in the time of its most complete ascendancy, the popular Ecclesia could pass Psephisms (mostly decrees on single matters of policy), but laws so called, could only be made or altered by a different and less numerous body, renewed annually, called the Nomothate, whose duty it also was to review the whole of the law, and keep them consistent with one another.¹⁷

These passages from Mill and Madison illustrate Manin’s third point: the distinction between direct and representative democracy is not an either-or proposition. They are not, as he puts it, ‘two varieties of one type of government.’¹⁸ Understanding these processes is not about

²⁷ Alexander Hamilton, James Madison and John Jay, *The Federalist Papers* (Penguin Classics 1987). 387 (emphasis in original).

studying two systems in parallel; it requires instead understanding how they are connected: how representative democracy relies on direct democracy, and how direct democracy relies on representative democracy. Getting these mechanics right is important because, even though contemporary democracies are very different, the classical ideal of direct democracy remains influential. As Urbinati says:

Indirectness in politics has never enjoyed much fortune in democratic theory. Direct ruling has generally been seen as paradigmatic of democracy because it entails a fusion of “talking” and “doing” in political action, and the full participation of all citizens in the process of decision making. The modern discovery of representation has left the normative value of this paradigm unchallenged. Particularly since the French Revolution, democracy has come to denote like Athens a state of perfection that the moderns admire and long for all while knowing it is unattainable to them: today in politics, democracy is the *name* of what we cannot have –yet cannot cease to want.²⁸

Urbinati is right about this. She is right too that representation has been associated with ‘the weakening of self-government’²⁹ and ‘promoting a passive citizenry.’³⁰ Neither of these associations holds up to scrutiny, and one of the aims of making a case for directed democracy is to challenge the idea of direct democracy. The term direct democracy is used in a variety of ways. It is used to say something like: people make decisions rather than their representatives, but the extent of that claim varies a great deal. The aim of this thesis is to challenge this range of views by arguing that representatives are required for all democratic processes. The distinction between direct and representative democracy is not an either-or proposition.

²⁸ Nadia Urbinati, ‘Representation as Advocacy: A Study of Democratic Deliberation’ (2000) 28 *Political Theory* 758. 758 (emphasis in original).

²⁹ *ibid.* 759

³⁰ *ibid.*

One final note about the term direct democracy: referendums are not the only devices that are defined as directly democratic. Lijphart argues that presidentialism, primaries, initiatives, and recall are also exercises in direct democracy.³¹ What Lijphart thinks defines these devices as directly democratic is that they offer voters more influence over representatives than representative processes do.³² A discussion of all these other democratic processes is beyond the scope of this thesis, but I suspect these other democratic devices do not undermine the case for directed democracy; they support it. The aim of institutions such as recall and presidentialism is also to provide direction to representatives: these processes cannot replace or bypass representatives either. The unhelpfulness of direct democracy as a term undermines the helpfulness of this category altogether, and I expect the claims I make here about referendums are applicable to the other democratic processes that are sometimes put in this category too.

3.3 Representation

It is not only the terms direct and democracy that have evolved over time. The terms representative and representation have too. The term representative has become synonymous with democratically elected representatives. This, as Pitkin says, is not a helpful evolution. Pitkin provides the best and clearest starting point for thinking about representation. When defining the concept of representation, she says:

No doubt the contemporary popularity of the concept depends much upon its having become linked with the idea of democracy, as well as with ideas of liberty and justice. Yet through much of their history both the concept and the practice of representation have had little to do with democracy or liberty. Representation need not mean representative

³¹ Lijphart (n 10). 198

³² *ibid.* 198

government. A king can represent a nation as can an ambassador. Any public official can sometimes represent the state. Thus institutions are practices which embody some kind of representation are necessary in any large and articulated society, and need have nothing to do with popular self-government.³³

As Pitkin says in this passage, it is essential to decouple the idea of a representative from an elected representative. Indeed, the concept of representation has been used in a variety of ways, and she sets out to disambiguate the different uses of the term. Principally, she distinguishes between representation as standing for and acting for others.³⁴ These accounts overlap. Someone might act for others while also representing them descriptively or symbolically, but not necessarily.³⁵ In the sense of acting for others, Pitkin says:

Representing...means acting in the interest of the represented, in a manner responsive to them. The representative must act independently; his actions must involve discretion and judgment; he must be the one who acts.³⁶

As Pitkin acknowledges, her account is not meant to exhaust the concept of representation but rather to set the 'outer limits of a term.'³⁷ Unless stated otherwise, when I use the word representative in this thesis I am taking Pitkin's definition. A representative is someone acting independently on behalf of someone else in a responsive manner.³⁸

³³ Hanna Pitkin, *The Concept of Representation* (University of California 1967). 2

³⁴ *ibid.*

³⁵ *ibid.*

³⁶ *ibid.* 210

³⁷ *ibid.*

³⁸ *ibid.* 117

This is a broad way to think about representatives, and readers might resist it. On Pitkin's account, civil servants and judges are representatives. Is this right? I think this is entirely right. Defining representation in this expansive way helps rather than obscures the nature of representation in a democratic context. A broader definition helps rather than obscures because the concept of representation has become closely tied to elections. Because of this close connection between elections and representatives, if someone is not elected then they are not thought to be representative. A more expansive account of representation helps to capture the many ways that democracies require people to act on behalf of others. More specifically, this is the best way to understand what public actors like judges do in their roles. As Pitkin says, the pronouncements of judges are 'not private expressions of opinion, but official utterances of the state. Hence [they] represent the state.'³⁹ Are judges and civil servants acting for others in a manner responsive to their interests? They are not responsive to interests in the same way that MPs are, for instance, but not being elected does not preclude being responsive. Elections are not the only way that representatives are held legally or politically accountable in democracies. General public approval is necessary for the institutional integrity of all representatives.

I think referendums require representatives, people to act independently for others in a manner responsive to them, in two ways. First, representatives are the bridge between referendums and the institutions of representative democracy upon which referendums necessarily rely. Examples of these representatives are MPs, judges, and electoral commission-type officers. This bridging representation happens in three ways. Representatives are required to maintain the coherence of decisions. This is to address a situation where voters choose both to X in 2000 and to not-X in 2005. Second, there is a need to implement the decisions that are

³⁹ *ibid.* 210

taken by referendum. There is no point in having a decision unless it is executed, and this is not something that voters can do themselves. As will be seen in Chapters Three and Seven, all political questions are necessarily indeterminate. This means that executing decisions requires judgment; it is not just a mechanical process. Finally, and also because of this indeterminacy, there is a need to adjudicate the meaning of voters' choices. Judges are required to address this sort of indeterminacy. Taken together, the need for coherence between decisions, as well as the execution and implementation of decisions, mean that referendums rely on representatives to connect them to the representative democracies upon which they depend.

There is another way in which referendums require representatives. This is the representation that is required for referendums to be a process of decision-making. Because, as I argue, that the voting stage of a referendum alone cannot be a process of decision-making (it is instead the process of making choices about potential decisions that have been made by representatives) there is a need for representatives to make the decisions that voters then make choices about. The reason that the voting stage of a referendum cannot be a decision-making stage is that a group like an electorate does not have the requisite intention to make decisions. A smaller group of people is required to make decisions, and these smaller groups of people are representatives.

One point to clarify: is the claim here that referendums require representatives or representative democracy? The claim is both. This is because there can be no democratic representatives without representative democracy. As Pitkin says, representation is a system. She says:

When we call a governmental body or system 'representative,' we are saying something broader and more general about the way in which it operates as an institutionalised arrangement. And perhaps even the

representing done by an individual legislator must be seen in such a context, as embodied in a whole political system.⁴⁰

Representatives become representatives in virtue of being part of a system. I cannot unilaterally appoint myself as a representative, for instance. So referendums are reliant both on representatives and representative democracy.

3.4 Directed Democracy and Representative Democracy

Having challenged the usefulness of the term direct democracy, and the helpfulness of distinguishing it from representative democracy, I suggest using the term directed democracy instead. Directed democracy is defined as the process of providing direction to representatives. Directed democracy is contingent on representative democracy even though the ‘representative’ in representative democracy is redundant; all democratic processes require representatives. However, representative democracy is contingent on directed democracy too. Representatives cannot be representatives if they are not at least partly responsive to the direction from their constituents. Directed and representative democracy are mutually reliant and mutually reinforcing. If representative and direct democracy are so connected, readers might wonder if it is worth distinguishing between them at all. What these two terms capture, rather than two varieties of the same type of government, are two different parts of the process of representation. As Pitkin argues, to be a representative is to independently act on behalf of constituents in a manner responsive to them.⁴¹ Being a representative requires both independence and judgment, identified here by the term representative democracy, and

⁴⁰ ibid. 221

⁴¹ ibid. 210

responsiveness to constituents, identified here by directed democracy. These two parts of representation might be initially thought to be in tension with each other, but they are mutually supporting. Representative democracy captures the way in which representatives act independently on behalf of their constituents, and directed democracy captures the way in which representatives must be responsive to their constituents in order to be representatives at all.

This is an unfamiliar way to carve up democratic processes; some examples might help to make it explicit. Examples of directed democracy include referendums but also protesting and writing letters to representatives. Elections are instances of directed democracy too insofar as representatives are elected on manifestos that give direction to representatives. When representatives vote in a legislature, however, they may be acting independently without direction from their constituents, but this is likely only to be a matter of degree. The purpose of these examples is only to clarify this unusual formulation; they are not meant to draw a distinction between directed and representative democracy. As I said before, directed and representative democracy capture different features of the same process, they are mutually dependent and mutually supporting. A full account of directed democracy and its relationship with representative democracy is the subject of Chapter Six.

3.5 Decisions and Choices

The heart of this thesis is the distinction between what it means to make a decision and what it means to make a choice. This is a familiar distinction in the literature made by Meiden, Oldenquist, and Raz. The purpose of drawing a distinction between a decision and a choice is to differentiate those intentional acts where deliberation takes place prior to an act from those

where deliberation happens *ex-post* or not at all. Oldenquist⁴² and Raz draw on the same type of example to distinguish between decisions and choices.

If Jones is offered a tray of different kinds of drinks and takes a martini it would be correct to say that he chose the martini but not that he decided to take the martini. If Jones decided to take a martini, then we expect that prior to the action there was deliberation, or at least preference and resolution, and *that between the time he decided and the time he acted we could correctly say that he intended to take the martini.*⁴³

In this example Raz shows that choices might be decisions, but not necessarily. Decisions require a certain type of intention that is the result of deliberation.⁴⁴ I argue in Chapter Four that groups may have intentions, but the electorate is not the sort of group that has the necessary intention to deliberate, and cannot make a collective decision through the act of voting. Instead, voting is a series of individual choices that are aggregated together to determine the choice of a group. An individual may well decide whom to vote for, just as Jones might decide to take the martini, but not necessarily. Jones might flip a coin; he might grab a drink without looking at the tray because he is lost in conversation. This is true of voting too. Individuals each make a choice when they put their X in a box, but how they come to that choice is up to them. They may well deliberate individually, and indeed they may well deliberate with others. But this deliberation with others is deliberation *about* a decision; it is not deliberation to *make* a decision. If they did deliberate individually, then this deliberation preceded an individual rather than a collective decision. Crucially, this is different than saying the group makes a decision

⁴² 'The difference between choice and decision. In the preceding example Jones did not *decide* to take a martini because decision is more closely tied to deliberation and intention than choice. That is, if Jones decided to take a martini then we expect that prior to the action that there was deliberation or at least preference resolution...it makes sense to speak of habitual choices, but less sense to speak of habitual decisions.' Andrew Oldenquist, 'Choosing, Deciding, and Doing' in Paul Edwards (ed), *The Encyclopedia of Philosophy* (Macmillan ; Collier-MacMillan 1967).68 (emphasis in original).

⁴³ Joseph Raz, 'Reasons for Action, Decisions and Norms' (1975) 84 *Mind* 481. 489

⁴⁴ As will be discussed in Chapter Four, this is a position that Raz and Oldenquist share with Meiland who says that 'deciding is the formation of an intention after deliberation takes place.' Jack W Meiland, *The Nature of Intention* (Methuen 1970). 65

collectively. If groups do not make decisions collectively, then on many accounts (as seen in Madison's definition above) the process is not an instance of direct democracy.

Does this matter? Does it make a difference politically or constitutionally that the voting stage of a referendum is a choice rather than a decision? It does matter both conceptually and politically, and these two areas of significance are connected. The character of the voting stage matters because it clarifies what that stage of the referendum can, and cannot, accomplish as part of a wider process. For instance, it follows from the voting stage of a referendum being an exercise of making choices rather than decisions that the voting stage of a referendum is better placed to ratify rather than initiate constitutional and policy change.

If voting is a choice, then how should the aggregated choice of voters be treated in a referendum? Even though the aggregated choices of votes in a referendum are not a decision, there may be good legal and political reasons to treat them as authoritative. These are the reasons to hold referendums in the first place: to come to a decisive outcome. There is no point in holding a referendum if the outcome is not taken to be dispositive. While the outcome of these shared choices may be conclusive and authoritative, they are not conclusive in an exceptional sense. So while the aggregated choices of voters in a referendum might confer legitimacy, I will argue in this thesis that this legitimacy is not different in kind than – say – a vote in an election.

Finally, what is the character of this aggregated choice, is there any sense in which this aggregated choice is shared? The act of making a choice is common, of putting an X in the box, but that act is independent of the intention. The choice is not shared because the intentions

of voters vary. It is not even the case that every voter intends to participate in the process in the same way, voters may spoil their ballots or cast write-in protest votes near certain in the knowledge they will fail. They may not even vote in the belief that the process is free and fair and that their vote will count at all. The process by which choices are aggregated is not collective or shared, but the *individual acts of voting* may be shared in order to be aggregated. Votes aggregate actions, not intentions. The distinction between common actions and shared intentions, decisions and choices will be explained in more detail in Chapter Four. The distinction between decisions and choices is not only semantic. It is an important move in two of the overall arguments of the thesis. First, to establish the necessary features of the relationships between representatives and the represented, in order to establish features of democracy that hold in general and consequently features of referendums that hold in general. Second, to challenge a core plank of two-track democracy: that there is a higher order of decision-making where The People make decisions instead of representatives.

4. The Value of Normalizing Referendums

Arguing for the normalization of referendums is not about challenging their value, the aim instead is to challenge the way in which referendums are characterized. What makes referendums distinctive is not that they are exceptional democratic processes, it is instead the specificity of the direction they give to representatives. The aim of identifying what makes referendums ‘normal’ is to identify what makes them useful. What does it mean for referendums to be normal? It does not mean that they should be used to consider all political issues all of the time. The aim instead is that they are not higher-order processes of lawmaking which supplant or replace representatives. Like other democratic processes such as elections and protests, referendums are ways of giving direction to people who act on our behalf. The

value of referendums is to some extent contingent on the particular context, but there are some general principles that apply too. One such general principle is that they should not be treated as constitutional processes themselves, even when they are used to consider constitutional questions. The reasons to normalize referendums reflect the reasons to have referendums in the first place, and the strengths of referendums. There is a risk when referendums are exceptional they can undermine rather than support and strengthen democratic processes and institutions. By prioritizing the relationship between representatives and representative democracy, there is less risk of undermining institutions of representative democracy.

The case for referendums as exceptional provides one type of justification for their use in one type of circumstance, but the aim here is to provide a piecemeal justification of referendums suggesting that there are all kinds of reasons that referendums are justified depending on the context. The current treatment of referendums as exceptional reserves them for the most serious constitutional questions, or the smallest and most sophisticated democracies. This limits their use, and there may be all kinds of contingent reasons to use referendums in a wider range of ways.

5. Direct and Specific Democracy

There might be a residual hesitation in readers' minds. Despite perhaps being persuaded of the potential ambiguities and difficulties of the term direct democracy, they might nevertheless still think that there is something right and helpful about the 'direct' in direct democracy. There is something direct, they might insist, about voting for a proposition in a referendum as opposed

to a candidate or political party. Further, this directness is central to the case for referendums; they disrupt the rigidity of party structures and opinion by allowing people to weigh in on specific topics.⁴⁵ A reader might agree with me that more clarity is required around the term direct democracy, and even accept that it is misleading to say that The People make decisions directly or democratic processes can be unmediated, and still think the word captures something important about the type of content considered in a referendum in contrast to electing a representative.

The intuition that there is something direct about processes like referendums is right, but I think it is better to find another word to express this intuition rather than to try to reclaim the ‘direct’ in direct democracy. To say something is direct is to say something is a shortcut or a way around something else: a direct flight or telephone line, for instance, or a more direct way home. The insight that the narrower content of referendum suggests that there is something direct about direct democracy is right, but I try to show that I think direct is a misleading and even dangerous word to express that intuition. This is because the term direct democracy has been misused to suggest that referendums are a way around representatives. This is the shortcut that the directness in direct democracy offers. The danger of this view is that there are no shortcuts around representatives in democracies. In my view, the use of the label direct obscures necessary features of referendums and has led to their misuse and abuse. My alternative is to use the word ‘specific’ instead of direct. The word specific captures that the scope of direction given to representatives in referendums is likely, albeit not necessarily, narrower than it is in elections. It also captures that referendums do not bypass or supplant representative processes, and so cannot be characterized as constitutional. The case for

⁴⁵ ‘The demand for the referendum arises out of distrust of the efficacy of representative institutions, but more particularly from dislike of the rigidity of the party machine.’ Bogdanor (n 2). 82

referendums as specific rather than direct forms of democracy is bound up in treating them as normal.

6. Conclusion

This thesis challenges the philosophical presuppositions that inform the treatment of referendums in theory, politics, and law. It argues that referendums are not exceptional, *sui generis* democratic processes. It offers an alternative, general account of what they are in contrast to their characterization as: (i) synonymous with votes, (ii) instances of direct democracy, (iii) votes for issues instead of representatives, (iv) moments when The People come together as a collective body, (v) to make decisions and (vi) express consent to propositions. There is a further presupposition about a type of referendum which is (vii) that referendums with constitutional content are themselves constitutional processes. The aim of challenging these presuppositions is to make a case for the normalization of referendums. To make a case for the normalization of referendums is to say they are no different from other democratic processes, even when they have constitutional content. The case for the normalization of referendums is not to say that they should be used all of the time, or that they should not be used at all, it is rather to say that referendums should be treated as democratic processes like any other. Referendums are just one of many ways that direction is given to representatives in a democracy. Being treated as exceptional has worked against referendums, not in their favor.

Chapter Two: Seven Presuppositions About Referendums

1. Introduction

This chapter lays the groundwork for the thesis. It lays the groundwork by: (a) outlining the way that referendums are currently understood in theory, law, and politics and (b) identifying some unpersuasive philosophical presuppositions that inform the thinking about referendums in these three domains. In theory, politics, and law, referendums are regularly taken to be (i) synonymous with votes, (ii) instances of direct democracy, (iii) votes for issues instead of representatives, (iv) moments when The People come together as a collective body, (v) to make decisions and (vi) express consent to propositions. There is a further presupposition about certain types of referendums which is that (vii) referendums with constitutional content are themselves constitutional processes. Not all of these presuppositions are at play in all accounts of referendums. Further, in the best literature on referendums, there are tensions in the arguments that reflect unease with some of the presuppositions articulated above. Together, this cluster of connected presuppositions informs the standard picture of referendums. It is important to articulate and challenge these underlying presuppositions because, as I will show in the sections on law and politics, these underlying philosophical ideas about referendums have real consequences for the use of referendums in practice. This chapter begins to challenge these presuppositions, and then the aim of the rest of the thesis is to develop these concerns in a sustained way and to offer an alternative account of what referendums are. Finally, this chapter identifies two further, deeper presuppositions that underlie the presuppositions about referendums outlined above: (i) that direct democracy is the ideal form of democracy and that (ii) democracy is justified on a social contract rationale. It is the aim of this thesis to challenge these deeper presuppositions too.

One final point before proceeding. The referendum experience itself is varied and context contingent. This leads most political scientists, and some theorists, to conclude that there is very little, if anything, that can be said about referendums in general.⁴⁶ To cope with the varied experience of referendums, a defining feature of the literature on their use is taxonomies. The wide range of referendum experiences is important to understanding what they are, and taxonomies are useful ways to help make sense of the many different uses of referendums. I argue in this chapter and this thesis, however, that there are features of referendums that hold in general because there are features of democracy and representation that hold in general. Whether or not a general account of referendums is helpful depends on what it is set out to do. The general account of referendums put forward here does not aim to say everything about referendums. Its aim is to identify some necessary features of democracy and representation in general to understand the referendum phenomenon better.

2. Taxonomies and Types of Referendums

This thesis does not put forward a taxonomy of referendums, it offers a general account of referendums, but taxonomies are essential to the literature on referendums. These different taxonomies can be useful in identifying different contingent features of referendums, but they are limiting when they suggest that there are fundamental differences between different types of referendums. There are a range of democratic processes that might be referred to as a referendum, and so taxonomies are important in even getting a discussion of referendums off the ground. What distinguishes referendums from processes such as plebiscites, polls, and

⁴⁶ Smith (n 11). 6

initiatives? There is no consistent view,⁴⁷ but initiatives are often taken to be processes where the triggering mechanism for their use comes from voters rather than representatives.⁴⁸ It is worth stressing, though, that the use of these terms is inconsistent. Many votes initiated by the actions of citizens are classified as referendums both in law and in the literature, and sometimes referendums are treated as sub-species of the initiative too.⁴⁹ This confusion is compounded by words such as polls being used synonymously with referendums, as in the United Kingdom in the Political Parties, Elections, and Referendums Act 2000⁵⁰ and the Local Government Act 2000.⁵¹ The distinction between referendums and polls and plebiscites is sometimes on the content of referendums, but more often distinguishes between referendums that are binding and advisory. This is the case in Australia where s 128 of the Australian Constitution defines referendums as binding votes and plebiscites as advisory votes.⁵²

In addition to taxonomies to establish what referendums are, taxonomies are also used to track different features of the use of referendums. These taxonomies play different roles in the literature in political science as opposed to constitutional theory. The use of taxonomies in political science is descriptive. Political scientists use taxonomies to identify and classify features of referendums and how they work in practice. The distinction between law-

⁴⁷ Gallagher and Uleri (n 10). 3

⁴⁸ Setälä (n 14). 4

⁴⁹ Gallagher and Uleri (n 10). 8-9

⁵⁰ Political Parties, Elections, and Referendums Act s 101 (2) (a) “Referendum” means a referendum or other poll held, in pursuance of any provision made by or under an Act of Parliament, on one or more questions specified in or in accordance with any such provision.’

⁵¹ The Local Government Act 2000 s 34

⁵² Commonwealth of Australia Constitution Act 1990 s 128

controlling and initiating referendums is one of the leading examples.⁵³ A related distinction is the difference between pre-legislative versus post-legislative referendums.⁵⁴ These taxonomies distinguish between those referendums that are limits on the actions of representatives approving proposals for reform, and those that direct representatives to undertake proposals for reform. In constitutional theory, taxonomies are doing additional normative work. The aim of taxonomies in constitutional theory is to offer a justification for the process of referendums, rather than to describe them as is the case with political science. Constitutional theorists distinguish between referendums with and without constitutional content. Tierney calls this the distinction between constitutional referendums and ‘ordinary legislative referendums.’⁵⁵ This distinction is drawn because of the view that referendums with constitutional content are of a different order of decision-making. Referendums with constitutional content are sometimes taken to be constitutional processes themselves, even if they are not legally binding processes. Within the category of constitutional referendums, a range of further taxonomies exists to clarify what kind of constitutional process they are. Tierney distinguishes between constitutive constitutional referendums, that establish new constitutions, and constitution-changing constitutional referendums that amend existing constitutions.⁵⁶ This distinction matters a great deal of difference for Tierney because he is arguing that there are different roles for voters as constitutional authors depending on the type of constitutional process at stake.

⁵³ Gallagher and Uleri (n 10). 11

⁵⁴ This is the approach taken to this difference by UCL’s Independent Commission on Referendums. ‘Independent Commission on Referendums’ (Constitution Unit 2018) <https://www.ucl.ac.uk/constitution-unit/publications/tabs/unit-publications/182_-_Independent_Commission_on_Referendums>. 6.20

⁵⁵ Tierney (n 1). 366

⁵⁶ Tierney (n 22). 11

As a contingent matter it is right to say that referendums with constitutional content do present particular legal and democratic challenges, but in this thesis I do not adopt this distinction between constitutional and legislative referendums. The view that constitutional referendums are a distinct type of referendums reflects the idea that there are two tracks in democracy: one for people and one for politicians where referendums are processes of higher-order lawmaking. I do not use the distinction between constitutional and legislative referendums, because one of the aims of this thesis to challenge constitutional referendums as instances of higher-order law-making. The distinctions drawn between different types of referendums such as pre-and post-legislative are useful and important for thinking about how they work in practice, but –again– I do not think referendum processes are fundamentally different. There are still meaningful features of democracy that hold in general. I will argue that there are some features of referendums that are the same, irrespective of whether they have constitutional content. It is the aim of Chapter Five, which concerns the normalization of referendums, to argue referendums with constitutional content are not themselves constitutional processes; or at least not constitutional in a way that separates them from other democratic processes. The aim of this chapter is to identify the set of presuppositions that inform the view of referendums as exceptional, and to establish the value of making a general case for referendums.

Finally, the literature in theory and practice treats jurisdictions where referendums are used regularly as *sui generis*.⁵⁷ This is particularly the case with Switzerland, but to a lesser

⁵⁷ ‘In some places, such as California and Switzerland, they act almost as adjuncts to the legislature.’ *ibid.* 1; ‘Especially in the case of Switzerland, it is appropriate to ask whether it is possible to make any generalisations because the Swiss political system is, in many respects, exceptional among western democracies.’ Theo Schiller and Maija Setälä, *Referendums and Representative Democracy: Responsiveness, Accountability, and Deliberation* (Routledge 2009). 164; ‘Switzerland, in so many ways *sui generis*.’ Qvortrup (n 1). 1-2

extent California too.⁵⁸ There are some features of these systems of lawmaking that are distinct. The initiative and referendum experiences are more common in these jurisdictions, and consequently the processes are more integrated into their democracies as a whole.⁵⁹ Once again there are features of these systems of referendums that are distinct, but I do not think they are in a different category altogether. I will argue that there remains a core idea of referendums as giving direction to representatives that persists across all of these examples and jurisdictions. In Switzerland more than California, a lot of thought has been given to how referendums provide direction to representatives. Indeed, the care taken in Switzerland to clarify the direction being given to representatives is part of what makes this system successful.⁶⁰ Even with a case like Switzerland, it is unhelpful to treat the style of referendums as *sui generis* or to characterize the jurisdiction as an instance of direct democracy.⁶¹ I will argue that there remains a core idea of a referendum, referring a question back to voters to provide specific direction to representatives, that holds irrespective of the content of referendums or the jurisdiction in which they are used.

Given the plurality of the referendum experience, different taxonomies can be helpful in understanding the wide range of ways that referendums may be used. Taxonomies are helpful in the political science literature to aid in identifying when referendums work well and

⁵⁸ Peter Schrag, *Paradise Lost: California's Experience, America's Future* (University of California Press 2004). 23

⁵⁹ '...in Switzerland, where referendums are highly institutionalized and frequently used, voters have learned to use referendums as a check on representative institutions.' Setälä (n 14). 12

⁶⁰ 'For decades, political scientists have put the Swiss case aside as an anomaly – a quaint society where virtually everything works...this study assumes the opposite, that Switzerland is not in a class by itself...it principally provides an effective check on government decision-making.' Kris Kobach, *The Referendum: Direct Democracy in Switzerland* (Dartmouth Publishing Company 1993).253-254

⁶¹ I will argue later that the Swiss system is instead a few degrees different than systems like Australia and Ireland where the role for referendums in the process of constitutional change is clearly established in law.

why. The literature in constitutional theory is right too that referendums with constitutional content present different challenges and opportunities than those that do not. There are also particular features and challenges of the Swiss and Californian systems that do not apply elsewhere. Nevertheless, in all of these contexts there are core democratic dynamics at stake. There are features of the relationships between representatives and the represented that hold in general, as the next section suggests.

3. Referendums in General

The use of taxonomies in the literature on referendums reflects a reticence to say anything in general. As Setälä says ‘the referendum phenomenon is not unitary...the theoretical approaches taken to it cannot be either.’⁶² Similarly, Smith argues that nothing about democracy, representation and majority rule holds in general, so nothing holds in general about referendums too.⁶³ This section will introduce what I do think holds in general about democracy and representation to show what holds in general about referendums too. It also explains what a general definition of referendums seeks to accomplish, and cannot accomplish.

There is much about democracy that is contingent, but some features hold in general. One of the features of democracy that holds in general is the necessity of representation. Democracy has a cluster of meanings including, but not limited to, rule by the many, rule by The People, and The People rule themselves.⁶⁴ This definition of democracy does not mean or require, however, that all people rule all of the time. Even Rousseau, who is read by theorists

⁶² Setälä (n 14). 169

⁶³ Smith (n 11). 5-7

⁶⁴ Thomas Christiano, *The Rule of the Many* (Westview Press 1996). 2

such as Barber as being radically anti-representative,⁶⁵ argues that there is a necessary role for people to act on behalf of others in all political communities.⁶⁶ The idea of rule by The People requires people to act on behalf of others: no exceptions. Acting on behalf of others in their interests is, as Pitkin says, the heart of what it means to be a representative.⁶⁷ Pitkin's is an expansive account of representation, but this expansiveness is helpful because it captures the many ways that individuals must act for each other in democracies. Representatives may not necessarily be elected; take judges, police officers, and civil servants for instance.⁶⁸ Representatives can also take a range of approaches to that role, seeing themselves as agents versus delegates.⁶⁹ Those sorts of disagreements are not at issue here. The claim is instead that all democratic processes require representatives, and consequently that this should be recognized in the definition of referendums.

There is a need for representatives holds even in small close-knit political communities. Even in small communities, it is necessary that some people act for each other some of the time. Representation is a necessary feature of democracies, even small political communities, because of another necessary feature of democracies: disagreement. Democracies are, among many other things, a method of addressing disagreement.⁷⁰ It is not the case that everyone in

⁶⁵ Barber cites Rousseau as saying 'Once a people permits itself it be represented it is no longer free.' Barber (n 25). 261

⁶⁶ Although Rousseau instead refers to them as 'agents.' 'Hence, the deputies of the people are not and cannot be its representatives; they are merely its agents, who cannot conclude anything definitively.' Jean-Jacques Rousseau, *Of the Social Contract and Other Political Writings* (Penguin 2012). 92

⁶⁷ 'Representing... means acting in the interest of the represented, in a manner responsive to them.' Pitkin (n 33). 290

⁶⁸ 'A judge is an agent of the state like all government officials. His pronouncements are not private expressions of opinion, but official utterances of the state.' *ibid.* 116-118

⁶⁹ *ibid.* 134

⁷⁰ Amy Gutmann and Dennis Thompson, *Democracy and Disagreement* (Harvard University Press 1996). 2; Jeremy Waldron, *Law and Disagreement* (OUP 1992). 1

democracies disagree all of the time, but there is always the potential that people in democracies will disagree at least some of the time. In circumstances of disagreement, there is a need for compromise and negotiation.⁷¹ This requires deliberation, discussion, and decision-making. These processes require mediation and facilitation to organize ways of addressing disagreement and coming to conclusions.⁷² This method of addressing disagreement in groups cannot occur without representatives. In mediating and facilitating processes of discussion, it is necessary that some people act on behalf of others in a manner responsive to their interests. Even if readers are unpersuaded that representatives are necessary in very small political communities, representatives are clearly required in the large, pluralist, democracies where the use of referendums is at issue. Without representatives, it is impossible to have processes such as voting at all. Representatives are necessary to execute, interpret, enforce, and apply the preferences of the larger group voting in a referendum. This is one of the reasons why referendums are better defined as processes of referring back questions to the public in order to provide direction to representatives. This is because voting does not occur in a vacuum. Prior to a vote, a series of decisions are required about what to vote on and whether to hold the vote in the first place. When voters vote in referendums, the content of what they are voting on is determined by representatives such as legislators or participants in constitutional conventions. Votes are overseen by representatives like electoral commissions, and they are interpreted by governments and applied by judges. The vote in a referendum is contingent on the actions of representatives, it is impossible for the vote to exist without representatives. All of these processes that precede and follow the act of voting require representation. Moreover, both

⁷¹ Gutmann and Thompson (n 70). 3-4

⁷² Even a supporter of direct democracy like Budge concedes that some facilitation by representatives such as legislatures is necessary. He goes further than most in conceding some organising groups like political parties required too. Ian Budge, *The New Challenge of Direct Democracy* (Polity Press 1996). 181

research in social science and the actions of campaigners in referendums demonstrate how significant the shaping of referendum questions, timing, and processes are to outcomes.⁷³ Referendum votes are reliant on, and shaped by, the processes that both precede and follow them. The larger process of which voting is a part is a necessary feature of referendums because of the necessity of representatives, so it is essential that the definition of referendums reflects this. Without taking seriously the larger context of which voting is apart, it is difficult to see how referendums work. The necessary roles for representatives should not be bracketed or minimized in thinking about the definition of referendums, or democratic design. There are necessarily different stages to a referendum process.⁷⁴ Drawing out these different stages shows how crucial representatives are at different points and how, as Gallagher and Uleri show, referendums cannot be autonomous from representative processes.⁷⁵ Given that representatives are required for all decision making in all circumstances in democracies, this is a necessary feature of referendums that any account should capture. Further, and as argued already, making this explicitly rules out the most common definition of, and justification for referendums, and

⁷³ Tierney explains the risks and implications of elite manipulation at Tierney (n 22). 98. Tierney's account is borne out by first-hand accounts of referendums all of which conclude that referendum campaigns may well have been won or lost at the agenda-setting stage including Tim Shipman, *All Out War: The Full Story of How Brexit Sank Britain's Political Class* (Harper Collins 2016).; Aaron Banks, *The Bad Boys of Brexit: Tales of Mischief, Mayhem & Guerrilla Warfare in the EU Referendum Campaign* (Biteback Publishing 2016).; Chantal Hébert and Jean Lapierre, 'The Morning After: The 1995 Quebec Referendum and the Day That Almost Was' (Knopf Canada 2014).

⁷⁴ 'This...requires that the referendum be broken down into a number of process components: the initiation stage begins the process, but we must also consider a second agenda-setting stage, which encompasses question-formation and process planning and including timing issues; and, third, the campaign process itself, embracing the campaign rules, provision of information to voters, funding and expenditure rules etc.' Tierney (n 22). 99

⁷⁵ 'Considered as a decision-making process, the referendum phenomenon can be described as a set of decisional mechanisms and processes that interact with the mechanisms and decision-making processes of representative government...the referendum phenomenon considered as a decision-making process is not an autonomous and independent phenomenon. The referendum phenomenon generally presupposes an interaction with the mechanisms and processes of the political system within which it works; different referendum processes are characterized by different degrees of interaction.' Gallagher and Uleri (n 10). 2

instead centers the definition on the necessary dynamic in democracy: the relationship between the representor and the represented.

Why is this dynamic where representatives are responsive to the represented valuable? Why is it justified? These are the questions that inform the rationale for democracy in general and referendums in particular. This relationship between representor and represented is valuable for some general reasons, but that these general reasons will play out differently depending on the issues, representatives, and context. In this way, a piecemeal justification for democracy provides a better and more nuanced justification for referendums. There may be some broad reasons to hold referendums in general, but much of the rationale will depend on the context and the type of issue at stake. The reason to hold a referendum on electoral reform, for instance, is different from the rationale for holding a secession referendum. In this way, taxonomies are right to carve up referendums to highlight that the justifications for their use are different. I disagree, though, that these referendums are different types. I will now consider just a few of the many different reasons that the use of referendums might be justified in particular cases, and why there are still core features of referendums that hold in general.

On the standard definition of referendums, representatives at most play a peripheral role. Sometimes, as explained above, a role for representatives is explicitly precluded because of the underlying democratic division of labor. The standard view is that referendums are defined by the absence of representatives. I will challenge this picture and argue that representatives are necessary features of democracy, and necessary prerequisites for referendums. This is why the way that referendums connect representatives and the represented is at the heart of the alternative definition of referendums as providing specific direction to

representatives. This alternative definition better captures necessary dynamics in democracies, and what referendums can do as part of those processes. This alternative provides more conceptual clarity and, as I will argue in the final part of the paper, better constitutional and democratic design.

To see why there is value in thinking of referendums in general, consider the idea of an election. There are all kinds of types of elections and electoral systems. Ways elections can be called and functions they can perform, there are recall elections and elections that occur at constitutionally required intervals. It is difficult to have a full picture of how elections work without thinking hard about these specific questions, some of which will have broader applicability than others depending on the political system. There are, however, core features of the relationships between representatives and the represented that hold across electoral systems. The same is true of referendums. Features of the relationship between the representor and the represented hold in general. One way or another, referendums are another chance to give more direction to representatives. Further, it is good to identify in general terms the normative and political significance of choosing someone to act on your behalf. Indeed, there is a massive and illuminating literature on the relationships between delegate and trustee models of representation.⁷⁶ This literature is implicated by questions specific to particular electoral models, but features of the analysis remain important in general. The same is true of the relationship between the representors and the represented in referendums. Some issues of what an election depends on, among other things, the type of voting system used. However, some features of elections and what it means to be a representative hold in general.

⁷⁶ Pitkin offers a survey of the literature at Pitkin (n 33). Chapter Six

There is a long list of what cannot be said about referendums in general. This list includes: is their use effective, legitimate, a good idea, are they the appropriate democratic mechanism for this question at this time? Questions such as: will referendums be divisive, will they address democratic deficits, will they come to conclusive conclusions? The answer to all of these questions depends on the circumstances. There are all kinds of reasons to hold a referendum. To seek broad public support, to legitimize outcomes, to come to conclusive conditions. A general account of referendums is not exhaustive, and an exhaustive account of referendums is not general. The helpfulness of speaking about referendums in general depends on what it is the purpose of a general account too. The purpose of this general account of referendums is better conceptual clarity about what referendums are. My general claim is just that whatever else referendums are, they are a way of giving direction to representatives. Referendums are a way of giving direction to representatives because representatives and disagreement are necessary features of any democratic decision-making process. This alternative is different from the way that referendums are usually understood in political science and constitutional theory, as I will now demonstrate.

4. Referendums in Political Science and Constitutional Theory

The aims of studying referendums in political science are twofold, and these aims are connected. The first is to describe what the referendum phenomenon is. Many useful studies of referendums do this by considering comparing the use of referendums throughout the world.⁷⁷ The aim of these descriptions is to come to a set of prescriptions or recommendations about what it means for referendums to be used well. The conclusions of all of these studies are

⁷⁷ Gallagher and Uleri (n 10).; Austin Ranney and David Butler, *Referendums Around the World: The Growing Use of Direct Democracy* (American Enterprise Institute 1994).; Qvortrup (n 1).

versions of the persuasive view that ‘referendums work well provided certain democratic and constitutional challenges are met.’⁷⁸ There is agreement that: ‘constitutional regulation seems to be crucial with respect to the fairness of referendums and the extent to which they work according to democratic principles.’⁷⁹ Accounts in political science conclude by arguing: ‘there may be a definite, subordinate and, especially, well-regulated role for the use of the referendum institution within constitutional government regimes.’⁸⁰ Note that these accounts all stress the necessity of representatives and regulation for the success of referendums, but more on that later.

There is a tension in the literature on referendums in political science in that while the literature relies on and is informed by the seven presuppositions that worry me, there are clear instances where the authors are clearly dissatisfied with these views. The best instance of this is Gallagher and Uleri who at once define referendums as votes, and use the language of direct democracy, while also stressing that defining referendum as votes is unhelpful, and that referendums cannot be instances of direct democracy because they are not processes that are autonomous from representative democracy. They say:

The referendum phenomenon generally presupposes an interaction with the mechanisms and processes of the political system within which it works; ...there is no room for a contrast between representative democracy and ‘direct democracy.’⁸¹

⁷⁸ Qvortrup (n 1). 13

⁷⁹ Setälä (n 14). 169

⁸⁰ Gallagher and Uleri (n 10). 17

⁸¹ *ibid.* 2

This sort of tension in the literature demonstrates the ‘poverty of terminology’⁸² in the language of referendums. This poverty of terminology matters because, as Gallagher and Uleri suggest, it is misleading. It misrepresents the sort of democratic process that referendums are and what they can achieve. This dissatisfaction is also expressed in Kobach’s study of Swiss referendums where he says that they are not really instances of direct democracy.⁸³ Terms such as hybrid or quasi-direct democracy are common in this literature, but no principled distinction has caught on. There sometimes is a sense that the underlying conceptual tools to think about referendums are doing more harm than good. One of the aims of this thesis is to introduce and defend the idea of directed democracy to articulate this tension that referendums are distinct from elections but still ways of providing direction to representatives.

The treatment of referendums is slightly different in constitutional theory than it is in political science. This is because these two bodies of literature have different purposes. The constitutional theory literature is offering a justification for the use of referendums in the process of constitutional change and offers prescriptions for when referendums should be used on that basis. The work in political science, by contrast, also offers prescriptions but it is principally descriptive. The aim of this section is to trace the arguments made by constitutional theorists for the use of referendums. This requires not only understanding what this body of literature takes referendums to be, but the views of democracy and democratic authority that inform this thinking. Further, because this literature places referendums with constitutional content in a different category, it is necessary to understand the views about constitutionality that inform this thinking about referendums too.

⁸² Manin (n 23). 6

⁸³ Kobach (n 60). 58

The best available accounts of referendums in constitutional theory comes from Tierney and he, as well as Ackerman and Galligan, seems to say that referendums with constitutional content are themselves constitutional processes. Further, Bogdanor and Leyland seem to endorse this view in some places. Referendums with constitutional content, Tierney says, can be distinguished from ‘ordinary legislative referendums.’⁸⁴ Consider four different accounts of referendums in constitutional theory to see why this is the case. The aim of these accounts is to explain the ways in which referendums are instances of higher-order lawmaking. It is very important to stress, however, that the literature in constitutional theory sets very high standards for what is required in order for referendums to work well. Here, I will lay out the case for referendums as devices of high-order law-making in full, and then will challenge this approach throughout the rest of the thesis.

Tierney spends more time and care dissecting the theoretical foundations of the use of referendums than the rest of the literature put together. Across his body of work, he argues that constitutional referendums are instances of higher-order lawmaking, but in order for their use to be effective a series of demanding conditions must be met. He says:

At least in undivided societies, the referendum can be a successful constitutional instrument provided that adequate legal regulation serves to promote and protect a deliberative environment in which citizen participation can be fostered.⁸⁵

Note that while the scope of this claim is narrower than the conclusions drawn in the literature on political science, and the aim of his work is different, the conclusion itself that Tierney draws is similar. Above all, it is the final part of his conclusion that is important. As he says,

⁸⁴ Tierney (n 1). 366

⁸⁵ Tierney (n 22). 284

promoting and protecting a deliberative environment is where the practical and normative power of referendums come from. This deliberation reflects a Republican ideal of the people ruling themselves.⁸⁶

Even within the category of constitutional referendums, however, Tierney draws important distinctions. Tierney defines constitutional referendums as votes,⁸⁷ but he creates subcategories within this group which implicate the normative significance of the vote. He draws a distinction between what he calls constitutional changing and constitutional framing referendums.⁸⁸ He thinks that constitutional framing referendums (also called constitutive referendums) represent constituent sovereignty. He says the people only express their popular sovereignty as constitutional authors in these constitutive referendums. To make this argumentative move, Tierney draws on Ackerman's distinction between 'the will of We the People and the acts of We the Politicians.'⁸⁹ Ackerman and Tierney's pictures are similar, and they draw on a similar civic republican tradition. While Ackerman is interested in a distinctly American context, he agrees that it is acts by The People as constituent actors that gives constitutions their legitimacy.⁹⁰ Tierney and Ackerman agree that referendums with certain types of constitutional content are constitutive of constitutional orders, and that these sorts of processes are instances of higher-order lawmaking. There is a tension in Tierney and Ackerman's arguments, though, in that they both clearly recognize the necessity of representative democracy. For instance, Tierney says that 'The referendum is fully entwined

⁸⁶ *ibid.* 3-4

⁸⁷ 'I take it to mean any direct citizen vote on the specific issue of constitutional change or constitutional creation.' *ibid.* 11

⁸⁸ *ibid.*

⁸⁹ *ibid.* 14

⁹⁰ Ackerman (n 1). 7

with the changing dynamics of contemporary representative government.’⁹¹ Nevertheless, for these big constitutional questions about constituting democracies, it is foundational to this literature that referendums are instances of The People speaking in their own name, not through representatives. This tension between the necessity of representation and the need for The People to speak in their own name can be seen in the world of other constitutional theorists such as Bogdanor too.

Bogdanor’s view, following Dicey, is that the right role for referendums is as a conservative device.⁹² Fundamentally, referendums are vetoes.⁹³ The role of referendums is to prevent actions by representatives. Referendums are limit on the actions of representatives and especially on the power of political parties. On the other hand, Bogdanor takes Ackerman and Tierney’s view and invokes Locke to make an argument for referendums based on two-track democracy. Bogdanor too thinks that at least one of the arguments for voters to act as a veto is that it is not within the power of representatives to make decisions about where power in a democracy is constituted.⁹⁴ Bogdanor seems to recognize this tension by stating that these two purposes of referendums rest on different rationales,⁹⁵ but it is the aim of this thesis to argue that these two modes of argument are mutually exclusive. It cannot be that referendums are

⁹¹ Tierney (n 22). 6

⁹² ‘This argument forms an important supplement to the argument for the referendum as a veto, an entrenching device. For, as we have seen, the case for the veto is broadly a conservative one, based upon a distrust of the efficacy of representative institutions, and, in particular, of political parties. But the case for the referendum based upon its educative nature and the need to encourage participation relies upon arguments of an entirely different type. For they reflect not a conservative skepticism towards representative institutions, nor a belief that the source of authority lies with government, but a view that authority derives from the electorate itself.’ Bogdanor (n 2). 85

⁹³ This is a view that Bogdanor draws from Dicey who says that the referendum is ‘the people’s “Veto”’ Albert V Dicey, *Introduction to the Study of the Law of the Constitution* (Roger E Michener ed, 8th Revised edition edition, Liberty Fund Inc 1982).cix

⁹⁴ Bogdanor (n 2). 76-77

⁹⁵ *ibid.* 85

limits on the actions of representatives and that they replace representatives for purposes of certain decision-making processes. This survey of referendums in political science and constitutional theory shows both the presence of the seven presuppositions that trouble me, but –more importantly– demonstrate too that the concerns I have about these presuppositions are shared. I will argue in this thesis that these presuppositions about referendums are sufficiently serious that they cannot be addressed by qualifications to the existing language. Terms such as semi-direct democracy are the wrong approach that cannot address the heart of the problem. An alternative account of referendums is necessary.

5. The Rise of Referendums

Since the 1970s, the use of referendums, particularly constitutional referendums, has been increasing around the world.⁹⁶ A range of explanations are offered for this in social science literature including the connection with the rise of self-determination movements, the process of European integration, and dissatisfaction with political parties.⁹⁷ This section is going to identify some of the controversies surrounding the current use of referendums. The purpose of this survey is to show how contemporary challenges with the use of referendums in practice reflect the difficulties with the underlying philosophical presuppositions that will be challenged in this thesis. The current challenges with the use of referendums reflect that referendums must be about giving direction to representatives, they cannot be understood as mere votes on matters of policy. Indeed, the more successful uses of referendums reflect the necessity of representatives in the referendum process. Different presuppositions affect different types of

⁹⁶ Tierney (n 22). 1

⁹⁷ Qvortrup (n 1). 1-3

referendums in different ways. In questions of secession referendums, for instance, the question of who the people are has a difference salience than in a referendum about electoral reform. This section focuses principally on political challenges, and the next on legal challenges. The three contemporary challenges I will focus on here are referendums with respect to populism and authoritarianism, self-determination, and rights.

5.1 Populism and Authoritarianism

The rise of referendums is sometimes thought to be tied to the rise in populism.⁹⁸ While the meaning of populism is ambiguous and contested, I will treat populism as including (but not limited to) a dissatisfaction or disenchantment with established democratic actors and institutions. It is clear why referendums are a useful tool for actors looking to exploit this dissatisfaction. There is a need, so populists often argue, to get representatives out of the way and to bring a strong leader in closer connection to The People.⁹⁹ The line between populist and authoritarian uses of referendums can be blurry. Either deliberately or accidentally, the use of referendums can undermine representative processes. Some populist uses of referendums in 2016 alone include their use in Turkey with respect to constitutional reform and Hungary with respect to migration. A clear authoritarian use was in Crimea in 2014 to reinforce Russian

⁹⁸ 'While populists often call for referenda, such exercises are...not about democratic will formation among citizens. Populists simply wish to be confirmed in what they have already determined the will of the real people to be. Populism is not a path to more participation in politics. Jan-Werner Müller, *What Is Populism?* (University of Pennsylvania Press 2016). 102

⁹⁹ Mehmet Ucum, judicial consultant to President Erdogan, said that the aim of these constitutional amendments was to 'strengthen the ordinary citizen's relationship with the state' and for President Erdogan, as with many dictators, he is the state. Ucum has also said that 'any attempt to form an institutional control over the people's will is against democracy.' Birce Bora, 'Turkey's Constitutional Reform' (*Aljazeera*, 17 January 2017) <<http://www.aljazeera.com/indepth/features/2017/01/turkey-constitutional-reform-170114085009105.html>> accessed 28 February 2017.

control, a referendum whose legitimacy was denied across the world.¹⁰⁰ In all of these instances, though, beyond what was on the ballot, the purpose of these referendums was to solidify authority. This idea of The People, and particularly an anti-pluralist vision of The People at that,¹⁰¹ reflect that the populist aim of referendums is to use them as a homogenizing force. The presupposition that in referendums The People come together to speak with one voice is key to the normative work that populists take referendums to be doing on their behalf. This is especially important in migration referendums, as in Hungary in 2016. One of the aims of holding this referendum was othering. To establish The People as a sovereign body above representatives, and that this sovereign body was homogenous.

One final note on the populist abuses of referendums before proceeding. Theorists like Tierney who do think that constitutive constitutional referendums are instances of The People speaking with one voice build protections into their accounts to prevent populist misuses. This is why the idea of deliberation is so important to Tierney, Ackerman and others. It is right to say that inclusive, deliberative processes must be distinguished from attempts to exclude others.¹⁰² Nevertheless, and for a host of reasons that will be explored throughout this thesis, I think the idea of The People speaking through referendums – even after the highest quality process – creates more problems than it solves. I disagree when Tierney argues that the idea of

¹⁰⁰ 'Crimea's leader says he will apply to join Russia on Monday. Russia's Vladimir Putin has said he will respect the Crimean people's wishes. Many Crimeans loyal to Kiev boycotted the referendum, and the EU and US condemned it as illegal.' 'Crimea "Votes for Russia Union"' *BBC News* (16 March 2014) <<https://www.bbc.com/news/world-europe-26606097>> accessed 23 September 2018.

¹⁰¹ Müller argues that anti-pluralism is a defining feature of populism, 'The core claim of populism is thus a moralized form of anti-pluralism.' Müller (n 98). 20

¹⁰² Tierney (n 1). 381

The People is a logical prerequisite for a constitutional referendum.¹⁰³ I think this view of The People reflects the idea of two-track democracy, and I think there is a better view of democracy available to justify the use of referendums.

5.2 Self-Determination

Referendums have become essential instruments in the process of self-determination. This is to be applauded. Referendums are a better expression of political will than violence, and are clearly preferred to civil as peaceful ways of transitioning power. Referendums on self-determination have, however, created difficulties too. Referendums have a specific set of challenges related to questions of self-determination. Questions such as ‘Who are the people?’ and ‘Who gets to decide who the People are?’ have been so contentious that they led to violence. The situation is particularly fraught when the state from which the sub-state seeks to secede will not engage in a negotiation process in good faith. In the *Secession Reference* case, the Supreme Court of Canada held that the Canadian Government had a duty to negotiate if there was a clear will to secede in Quebec as expressed in a referendum.¹⁰⁴ This is connected to a larger set of problems about agreeing to hold referendums at all, especially if the sub-state must acquire the agreement of the larger state in order to hold a referendum process. The independence votes in Catalonia in 2016 and throughout the Kurdish independence movement

¹⁰³ ibid. 376, 379

¹⁰⁴ ‘A clear majority vote in Quebec on a clear question in favour of secession would confer democratic legitimacy on a secession initiative which all other participants in Confederation would have to recognise...the negotiation process would require the reconciliation of various rights and obligations by negotiation between two legitimate majorities, namely, the majority of the population of Quebec and that of Canada as a whole.’ *Reference re Secession of Quebec* [1996] Supreme Court of Canada C S-26. 220-221

are further instances of this.¹⁰⁵ Secession referendums are some of the most challenging uses of referendums because they bring all of the underlying presuppositions about referendums to bear. It is not always clear to which representatives direction is being given. Often, these referendums lend legitimacy to new representatives, or change the roles of existing representatives as leaders of sub-state governments to national governments. There is a need to take seriously the instances where the state level government will not negotiate, as with the Kurds and the Catalans. Given the recognition the right of self-determination in Article I of the Charter of The United Nations,¹⁰⁶ and the use of referendums as devices of self-determination, there is a need for the international community to intervene as representatives in this process to help them succeed. Bare votes are inchoate and they require representative structures to interpret and execute them. The challenges around the use of referendums in self-determination reflect the limits of treating referendums as votes alone, and the need to identify what direction is being given to what representatives in the process in order to avoid violence. In a case where there is unwillingness to negotiate between parties, there may be a need for international representatives to step in.

5.3 Referendums and European Integration

The use of referendums, and decisions not to use referendums,¹⁰⁷ have been important in the ratification of various treaties through the processes of European integration. There have been

¹⁰⁵ Key to this debate was the question of whether the Kurds are a people. Peter Malanczuk, 'The Kurdish Crisis and Allied Intervention in the Aftermath of the Second Gulf War' (1991) 2 *European Journal of International Law* 114. 115

¹⁰⁶ 'To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace' United Nations, Charter of the United Nations (24 October 1945) Article 1 (2)

¹⁰⁷ In countries such as the United Kingdom where the requirements for the use of referendums are not stipulated in law, the decision to not hold a referendum can be controversial too. This question was

a patchwork of referendums depending on the status of the particular member state. It was a mistake on the part both of member states and the EU itself, I think, to treat these votes as mere formalities at the end of the stage of constitutional reform. The deep dissatisfaction with EU policies, and the EU itself, suggest that voting alone does not necessarily give voters a nuanced opportunity to provide feedback on processes such as European integration. By treating referendums as longer multi-stage processes in the manner recommended by Tierney, referendums can really do the legitimizing work that they are being asked to do. They cannot do this legitimizing work in a sustainable way, however, when treated as votes alone.

5.4 Referendums and Rights

Another set of questions put to referendums concern rights. This is true particularly in the state-level in the United States.¹⁰⁸ A question of rights was put to a vote in Ireland in 2018 too on the question of abortion. The debates about these referendum processes concern questions of who decides what rights are in democracies. The treatment of referendums as synonymous with votes suggests that it is possible for referendums to be expressions of the will of the people, and The People can be the ultimate arbiter of what rights are in a democracy. This picture makes me uneasy. Even in a well-regulated referendum like that of in Ireland in 2018, which included a constitutional convention and clear, vetted proposals for reform,¹⁰⁹ the idea that any

litigated, for instance, in. *R (on the Application of Wheeler) v Office of the Prime Minister* (2008) [2008] EWHC 1409.

¹⁰⁸ Barbara Gamble, 'Putting Civil Rights to Popular Vote' (1997) 41 *American Journal of Political Science* 245.

¹⁰⁹ 'The Irish Abortion Referendum: How a Citizens' Assembly Helped to Break Years of Political Deadlock' <<https://www.electoral-reform.org.uk/the-irish-abortion-referendum-how-a-citizens-assembly-helped-to-break-years-of-political-deadlock/>> accessed 23 September 2018.

group has to appeal to another for a right such as bodily integrity could be a misuse of referendums. In Chapter Seven I will argue that referendums are better placed to provide limits on the actions of representatives, rather than to adjudicate questions of rights.

5.5 Conclusion

Controversies around the use of referendums boil down to debates about underlying presuppositions about their use. Who are the people? Which representatives is direction being given to? What is the content of the direction being given? What should be done when the content of this direction is indeterminate? Is there any way to appeal an outcome? By addressing on and focusing on these presuppositions, rather than treating referendums with votes by citizens on matters of policy that bypass representatives, I will argue throughout this thesis that the use of referendums is likely to be improved. The controversies outlined above give me unease about treating referendums as bare votes on matters of policy.

6. Referendums in Law

Different legal systems treat referendums differently, and some have very little provision for the use of referendums at all. I will suggest here that, as with contemporary challenges of referendums, the treatment of referendums in law also often reflects the view that referendums are votes by citizens on matters of policy. Some legal systems do take an approach where referendums are treated as giving guidance to representatives. I will suggest that these systems are generally more successful uses of referendums than those where referendums are treated as votes for issues instead of representatives, or where referendums are employed in ad hoc ways

as in the UK and Canada. This section will consider a range of models from the least regulation of referendums to the most.

In the United Kingdom referendums are required by law in some circumstances as in the Scotland Act 2016,¹¹⁰ The Northern Ireland Act 1998,¹¹¹ and The Local Government Act 2000.¹¹² There is also legislation concerning the conduct of referendums in the Political Parties, Elections and Referendums Act 2000.¹¹³ There is not, however, legislation suggesting when referendums need to be used. In the way that referendums are enshrined in law they are treated as votes rather than processes. This is clearly true in the case of the Political Parties, Elections, and Referendums Act as well as the Northern Ireland Act. It is arguably also true in the case of the Scotland Act. Although constitutional conventions are arguably developing around their use,¹¹⁴ the use of referendums in the United Kingdom is, as the House of Lords Constitution Committee argued in 2010, remains largely ad hoc and tactical.¹¹⁵

¹¹⁰ In view of that commitment it is declared that the Scottish Parliament and the Scottish Government are not to be abolished except on the basis of a decision of the people of Scotland voting in a referendum The Scotland Act 2016 s 63A 1 (3)

¹¹¹ ‘It is hereby declared that Northern Ireland in its entirety remains part of the United Kingdom and shall not cease to be so without the consent of a majority of the people of Northern Ireland voting in a poll held for the purposes of this section in accordance with Schedule 1.’ The Northern Ireland Act 1998 s 1 (1)

¹¹² The Local Government Act 2000 s 27, 34-37

¹¹³ The Political Parties, Elections, and Referendums Act 2000 s 101- 129

¹¹⁴ Leyland argues that in the UK referendums as a form of consultation have ‘been recognised as a convention of the contemporary constitution.’ Leyland (n 15). 163

¹¹⁵ ‘We regret the ad hoc manner in which referendums have been used, often as a tactical device, by the government of the day.’ House of Lords Constitution Committee, ‘Referendums in the United Kingdom’ (2009) 12th. 62

It should be noted too that there was a massive legal debate that followed from the use of referendum in 2016 on the UK's membership of the European Union. Although the referendum itself is advisory, there was a contentious legal case about whether the process to trigger Article 50 and leave the European Union could be initiated by the executive acting under its prerogative power, or whether an Act of Parliament was necessary. This thesis makes no claims about the legal arguments advanced in *Miller* and the outcome has no bearing on the arguments of this thesis. This case is very important for my purposes, however, in that the legal debate in *Miller* itself reflects (i) the necessity of representatives in the referendum process and (ii) the value of clarifying what direction is being given to representatives in a referendum, and who those representatives are. On Pitkin's account of representation, both the executive and legislative branches of government are representatives, albeit in different ways.¹¹⁶ The difficulties in *Miller* reflect my unease with treating referendums as votes for issues rather than giving direction to representatives.

In Canada as well, there are no constitutional provisions or role for referendums, but constitutional conventions are developing around their use with respect to electoral reform, constitutional ratification, and even electoral reform.¹¹⁷ While there is no provision at the Federal level for the use of referendums, there is regulation of referendums at sub-state levels. This is true in the United States as well where there is no federal provision for the use of referendums, but they are regularly used at the sub-state level. In countries such as Ireland and Australia referendums are used with more consistency, but the process is much more integrated and developed than in Canada and the UK. In Ireland, referendums are automatically triggered

¹¹⁶ Pitkin (n 33). 117

¹¹⁷ Pierre Marquis, 'Referendums in Canada: The Effect of Populist Decision-Making on Representative Democracy' (Government of Canada 1993) BP-328E.

in processes of constitutional change.¹¹⁸ Similarly, in Australia, referendums approve bills from legislatures, and there are other devices such as plebiscites and non-binding polls as a variety of democratic tools for different purposes.¹¹⁹ While there are challenges with both systems, such as the ambiguity around the consequences of the postal vote on same-sex marriage as was the case in Australia in 2017,¹²⁰ as a general rule there is more consistency in the use of referendums in these countries and they are better integrated into the process of constitutional change. These processes are successful in that the use of referendums is more predictable and that while of course these processes are politically contentious, but their higher degree of integration with representative processes has been helpful in clarifying their role.

As mentioned above, the Swiss system of referendums is often treated as *sui generis* in the literature. In Switzerland the volume of referendums is far greater, as is the sophistication of the way they are integrated into the referendum process. Switzerland is generally taken to be a very successful democratic system, albeit one whose merits are not easily replicable elsewhere. What this system demonstrates is that the depth of the integration to representatives in this kind of system. Despite the distinctive strengths of the Swiss system of referendums, it is neither necessary or helpful to treat this as a different type of system of referendums altogether. Representatives are necessary, and especially necessary, in the Swiss system. The system of referendums has developed to provide a sophisticated set of checks on the actions of

¹¹⁸ 'Every proposal for an amendment of this Constitution shall be initiated in Dáil Éireann as a Bill, and shall upon having been passed or deemed to have been passed by both Houses of the Oireachtas, be submitted by Referendum to the decision of the people in accordance with the law for the time being in force relating to the Referendum.' The Constitution of Ireland art 46 (2)

¹¹⁹ The Commonwealth of Australia Act 1990 s 128

¹²⁰ 'High Court Postal Vote Challenge' (9 August 2017) <<https://www.theaustralian.com.au/national-affairs/samesex-marriage-postal-vote-to-be-challenged-in-the-high-court/news-story/05924552a4f5d0987841c8b10b47a91c>> accessed 23 September 2018.

representatives. While the specifics of how and why referendums are used will vary from jurisdiction to jurisdiction, there are still features of their use that hold in general.

7. Seven Presuppositions about Referendums

A cluster of ideas inform the current thinking about referendums. Not all accounts of referendums in all domains reflect all of these presuppositions. Nevertheless, these presuppositions are a constant presence in the literature. Taken together, these presuppositions create a picture that is broadly influential in both theory and practice. These presuppositions are that referendums are (or at least can be): (i) synonymous with votes, (ii) instances of direct democracy, (iii) votes for issues instead of for representatives, (iv) moments when the people come together as a corporate body, (v) to make decisions that (vi) express consent to propositions. There is a further presupposition about a certain type of referendum which is (vii) that referendums with constitutional content are themselves constitutional processes. The first three presuppositions are particularly salient in the literature on political science and the latter three in constitutional theory. All of these presuppositions play a role in the rhetorical use of referendums and the way they are enshrined in law. It is this set of presuppositions that make the case that referendums, particularly referendums with constitutional content, are exceptional democratic processes apart from institutions of representative democracy. I will challenge these presuppositions but arguing that even in the cases of the most important votes on the most fundamental constitutional issues, referendums are still instances of voters giving direction to representatives.

A caveat about these presuppositions before proceeding. The first is that establishing the presuppositions that inform thinking about referendums requires interrogating the language

that is used to describe them. This risks being uncharitable to writers in political science and constitutional theory because it involves attributing philosophical claims to authors that they never intended to make, and are often beyond the scope of their project. The aim of identifying and challenging these presuppositions is to identify underlying philosophical ideas about referendums, not to suggest that these are the questions that constitutional theorists and political scientists should have focused on themselves.

7.1 Referendums are Synonymous with Votes

The starting point for thinking about referendums in the literature, politics, or law is that a referendum is a vote by citizens on a matter of policy.¹²¹ While no theorist thinks votes are a necessary and sufficient condition for a *good* referendum, they do think that it is a necessary and sufficient condition for a referendum. They do not think that the vote is the only salient part of a referendum process, or the only one that should interest lawyers and philosophers. They all recognize that referendums can only be fully understood in the larger democratic context of which they are a part. As Tierney says, to work well referendums must be deliberative.¹²² He further argues that they cannot be deliberative without understanding that referendums are a series of stages, not just votes. Failing to take the different stages of a referendum serious risks the possibility of their tactical use and elite manipulation.¹²³ Tierney is concerned that:

...a vote-centered decision-making mechanism...cannot foster a meaningful deliberative process because it offers a winner-takes-all end

¹²¹ Setälä (n 14). 4

¹²² Tierney (n 22). 284

¹²³ *ibid.* Chapter Four

point and so the faction able to secure a majority has no incentive to change minds or compromise and so need not deliberate in a genuine way with its opponents. Instead, people within a majority group can simply maximize the outcome they want.¹²⁴

Instead of focusing on a vote alone, Tierney suggests dividing the different stages of a referendum into three: the initiating phase, the issue-framing phase, and the campaigning stage leading up to the vote.¹²⁵ Tierney is right about this, and his division of referendums into three different phases is very helpful. Nevertheless, the consensus in the literature is that while it might not be a good referendum, a vote (by citizens on a matter of policy) is a necessary and sufficient condition for a referendum. If a process of putting a question to the public does not include a vote, it is not a referendum properly so called. I disagree. A vote is likely to be an important part of a referendum process in almost all cases, but not necessarily. Further, there are good theoretical and practical reasons to distinguish between referendums and bare votes: the legitimacy the term referendum offers and the agreement that a vote is not a sufficient condition for an effective referendum. Given the credibility the term referendum offers to a democratic process, it is worthwhile to set the standard higher rather than lower. More on this in Chapters Two and Four on the necessity of building representatives into the definition of referendums, and of the practical implications of this change in Chapter Six.

7.2 Direct Votes

The definition of referendums in the literature not only treats referendums as votes, but votes with a certain character. Referendums are ‘direct’ votes. Qvortrup cites Jones and Scully in arguing that ‘A referendum takes power of decisions over a specific question back from the

¹²⁴ *ibid.* 51

¹²⁵ *ibid.*

elected representatives and returns it to the people who decide a matter directly.’¹²⁶ What does it mean to say that people decide ‘directly’? It is not entirely clear, but the thought seems to be that these votes are unmediated by representatives, or somehow bypass representatives. What does it mean for a process to be unmediated? This is tricky because, as will be seen shortly, direct and unmediated are also often used synonymously. The term unmediated is also slippery in that it is negative rather than positive. It defines referendums by what they do *not* do, i.e. include representatives, rather than by what they are. Understanding the meaning of mediation is necessary, however, for understanding what a referendum is when it is treated as a direct vote.

7.3 Policies not Representatives

Sometimes referendums are defined by what they are not: votes for policies instead of representatives. There is something important in this part of the standard definition of referendums, but the claim is misleading too. There will always be some overlap between voting on issues and voting for representatives. Votes on issues impact the representatives who are making a case for those issues, and (deliberately or accidentally) referendums can become conflated with the personal mandate of those whom they are voting for.¹²⁷ Further, some referendum outcomes do provide mandates to specific representatives. Conversely, representatives who lose referendums can lose personal mandates too. Consider the case of a secession referendum. It is very likely that a sovereigntist government making the case to secede will interpret a decision to separate as a personal mandate for them to take the secession process forward.¹⁰ As Walker says, this was how de Gaulle tactically used referendums

¹²⁶ Qvortrup (n 1). 3 citing Jones and Scully (n 17). 4-5

¹²⁷ M Walker, *The Strategic Use of Referendums: Power, Legitimacy, and Democracy* (Springer 2003). 1

throughout his career: ‘de Gaulle used referendums to legitimate his policy choices by making each vote a vote of confidence in him.’¹¹ It may even be useful to disambiguate these two processes and hold elections after referendums to identify who will execute the choice made by the public. This can limit, to a degree, the conflation of support for issues and representatives. This is all to say: to define referendums as something that occurs *instead* of selecting representatives is not necessarily true, and compounds the conceptual and empirical confusion. It is better to recognize that votes in referendums can impact the mandates of representatives. Defining referendums by distinguishing between voters as voting either for issues or for representatives is to premise the character of referendums on a false dichotomy.

7.4 *The People* make Decisions

Foundational to normative accounts of referendums is that these are instances of ‘The People’ coming together. This can be seen above in Qvortrup’s axiom that many argue that representatives can make unimportant decisions, but for important questions the whole people need to come together.¹²⁸ Sometimes, on populist accounts especially, the view is that the people come together as a corporate body, and they speak with one voice when they vote in a referendum. This presupposition is doing normative work in giving coherence to the outcome. There are many difficulties with the idea of The People¹²⁹ that are foundational to democratic theory.¹³⁰ It is not at all clear who The People are, or that if they can be identified they can be

¹²⁸ ibid. 21

¹²⁹ As Canovan argues, there are at least three different senses in which references to The People might be made. The members of the body politic, the common people, or the nation. None of these groups can be defined in a straightforward way. Margaret Canovan, *The People* (Polity 2005).; This is a longstanding problem in political philosophy as raised by, among others, Frederick Whelan, ‘Prologue: Democratic Theory and the Boundary Problem’ (1983) 25 *Nomos* 13.

¹³⁰ Espejo argues that it is right to say that the idea of The People is foundational to democratic theory, but that this means a different account of popular sovereignty is required; not that it is necessary to hold onto the idea of a static People, ‘The indeterminacy of popular unification undermines the foundations of

sharply defined. Further, the franchise does not exhaust The People. Even if the franchise was synonymous with The People, there remains the question whether voting is the sort of process that can manifest the will of this group. The inability of voting to express the collective intention of The People is the subject of Chapter Four.

7.5 The People *Make Decisions*

Another familiar presupposition about referendums is that The People make decisions instead of representatives. Sometimes this language should not be taken too literally. It probably means nothing more than that voters have a chance to weigh in on a question. Sometimes, however, this phrase is taken literally, particularly in accounts that rely on a two-track account of democracy. This is because the idea that The People make a decision suggests that (i) representatives cannot make certain decisions, (ii) it is possible that representatives do not make certain decisions. The idea that The People make decisions does a lot of normative work in accounts of referendums informed by two-track democracy. Challenging the idea that The People make decisions in a democracy is about challenging the view of democracy and popular sovereignty that underlie this approach to referendums. More on this in Chapter Five which argues against direct democracy and for the normalization of referendums.

7.6 Consent to Changes

democratic theory...the traditional concept of the people collapses under the weight of logical problems, and with it, the legitimacy of democracy collapses as well...The People should instead be understood as a process.' Paulina Espejo, *The Time of Popular Sovereignty: Process and the Democratic State* (The Pennsylvania State University Press 2011). 10-11

Consent is not central to all definitions of referendums in the literature, but it is foundational to some of the leading accounts. The aim of the referendum process, Tierney and Galligan argue, is to demonstrate consent to political propositions. That is part of the meaning of referendums. Tierney says that, ‘the one job that a referendum can do that no other device can is to provide the legitimacy that comes with a mass act of consent.’¹³¹ Galligan thinks that ‘the referendum device is the most direct and appropriate way to institutionalize government based on the consent of the governed.’¹³² Moreover, this idea of consent is tied to the act of voting. It is voting that serves the function of an act of consent.¹³³ This is important because, like the idea of directness, consent reflects the view of democracy that underlies the standard definition of referendums in the literature.

Understanding to what extent a vote in a referendum is a demonstration of consent requires understanding first what consent is. Consent, as Kleinig says, is a tripartite normative sanction that changes the relationship between A and B.¹³⁴ So to understand if a referendum is an instance of consent it is necessary to understand who A and B are and how the relationship between them is changing. As Kleinig says:

Consent is a three-place transaction in which consent to do something— ϕ —is always given to another party or agent, to whom we will refer as B. So, “A consented (to B) to ϕ .”¹³⁵

¹³¹ Tierney (n 22). 55

¹³² Galligan (n 9). 110

¹³³ This idea of consent can be seen law too, for instance in s 1 (1) of the Northern Ireland Act 1998 which says: ‘It is hereby declared that Northern Ireland in its entirety remains part of the United Kingdom and shall not cease to be so without the consent of a majority of the people of Northern Ireland voting in a poll held for the purposes of this section in accordance with Schedule 1.’

¹³⁴ John Kleinig, ‘The Nature of Consent’ in Franklin Miller and Alan Wertheimer (eds), *The Ethics of Consent: Theory and Practice* (OUP 2009). 5

¹³⁵ *ibid.*

How to understand the three parts of consent in the case of voting in referendums? Take A first, the actor providing the consent. It is unclear whether the consent is given by voters as individuals or as a collective. The dominant view, held by Galligan and Tierney, seems to be that this is a mass act of consent taken together by The People acting as a corporate body. The question of who consents is connected to the question of what is being consented to, and what the intention of voters is. Is it the intention of all voters to participate in a mass act of consent? Given that voters disagree on political propositions, that is the point of the process of holding a referendum, it seems they must be consenting to a process rather than an outcome.¹³⁶ If the consent is to a process, though, then it is difficult to say consent was given *for* a proposition in the manner indicated by ϕ above. Consent was not given to a new constitution, for instance, but rather the process that sanctioned its creation. Relation B in Kleinig's picture causes problems for referendums as expressions of consent too. Who is being consented to. Is it the state? Representatives? The government? A, B, and ϕ each create difficulties for the picture of referendums as demonstrations of consent to policy changes. At a minimum, it is not obvious that consent captures what is at stake in voting in a referendum. This matters hugely because of the normative significance of consent and how it is connected to the case for referendums. Consent is a very powerful normative sanction. It changes the relationships between agents. It is because of its normative power to change relationships that it invoked in the first place to underline the significance of referendums. The idea that a vote in a referendum is an expression of collective consent reflects the view of democracy that often informs the standard definition

¹³⁶ Tierney and Galligan's claim about voters' purported intentions is captured by Steinberger who says: 'The fact is that going to the polls and casting a vote in an election is analogous to sitting down at the poker table. It is a kind of engagement that signals prima facie a belief in the legitimacy of the electoral process and a willingness to accept its outcomes...my decision to join in... indicates not only active acceptance of winnings, should I win, but also an active acceptance of losses should I lose.' Peter J Steinberger, *The Idea of the State* (Cambridge University Press 2004). 219

of referendums in the literature; the view that democracy has two tracks, one for ‘We the People...and one for We the Politicians.’¹³⁷ That people transfer powers to representatives on a limited basis but that to change the terms of that transfer the consent of The People must be sought directly. On this picture, referendums with constitutional content are themselves constitutional processes.

7.7 Constitutional Referendums and Constitutional Processes

These seven presuppositions form much of the standard picture of referendums with constitutional content as constitutional processes in philosophy, politics, and law. Part of this picture is referendums as exceptional democratic processes that are outside the usual structures and institutions of representative democracy. This set of presuppositions about referendums are overdetermined and overlapping. Not all of these presuppositions may be present in every account of referendums, but this general picture is nevertheless influential. The aim of challenging these presuppositions it is about challenging the underlying view of democracy that they reflect. What these connected characterizations really reflect are deeper presuppositions about democracy. The central underlying presupposition is that (certain types) of referendums with constitutional content are instances of higher-order lawmaking.

8. Presuppositions about Presuppositions

¹³⁷ Galligan (n 9). 111

Where do these philosophical presuppositions that inform this picture of referendums come from? There are two underlying ideas that shape the standard picture of referendums. The first is the origin story of democracy and the view that classical democracy, the highest form of democracy, is direct democracy. The second idea is that the social contract is what makes democratic authority legitimate. These two ideas are connected by the view that voting is the sort of democratic process that can, when it is done directly, can demonstrate consent to the social contract or a change in the social contract. The ideas of direct democracy and the social contract are an unstable foundation for thinking about referendums, as I will demonstrate now.

8.1 The Ideal of Direct Democracy

The origin story of democracy is tied to the idea of direct democracy. This origin story informs the best-case scenario of what democracy can be. Direct democracy is sometimes called the highest or purest form of democracy. Representation is a necessary evil. Direct democracy is also taken to be the sort of process required for really important questions, which tend to be thought to be constitutional questions. Qvortrup makes this point by saying that there is a general principle of decision-making that transcends eras and contexts is that ‘on small matters the chiefs decide on important matters the whole community.’¹³⁸ This idea that on really important issues that The People weigh in instead of representatives comes in a variety of forms, but underlies much thinking about referendums. Especially challenging is the view that this is a purer form of democracy,¹³⁹ suggesting that representatives are part of impure or

¹³⁸ Qvortrup (n 1). 3

¹³⁹ *ibid.* 8

suboptimal democratic processes, and – at most – representatives play a peripheral role in referendums themselves.

8.2 The Social Contract and Democratic Authority

The social contract is a compelling idea. The idea that democratic authority is legitimate because people consent to it has theoretical elegance and intuitive appeal. This is because of the idea of consent, a demanding act, does a lot of normative work. It provides a stable justification for democratic authority in terms of a device that individuals have experience of in their own lives. Furthermore, the act of voting in a referendum (particularly on fundamental constitutional issues) seems in a *prima facie* way to demonstrate that idea of the social contract. Voters may really feel like they are coming together to express their independence or sovereignty.¹⁴⁰ This idea that referendums are opportunities to demonstrate consent to fundamental constitutional issues is hugely influential in thinking about referendums, going so far as for Tierney and Galligan to say that constitutional referendums themselves are expressions of consent. While the idea of the social contract remains hugely influential in thinking about referendums in constitutional theory and political science, it has been the object of serious and sustained criticism in other bodies of literature. There are concerns from race theorists and feminist scholars about who is really doing the consenting.¹⁴¹ There are a familiar and important longstanding set of critiques about whether consent can do the work it purports

¹⁴⁰ Although these sorts of feelings that voters have are not necessarily accurate. A John Simmons, *Moral Principles and Political Obligations* (Princeton University Press 1979). 73

¹⁴¹ The idea of the social contract has been challenged many different ways. It was challenged analytically in David Braybrooke, 'The Insoluble Problem of the Social Contract' (1976) 15 *Dialogue* 3. As well as from feminist and critical race theorists in Carole Pateman, *The Sexual Contract* (Polity Press 1988); Charles W Mills, *The Racial Contract* (Cornell University Press 1997).

to.¹⁴² This thesis will bring challenges to the social contract from philosophy, legal theory, political theory, and social choice theory to challenge the view that the social contract, particularly on its own, can provide a sufficient basis for democratic authority. It will argue instead that democracy is justified for a range of instrumental and procedural reasons, and that a wide range of reasons should be taken into account into determining if the use of referendums is justified.

9. Conclusion

The aim of this chapter was to lay out the context in which this thesis is written. To explain the best and current thinking about referendums, and why the standard picture of referendums makes me uneasy. I identified seven presuppositions about referendums, and explained how these ideas inform the standard picture of referendums. While making no claims of causality, I showed how these presuppositions are also reflected in the practice of referendums in politics and law. I argued that at least some of the confusions and difficulties surrounding the use of referendums reflect disagreement and ambiguity about these underlying presuppositions. Finally, I also identified the two deeper ideas that inform these presuppositions. This chapter gestured towards the challenges that will be made to these presuppositions in this thesis, but the rest of the thesis will develop these in a sustained way. Taken together, these presuppositions and ideas about referendums suggest that referendums are exceptional democratic processes apart from representative democracy. Challenging the exceptionality of referendums, even referendums with constitutional content, is the primary objective of the

¹⁴² For a very good survey of the many obstacles facing the idea of the social contract, and whether it can do the normative work it purports to, see Leslie Green, 'Law and Obligations' in Scott Shapiro and Jules Coleman (eds), *The Oxford Handbook of Jurisprudence and the Philosophy of Law* (OUP 2002). 526-529; Joseph Raz, 'Government by Consent' (1987) 29 *Nomos* 76.

thesis. The motivation for this interrogation of referendums does not come from doubts about referendums themselves, but rather that because referendums are treated as exceptional democratic processes the intellectual foundations of their use are unstable and unpersuasive. The aim of this thesis is nothing to say everything about referendums, but to make a few claims that hold in general in order to better understand how they might be used in particular.

Chapter Three: The Impossibility of Direct Democracy

1. Introduction

In order to challenge the treatment of referendums as exceptional democratic processes, this chapter and the next challenge the seven presuppositions about referendums identified in Chapter Two. This chapter focuses on four connected presuppositions, the first two are (i) that referendums are devices of direct democracy and (ii) votes in referendums are instances of The People making decisions collectively. These two presuppositions are connected because for some, like James Madison, the meaning of direct democracy is that The People make decisions together in their collective capacity.¹⁴³ Two further related presuppositions that will be challenged in this Chapter are that (iii) referendums are instances of The People making *decisions*, so focusing on the idea of what it means to *make a decision* and that (iv) The People are making decisions *instead* of representatives when they vote. These challenges to the standard picture of referendums are part of three larger projects in this thesis. The first is that challenging the idea of direct democracy, and its connected presuppositions, is really about challenging two-track democracy. The picture of referendums where *The People* make *decisions directly, instead* of representatives reflects the view that democracy has two-tracks: one for The People and one for politicians. On this two-track view of democracy, referendums are processes of higher-order lawmaking and so are exceptional. The second way that the challenges made in this chapter are important to the overall thesis is in making a case for a general account of referendums. By establishing the necessity of representation to democracy, this makes it possible to say something in general about referendums too. The third way that the challenges made in this chapter are important in the thesis as a whole is that the necessity

¹⁴³ Hamilton, Madison and Jay (n 27). 387

of representation is foundational to the alternative account of democratic legitimacy on which my alternative account of referendums is based. The necessity of representation as part of the process of democratic decision-making helps make a case for democracy and referendums instrumentally as well as procedurally.

2. What Does it Mean for Democracy to be Direct?

The claims that referendums are exceptional and that they are instances of direct democracy are closely tied together. One difficulty with this challenge, however, is that the term direct democracy is used to refer to a range of different ideas expressed in different ways. What is meant to be *direct* about direct democracy varies too. The rough idea, though, seems to be something like this: direct democracy is democracy that is unmediated by representatives.¹⁴⁴ This definition just postpones the problem; it is not clear either what it means to say a democratic process is unmediated. Those who argue that direct democracy is unmediated seem to think that processes like referendums bypass or replace representatives. For some, albeit for not all, this means that voters make decisions directly. This directness is what makes referendums exceptional democratic processes. Additionally, some who think that voters make decisions directly also think that they do so collectively. This collective dimension of directness compounds the exceptional nature of referendums. If they are decisions made by The People collectively, then there is a clear foundation for the view that referendums with constitutional content are themselves constitutional processes with constitutional significance.

¹⁴⁴ Suksi (n 26). 2

The term direct democracy is used in different ways. Sometimes it is used to describe a particular process. At other points, the idea of directness is part of the justification for a democratic process itself. Call the former descriptive use of the label thin, and latter justificatory use thick. Kobach uses direct democracy in the thin sense for his study of Swiss referendums. He says that while the Swiss system is really one of semi-direct democracy, there is no harm in using the term direct democracy as a shorthand instead.¹⁴⁵ Others, particularly those who write in the tradition of Rousseau, use the idea of directness as part of their justification for certain democratic processes.¹⁴⁶ They claim that in order to be democratic, processes cannot include representatives. Both the thin and thick uses of the term of direct democracy employ it in order to place voters in a different relationship to their representatives than elections do. Principally, many who use the term direct democracy are committed to the idea that these processes bypass representatives. The content of this claim remains elusive, however, and this is for two reasons. The first is that direct democracy is used as a heuristic, even in justificatory arguments. It is a shortcut for identifying that a democratic process is not an election, it does something else instead. The second is that direct democracy is defined in a negative rather than positive way.

With both the thin and thick uses of direct democracy, the term acts as a heuristic. The use of the term as a heuristic goes like this: there clearly is something different about the practices that are labelled exercises in direct democracy. They place voters and representatives in different relationships to each other than elections do, and the term direct democracy is used to highlight this difference. Everyone knows what sort of process is being referred to, even if it is not clear what precisely that process entails. I think this is a poor way to use the label direct

¹⁴⁵ Kobach (n 60). 58

¹⁴⁶ Barber (n 25). 261

democracy. Too much hinges on the character of these processes for the meaning of their label to be inchoate. But there is an additional difficulty with defining direct democracy. Direct democracy is more commonly defined by what it is not than what it is. Direct democracy is sometimes used as one half of the distinction with representative democracy, and so is defined in relative rather than absolute terms.¹⁴⁷ This is true for the term mediation too. It is not explained what it is for a process to be unmediated in positive terms. It means the absence of representatives rather than the presence of something else. Unfortunately, framing democratic exercises in terms of this distinction can give the impression that distinction between direct and representative democracy offers an exhaustive classification for democratic processes.¹⁴⁸ Democratic processes are either representative or direct, it must be one or the other. This sort of classification invites understanding these two processes as mutually exclusive, and this contributes to the unhelpful idea that representative and direct democracy are distinct. It might be countered that supporters of direct democracy do not consider such processes to be unmediated, at least not in the way it is suggested here. Those who use the label direct democracy can argue that representatives are still necessary for such processes; they think that representatives play different roles in processes of representative as opposed to direct democracy. The next section surveys arguments for direct democracy to demonstrate that (i) this counterargument is unavailable to supporters of direct democracy but (ii) even if this counterargument were available, it would not address the underlying problems with the label. By definition supporters of direct democracy are committed to the idea that democratic process bypass representatives, this cannot be the case.

¹⁴⁷ This is Manin's point when he says that direct and representative democracy are regularly mischaracterized as 'two varieties of one type of government.' Manin (n 23). 1

¹⁴⁸ 'Representative government... [was] conceived in explicit opposition to democracy, today it is seen as one of its forms.' *ibid.* 236

3. The Meanings of Mediation

This section seeks to establish two points. The first point is that supporters of direct democracy are committed to the idea that such processes are unmediated. Second, it tries to pin down what it means for such processes to be unmediated. This is tricky because direct and unmediated are often used synonymously. This inquiry is necessary, however, for understanding the mechanics of direct democracy; who is deciding what and how? What are the relationships between voters, representatives, and decisions in the processes of direct democracy? Further, I will show that the idea of referendums as unmediated processes is closely tied to their exceptional democratic status. Recall that I take the bare minimum commitments of supporters of direct democracy to be that there is (i) an unmediated connection (ii) between the largest set of coincidental expressed preferences (iii) belonging to members of groups, and (iv) the policies implemented in relation to that group. Much hinges on the two words in claim (i). The meanings of unmediated and direct will be illustrative of what is (thought to be) going on in these sorts of processes.

Different uses of the term direct democracy reflect different approaches to mediation and directness. Some take the idea of unmediated to mean something like a direct connection between voters and policies. Others use it to flag that a referendum is a different type of democratic process than an election. Most, however, take unmediated to mean much more than this. They make the more demanding claim that to say a democratic process is unmediated is to say that people make decisions directly. Finally, those who make the strongest possible version of this claim argue not only that people make decisions directly, but also that the People make decisions collectively and directly. This section surveys these different meanings of mediation. Views range from those who think unmediated means an alternative set of

democratic institutions, to those who take it to mean the absence of representatives altogether. These different approaches to mediation situate voters, decisions, and representatives in different relation to each other. Consequently, they offer varying accounts of the character and significance of referendums.

Some, like Schiller and Setälä, argue that processes of direct democracy are closely connected to processes of representative democracy. Their account of mediation reflects the closeness of the relationship between these two systems. Nevertheless, they still draw a distinction between representative and direct democracy, they say:

It is possible to make a distinction between the mediation of people's opinions in decision-making through the institutions and organizations of representative democracy on the one hand and through the institutions of direct democracy on the other.¹⁴⁹

What do Schiller and Setälä mean by mediation here? It is not totally clear. They seem to mean: democratic processes operate through a set of institutions that are not representative. What is unique about their position is that they do not claim that direct democracy entails the absence of mediation, but rather that there are a different set of institutions for direct democracy. This is not the way that mediation is usually understood in exercises of direct democracy. At the other end of the spectrum, Barber takes a much stronger view. He explicitly argues that strong, direct democracy (the only real kind of democracy) requires the absence of mediation altogether. He says:

¹⁴⁹ Schiller and Setälä (n 57). 4

Strong democracy requires *unmediated* self-government by an engaged citizenry. It requires institutions that will involve individuals at both the neighborhood and the national level in common talk, common decision-making and political judgment, and common action.¹⁵⁰

For Barber, writing in the Rousseauian tradition, to say a process is unmediated is to say that the people are engaged directly in, among other things, common decision-making and common-action. A distinctive feature of Barber's argument that he thinks the absence of mediation is required for answering all political questions. Particularly with respect to constitutional referendums, there is an alternative version of this argument. Galligan, Leyland, and Tierney argue that one type of democratic decisions; certain categories of constitutional decisions require direct democracy. Take Galligan first. He says: 'Constitutional referendums, while also being instruments of direct democracy, have as their fundamental purpose the originating and changing of the system of government itself.'¹⁵¹ In a similar vein, Leyland says 'Constitutional referendums are recognised as a form of direct democracy appropriate for deliberation on matters of nation building potential which are capable of influencing the constitution as the supreme source of law.'¹⁵² They do this, Leyland says, by 'measuring the aggregation of individual wills in relation to a single question, or series of questions.'¹⁵³ Note too that both Galligan and Leyland take referendums to be exercises in collective decision-making, Leyland cites Katz in arguing that referendums are a 'form of participation allow[ing] rational citizens to engage in the collective task of governing themselves.'¹⁵⁴

¹⁵⁰ Barber (n 25). 261

¹⁵¹ Galligan (n 9). 111

¹⁵² Leyland (n 15). 147

¹⁵³ *ibid.* 145

¹⁵⁴ *ibid.* citing Richard Katz, *Democracy and Elections* (OUP 1997). 28

Tierney shares many of Galligan and Leyland's commitments, but he offers the most developed rationale of what these commitments require. The question he asks in his book is whether 'The referendum can be an appropriate mechanism for the *direct* engagement of the mass public as constitutional authors in the process of constitution changing or constitution-framing, the latter including also policy formation.'¹⁵⁵ Again, it seems here like Tierney is committed both to referendums as devices of direct democracy and collective decision-making. He further argues that constitutional referendums, and only constitutional referendums, are devices of direct democracy. What he calls a legislative referendum is an instance of representative democracy because he thinks that, unlike a constitutional referendum, a legislative referendum does not supplant the relationship between the people and their representatives. Like Galligan and Leyland, he says in a constitutional referendum the people intervene directly in the law-making process:

There is certainly a sense in which, whenever the people are directly engaged in any law-making process, their exercise of collective will-formation and expression acts as a symbolic reminder that democratic authority finds its legitimacy in the consent of the people.¹⁵⁶

Tierney is committed to the term direct democracy because he thinks a constitutional referendum is a direct intervention in the terms of the social contract. For Tierney this is central to how higher-order law is made, so while he certainly recognizes the necessity of

¹⁵⁵ Tierney (n 22). 19

¹⁵⁶ Tierney (n 1). 364 (emphasis in original).

representative democracy,¹⁵⁷ he must think that direct democracy entails that voters make decisions themselves. He says:

Even the categorization of legislative referendums as an instance of *direct* as opposed to *representative* democracy is perhaps something of an oversimplification. In playing a role within a broader representative system of government, where the authority of these referendums is clearly subsidiary to those constitutional institutions which retain the competence to create and change higher order rules, they should perhaps more accurately be portrayed as being part of that representative system, since the effect given to the outcomes they produce is ultimately subject to the representative competence of constitutional institutions, most obviously legislatures, but also courts. In contrast, the people's direct democratic capacity to act as, or at least to influence the location and distribution of, the supreme source of constitutional law within a polity, distinguishes constitutional referendums as, potentially at least, true conduits of popular determination.¹⁵⁸

Tierney thinks that because constitutional referendums change higher-order they are devices of direct democracy. Referendums make higher-order law by ‘supplant[ing] the two levels of representation that are present in democratic constitutionalism.’¹⁵⁹ He says:

...Constitutional referendums can serve to unsettle the traditional balance between constituent power and constitutional form in the traditional policy, substituting the people directly for the representational role traditionally played by the democratic constitution.¹⁶⁰

¹⁵⁷ Tierney recognizes the necessity of representative democracy for direct democracy, but seems to think that these two systems operate ‘in parallel.’ He says: ‘Direct democracy is almost always a rarely activated constitutional device which is produced within a broader representative system. For example, a model of constitutional amendment is a hybrid involving a role not only for a referendum but also requiring the complementary endorsement of representative institutions. Whereas direct democracy is often presented in contrast to representative democracy, constitutional practise shows this to be a caricature; in complex modern systems the two operate in parallel. Tierney (n 22). 13-14

¹⁵⁸ Tierney (n 1). 364 (emphasis in original).

¹⁵⁹ *ibid.* 383

¹⁶⁰ *ibid.* 361

This idea that The People are substituted for representatives to create higher-order law demonstrates that Tierney is committed to a strong view of what it means for a process to be unmediated. Although it is not as demanding as the view put forward by Barber, it is much stronger than the view put forward by Schiller and Setälä. This is not to say that Tierney thinks representative democracy is unnecessary or that there is no underlying representative system, he says these processes exist in parallel.¹⁶¹ For Tierney representatives are replaced or suspended for exercises in direct democracy, this is by definition what direct democracy means. On his view, democracies require mediation but referendums must not.¹⁶²

While Tierney is only advocating for the use of referendums for constitutional questions, others like Budge support the use of referendums in general. Budge argues that new technology has made it possible for democracy to occur via millions of mouse clicks and that mass participation is possible in decision-making. He says ‘Direct democracy...is about opening up political processes to the whole of the population, by letting citizens vote directly on matters currently reserved to Parliaments.’¹⁶³ He repeatedly argues that referendums are

¹⁶¹ Tierney (n 22). 14

¹⁶² It might be asked if this characterization of Tierney is fair. He does give some suggestions, particularly in his later work, that he leans more towards a position like directed democracy. In later work he says that even constitutional referendums are *within* representative democracy not a substitute for it. He says: ‘Instead, it seems that the referendum, properly structured, can encourage the fuller engagement of citizens and civil society in democratic processes *within* the broader functioning of representative democracy. Therefore it is essential that we situate constitutional referendums as *part of*, and not *apart from*, representative democracy. And indeed in practice this is how things work. Elites will always have a role, whether in initiating the process, setting the agenda, framing the question, formulating the process rules or implementing any decision taken.’ *ibid.* 299-300 (emphasis in original). This is a position that is difficult to square with his commitment that the purpose of referendums is to supplant constitutional referendums. I think (at least part of) Tierney’s aim in this passage is to clarify that he does not endorse abolishing representative democracy altogether, but taking an approach like directed democracy would help address this tension in Tierney’s argument.

¹⁶³ Budge (n 72). 24

about people deciding for themselves. To cite one example, he says that the challenge for opponents of direct democracy is to explain: ‘Why responsible adults should be debarred from deciding policies for themselves?’¹⁶⁴ In this way Budge thinks that arguing against referendums is arguing against democracy itself. As with Tierney, Galligan, Leyland, and Barber, Budge also sees direct democracy as an instance of decision-making, and collective decision-making at that.¹⁶⁵ He argues for the primacy of participation in democratic decision-making and takes that to mean ‘taking part in the processes of formation, passage and implementation of public policies.’¹⁶⁶ To his credit, what sets Budge’s account apart from others is that he stresses all democratic exercises require mediation. He recognizes the need for a moderator of democratic processes and deliberation,¹⁶⁷ but for him moderation and mediation do not appear amount to representation.¹⁶⁸ Budge says:

It is only realistic...to envisage direct democracies retaining some of the institutional features of the representative democracy from which they have evolved. These would include not only parties – which are intrinsic to modern politics – but governments and parliaments too.¹⁶⁹

¹⁶⁴ ibid. 1

¹⁶⁵ Note though that Budge treats collective decisions and collective choices as synonymous. These acts will be distinguished in Chapter Four.

¹⁶⁶ Budge (n 72). 13

¹⁶⁷ ibid. 29

¹⁶⁸ ibid. 13

¹⁶⁹ ibid. 28

But while Budge acknowledges the need for moderation, his other arguments show he is nevertheless committed to the view that voters make decisions directly about questions of policy.¹⁷⁰

This section has considered a range of approaches to direct democracy ranging from Schiller and Setälä who argue that direct democracy requires mediation of a different kind than representative democracy, to positions like Barber's where the very idea of democracy, at least strong democracy, is unmediated self-government. This range of positions reflects a range of views about what the direct in direct democracy means. For some it means something like: people, or The People, make decisions for directly. For others it can be satisfied by a more minimal commitment like an unmediated connection between voters and outcomes. What unites all of these uses of direct democracy, however, is the idea that representative and direct democracy are, at least in part, distinct. This is the point that is challenged in this thesis. It is argued that direct democracy can only supplement, never supplant, representative democracy. There is no conceptual or political way to separate representative and direct democracy.

A reader might worry that this discussion runs two different arguments together as if they are the same. Clearly referendums, and indeed all decision-making require someone to count the votes, decide when voting will take place and so on. Should these actors be understood as representatives? I argue in this thesis that referendums require two types of representation. First, referendums require bridging representation, representatives such as judges and electoral commission officials who connect referendums to the rest of representative democracy. Second, I claim the nature of decision-making and voting are such that voters require

¹⁷⁰ Budge says he is advocating a 'mediated' form of direct democracy, direct democracy as party democracy. *ibid.* 38

representatives to make decisions that they then make choices about. Consider these two different ways that representation is necessary now.

4. What Representation Requires

In thinking about the meaning of representation, I largely adopt Pitkin's account in *The Concept of Representation*. What makes Pitkin's account worthy of adoption is her meticulous disambiguation of the dimensions of the concept.¹⁷¹ Pitkin rightly argues that there are many ways individuals may represent each other, they may do so descriptively or symbolically, or they may do so substantively by acting for others.¹⁷² What distinguishes substantive representation is that in substantive acting for others, 'The represented...person is present in the action rather than in the characteristics of the actor, or how he is regarded, or the formal arrangements which precede or follow the action.'¹⁷³ Democracies as decision-making processes may well feature all of the dimensions of representation Pitkin identifies. Indeed in many cases they probably do. But the claim here is that the type of representation that is necessary for decision-making processes is substantive representation: acting for someone else. Pitkin's formulation of substantive representation goes like this:

Representing...means acting in the interest of the represented, in a manner responsive to them. The representative must act independently; his action must involve discretion and judgment; he must be the one who acts. The represented must also be (conceived as) capable of independent action and judgment, not merely being taken care of. And, despite the resulting potential for conflict between representative and represented about what is to be done, that conflict must not normally take place. The representative

¹⁷¹ Pitkin (n 33). 1

¹⁷² *ibid.* 11-12

¹⁷³ *ibid.* 144

must act in such a way that there is no conflict, or if it occurs an explanation is called for...this rather complex view only sets the outer limits of what will be acceptable as representing in the substantive sense.¹⁷⁴

This passage lays out Pitkin's account of what it means to be a representative who acts for others. She says to be a representative is to acting independently in the interest of the representative in a manner responsive to them. I use her account because, helpfully, it is broad enough to include different approaches to representation. The debate in the background is the delegate-trustee controversy, but Pitkin argues that this debate is an unhelpful way to think about representation. Her account rules out the strictest version of both models as not being representation at all. She says 'There is room for a variety of views and some leeway, but moving too far in either direction and the representative becomes a tool.'¹⁷⁵ Pitkin is right about this. If an actor pays no attention to those whom they represent and simply do as they see fit all the time, then they have ceased in an important way to be a representative. On the other hand, if an actor exercises no independent judgment at all then they are parroting the views of their constituents rather than acting for them. In addition to not taking a side in the mandate-independence debate, Pitkin is not too prescriptive about representation arguing only that:

The representative must act in such a way that, although he is independent, and his constituents are capable of action and judgment, no conflict arises between them. He must act in their interest, and this means that he must not normally come into contact with their wishes.¹⁷⁶

¹⁷⁴ ibid. 210

¹⁷⁵ 'The conceptual principle sets the limits of representation, of what we are willing to recognize as representing (or a representative) and what no longer qualifies. If a state of affairs deviates too much in one direction or another, we shall say that it is no longer representation at all, there is room for a variety of views on what a good representative should and should not do.' ibid. 166

¹⁷⁶ ibid.

Following Pitkin, I will argue here that substantive representation requires acting for others in their interests. This does not require ‘a constant activity of responding, but there must be a constant condition of responsiveness.’¹⁷⁷ Individuals acting for others in isolation cannot satisfy this on-going condition of responsiveness. An institutional framework is required in order for this sort of responsiveness to be possible. This institutionalized representation is the second type of representation that is necessary for democratic decision-making.

4.1 Institutionalized Representation

In order for individual acts of representation to have meaning, there must be systems of representation that make this possible. Pitkin says:

Perhaps when we call a government body or system ‘representative,’ we are saying something broader and more general about the way in which it operates as an institutionalized arrangement. And perhaps even the representing done by an individual legislator must be seen in such context, as embodied in a political system.¹⁷⁸

Pitkin is too circumspect here. She must be right that:

What makes it representation is not any single action by any one participant, but the overall structure and functioning of the system, the patterns emerging from the multiple activities of many people.¹⁷⁹

¹⁷⁷ ibid. 233 (emphasis in original).

¹⁷⁸ ibid. 221

¹⁷⁹ ibid. 222

Here she is arguing that what makes acting for others in their interests possible, and what gives this action meaning, is the broader representative context of which it is a part. I cannot, for instance, unilaterally appoint myself as a representative. More is required for representation to occur. Pitkin's claim is not only that this institutionalized system of representation that gives representation meaning; she thinks it is what gives representative democracy meaning too. To say democracy is representative is to say more than individuals act for others in their interests. Although that is a necessary part, it is also to say something about the system altogether. This idea is clearest when she says: 'Representative government is not defined by particular actions at a particular moment, but by long-term systemic arrangements – by institutions and the way in which they function.'¹⁸⁰ Further she says that 'It seems to me that we show a government to be representative not by demonstrating its control over its subjects but just the reverse, by demonstrating that its subjects have control over what it does.'¹⁸¹ What makes Pitkin's final claim especially interesting and important is that for some readers it may be counterintuitive. Her account of what makes democracy representative is precisely what some think makes democracy direct. They use different words, but Lijphart's claim is that what makes direct democracy direct is the influence people have over their representatives.¹⁸² Pitkin's claim about the meaning of representatives does not itself demonstrate that representative democracy is redundant but it moves in that direction. If, as will be argued, all democratic decision-making requires representatives (because of disagreement, coherence, and implementation,) what makes this process democracy is inseparable from what makes it representative.

4.2 The Need for Coherence

¹⁸⁰ ibid. 234

¹⁸¹ ibid. 232

¹⁸² Lijphart (n 10). 198

The coherence of democratic decisions cannot be maintained without representatives. Without representatives, contradictions may arise such as when voters determine that they would prefer both to X and to not X; to both raise spending and cut taxes for instance. A counterargument might be raised to this position straight away. A reader might respond that governments are often elected on platforms to raise spending and cut taxes. Coherence of mandate is a general problem for democracy, not a specific impediment to direct democracy. The difference is that in the case of elections representatives then have the difficulty of deciding what to prioritize in order to meet their commitments. They are also held accountable should they fail to square this circle in a way that is acceptable to their voters. While complete coherence is not a democratic standard that can be met, and it is not suggested here that is what is required, what is suggested is that without representation democratic decisions can be directly contradictory, and this creates all sorts of problems. Consider three examples, two modern and one ancient to make this point.

Democracy is difficult in California. Decades of ballot initiatives have undermined the legislature.¹⁸³ Ballot initiatives have both limited the power of taxation and demanded that the legislature increase spending, the result being an intractable standoff and serious financial difficulties.¹⁸⁴ Contrast this with a very successful system of referendums in Switzerland. Even in such a very stable system there was a need in 1999 for representatives to conduct a 17-year review of all of the constitutional changes that had been made by referendum and initiative to make sure they were coherent.¹⁸⁵ This requirement of coherence is not a recent development.

¹⁸³ Schrag (n 58). 189

¹⁸⁴ *ibid.* 261

¹⁸⁵ Wolf Linder, *Swiss Democracy: Possible Solutions to Conflict in Multicultural Societies* (Third Edition, Palgrave Macmillan UK 2010). 92. A similar constitutional review process was attempted in California, but the results were not implemented. Schrag (n 58). 260

Democracy has always required coherence; consider Mill's argument about Athenian democracy.

In the Athenian Democracy...in the time of its most complete ascendancy, the popular Ecclesia could pass Psephisms (mostly decrees on single matters of policy), but laws, so called, could only be made or altered by a different and less numerous body, renewed annually, called the Nomothetae, whose duty it was to revise the whole of the law, and keep them consistent with one another.¹⁸⁶

Budge recognizes that there will be a need for what he calls 'moderators'¹⁸⁷ rather than representatives, but the role of a moderator is very different from that of a representative. Budge suggests that maintaining coherence is a task that does not require acting for others. It is indeed a mechanical or administrative process. Budge would be correct that moderation is sufficient enough if these roles required no element of judgment, and every possible consequence of a decision could be anticipated. Given that this is impossible, there is a need for representatives both to maintain to coherence but also, for a similar set of reasons, to implement decisions too.

4.3 Implementation and Adjudication

Democracies require decisions not only to be made but also to be implemented and interpreted. If decisions are not implemented there is no point in having democracy at all. Further, all possible circumstances cannot be anticipated, so the implementation and adjudication stage of democratic processes will inevitably involve some element of judgment. This judgment in turn requires individuals to act for other members of the group in their interests. It might be countered that the

¹⁸⁶ JS Mill, *Considerations on Representative Government* (OUP 1991). 245

¹⁸⁷ Budge (n 72). 38

sort of representation of a police officer or judge is totally different from that of a legislator, and is not an instance of acting for at all. While the sorts of actions taken may be different, they are still acting for others. When performing their role, a policeman or judge is not acting only for themselves, they are acting as public officials. While implementation and adjudication require a different form of substantive representation, it is substantive representation nevertheless.

The three inevitable features of democratic decision-making discussed in this part of the chapter, the inevitability of disagreement, and the need for coherence and implementation mean that substantive representation is a necessary part of all democratic decision-making. For some readers, however, even if all of these arguments hold it is still incorrect to argue that the ‘representative’ in representative democracy is redundant. The claim of redundancy is too strong. The final part of the chapter makes a case for the importance of making this stronger claim that the ‘representative’ in representative democracy is redundant.

5. *Instead of Representatives*

There will always be some overlap between voting on issues and voting for representatives. Votes on issues impact the representatives who are making the case for those issues, and (deliberately¹⁸⁸ or accidentally¹⁸⁹) referendums can become conflated with the personal mandate of those whom they are voting for. Further, some referendum outcomes do provide mandates to specific representatives. Conversely, representatives who lose referendums can lose personal mandates too. Consider the case of a secession referendum. It is very likely that a sovereigntist government making the case to secede will interpret a decision to separate as

¹⁸⁸ Walker (n 127). 21

¹⁸⁹ *ibid.*

a personal mandate for them to take the secession process forward.¹⁹⁰ As Walker says, this was how de Gaulle tactically used referendums throughout his career: ‘De Gaulle used referendums to legitimate his policy choices by making each vote a vote of confidence in him.’¹⁹¹ It may even be useful to disambiguate these two processes and hold elections after referendums to identify who will execute the choice made by the public. This can limit, to a degree, the conflation of support for issues and representatives. This is all to say: to define referendums as something that occurs *instead* of electing representatives is not necessarily true, and compounds the conceptual and empirical confusion. It is better to recognize that votes in referendums can impact the mandates of representatives.

6. The Redundancy of Representative Democracy and why it Matters

To add the prefix ‘representative’ to democracy suggests that it is possible to have democracy without representatives and a system of representation. I argue that representativeness is a necessary part of the meaning of democracy itself, and so the word ‘representative’ in representative democracy is redundant. This inquiry into the meaning of direct democracy, and why all democratic processes including referendums require representatives, is in the service of three larger aims: challenging two-track democracy, making a case for a general account of referendums, and for a piecemeal account of democratic legitimacy. By arguing for the ways in which representatives are necessary to all democracies and democratic decision-making processes, the aim is to show that there cannot be one track reserved for representatives because representatives are always necessary. Further, if representatives are always required for

¹⁹⁰ ibid. 22

¹⁹¹ ibid.

decision-making processes this then offers a general feature of democracy which particular accounts of decision-making processes such as referendums and elections can reflect. Finally, the aim of this thesis is to argue for the normalization of referendums by challenging the view of democracy that treats them as exceptional. The justification of representatives reflects the piecemeal justification of democracy. I argue here that democracy is justified not because of the consent of the governed, but rather for a series of instrumental and procedural reasons. Representatives give democracy its instrumental value. It is through representatives that disagreements are addressed, coherence is maintained, and decisions are executed. This is not to suggest that democracy in general, or specific types of democratic processes like referendums can only be advocated instrumentally. Democracy is justified both instrumentally, by its ability to address disagreement, and procedurally, by the opportunities it offers for members of the group to participate. Supporters of deliberative and direct democracy are correct that rule by The People requires wide and meaningful participation by voters, but it is representatives that make this process of participation greater than the sum of its parts. It is representatives that make democracy greater than a set of preferences. Without representatives, there can be no rule by The People, and that is why representative democracy is redundant.

7. Conclusion

The language used to describe and define referendums is not benign. It both reflects and informs the way that referendums are understood. This chapter challenged presuppositions about referendums that are reflected in the language around their use: that they are devices of direct democracy, where people make decisions collectively, instead of representatives. This chapter has argued that the term representative democracy is redundant. This is not because representativeness is unimportant: quite the opposite. It is because representatives and

representation are necessary features of all democratic decisions. They are the core dynamic that defines democracy. Representativeness is part of the meaning of democracy itself. There are a series of ways that democracies can be representative, and necessary functions that representatives fulfill. It then disambiguated the different ways in which democracy requires representation arguing that: (i) it requires people to act for others in their interests (ii) a general system of representatives (iii) and that the decisions of the group stand for the group in representative ways. It argued that there were three features of democratic decisions that necessitate representation: (i) disagreement (ii) the need for coherence and (iii) the ability to execute decisions, all of which require acting for others. It is inevitable that when voters cast their ballots in elections doing so will impact the mandates of representatives. It is better to face this reality directly rather than try to bracket it to the side. Referendums are important, useful, and even in some ways distinctive democratic processes, but they are not exceptional. Demonstrating the impossibility of direct democracy is about showing that democracy must have only one track, and that referendums are on the same democratic plane.

Chapter Four: The Act of Voting and its Limits

1. Introduction

This chapter challenges more of the presumptions that inform the standard picture of referendums, but makes this challenge by focusing on a different democratic process: voting. This chapter focuses on philosophical presuppositions about the character of voting, and shows how these presuppositions inform the case for referendums too. The presuppositions that will be challenged in this chapter are that: (i) referendums can be defined as votes alone and (ii) that they can be processes of collective decision making. In challenging this second presupposition, attention is paid both to the claims that (a) The People make decisions collectively, and (b) that they make decisions at all. As with the last chapter, the aim of challenging the view of voting that informs the standard picture of referendums is really to challenge the two-track view of democracy that underlies this way of thinking about referendums. The claim made in the literature is that The People make decisions instead of representatives, and the focus of this chapter is the character of decision-making as it applies to referendums. It splits the referendum process into different stages and isolates the act of voting as one stage among many parts of a referendum process. Isolating the necessary features of democratic decision-making is also essential in making the general case for referendums. By demonstrating the necessary features of democratic decision-making, it is possible to identify features of democracy that hold in general that offer a foundation for a general account of referendums. Again, all of these challenges together contest the view of referendums with constitutional content as exceptional democratic processes. If referendums are autonomous decision-making processes apart from the institutions of representative democracy, then the case for their exceptionality is strong. I will argue, however, that the view that referendums are

processes that are autonomous and distinct from representatives is untenable. Thinking about different types of voting as exceptional from, or different than, voting in elections leads to the position that referendums are exceptional too.

2. Why Referendums are not Synonymous with Votes

Referendums are not synonymous with votes, and votes are not synonymous with decision-making processes. Nevertheless, the literature on the theory and practice of referendums refers to referendums as synonymous with votes. Setälä says that: ‘All referendums have the common feature that citizens have the right to vote on a specific political issue.’¹⁹² In their study of referendums, Uleri and Gallagher treat referendums and votes synonymously, too. They say ‘the referendum phenomenon is that...a mass electorate vote on some public issue.’¹⁹³ Tierney also defines a referendum as a vote saying ‘By referendum I mean any poll where citizens vote for an issue rather than for a representative.’¹⁹⁴ Qvortrup offers a narrower view of what kind of vote referendums are, but nevertheless agrees that they are votes. He says that referendums are ‘votes by citizens on bills before they become laws.’¹⁹⁵ These definitions all take the view that a vote (by citizens on a matter of policy) is a necessary condition for a referendum. Without a vote a referendum is not a referendum; something essential has been lost. Moreover, these definitions suggest that a vote on an issue is a sufficient condition for a referendum too. A vote on an issue is all that is required for a democratic process to count as a referendum. None of

¹⁹² Setälä (n 14). 4

¹⁹³ Gallagher and Uleri (n 10). 2

¹⁹⁴ Tierney (n 22). 9

¹⁹⁵ Qvortrup (n 1). 2

these theorists think a vote alone offers the necessary and sufficient questions for a *good* referendum.¹⁹⁶ They do not think that the vote is the only salient part of a referendum process, or the only one that should interest lawyers and philosophers.¹⁹⁷ They all recognize that referendums can only be fully understood in the larger democratic context of which they are a part. As Tierney says, to work well referendums must be deliberative.¹⁹⁸ He further argues that they cannot be deliberative without understanding that referendums are a series of stages, not just votes. Failing to take the different stages of a referendum serious risks the possibility of their tactical use and elite manipulation.¹⁹⁹ Tierney is concerned that:

...a vote-centered decision-making mechanism...cannot foster a meaningful deliberative process because it offers a winner-takes-all end point and so the faction able to secure a majority has no incentive to change minds or compromise and so need not deliberate in a genuine way with its opponents. Instead, people within a majority group can simply maximize the outcome they want.²⁰⁰

Instead of focusing on a vote alone, Tierney suggests dividing the different stages of a referendum into three: the initiating phase, the issue-framing phase, and the campaigning stage leading up to the vote.²⁰¹ Tierney is right about this, and his division of referendums into three different phases is very helpful. Nevertheless, the consensus in the literature is that while it might not be a good referendum, a vote (by citizens on a matter of policy) is a necessary and

¹⁹⁶ 'The potentiality of referendums to increase democratic virtues hinges largely on the extent to which referendum campaigns enhance inclusive and informed public deliberation on the issue at hand, and, further, on the extent to which voters' choices are based on...deliberation.' Setälä (n 14). 10

¹⁹⁷ 'At least in undivided societies, the referendum can be a successful constitutional instrument provided adequate regulation serves to promote and protect a deliberative environment within which citizen participation can be fostered.' Tierney (n 22). 285

¹⁹⁸ *ibid.* 51

¹⁹⁹ *ibid.*

²⁰⁰ *ibid.*

²⁰¹ *ibid.*

sufficient condition for a referendum. If a process of putting a question to the public does not include a vote, it is not a referendum properly so called. I disagree. A vote is likely to be an important part of a referendum process in almost all cases, but not necessarily. Further, there are good theoretical and practical reasons to distinguish between referendums and bare votes.

The meaning of the word referendum comes from the word *referre* which means ‘to refer back.’²⁰² This is a far more helpful starting point than a vote (by citizens on a matter of policy) for three reasons. First, voting is not synonymous with referring back. There are many ways to refer questions back to the public, this is a much broader definition than putting a question to a vote. Citizens’ juries, constitutional conventions, a series of polls, even consulting people one-on-one are just a few of the ways that questions can be referred back to the public.²⁰³ Some of these approaches are unwieldy, especially in large democracies, but there is nothing logically or practically necessary about voting as the best or only way to refer a question to the public. It is not voting that is important and makes referendums referendums, it is the fact that the question is put back to the public in the first place. The second reason that it is better to define referendums as referring back rather than votes, is that it defines referendums by an action rather than an objective. Treating referendums as synonymous with votes puts the cart before the horse. Why is a vote being held in the first place, what is its objective? The standard definition of referendums in the literature defines them by an action without identifying what the reasons for holding this action are. By defining referendums without laying out their purpose, the overwhelming focus of the referendum becomes the vote rather than what that vote is trying to achieve. Voting has much to commend it in terms of equality of participation,

²⁰² ‘The word “referendum” comes from the Latin neuter of *referendus*, gerundive of *referre*, “to refer back.” Qvortrup (n 1). 2

²⁰³ For a very good overview of different deliberative and constitutional processes and the roles they can play as part of referendum processes see Tierney (n 22). Chapter Seven

low barriers to entry, and publicity of involvement,¹³ but it has its limitations too. Voting does not offer the opportunity for voters to provide substantive input about the content of proposals, and voters are unable to cast their ballots with reservations attached. Referendums are one tool in a democratic toolbox for referring a question back to the public, and votes should be understood as just one tool in the referendum toolbox too.

To further illustrate the dangers of the standard definition, contrast the definition of referendums with that of elections. To define elections as ‘voting for representatives’ misses the necessary features of their use. Different accounts of elections in the literature stress that defining elections as the selection of representatives is insufficient without including the broader democratic context.²⁰⁴ To define elections as ‘voting for representatives’ allows that such a representative could serve indefinitely, when it is a necessary feature of elections that they happen periodically.²⁰⁵ Elections cannot be permanent decisions. A far better definition of elections is something like: the selection of people to act on behalf of others for a set period of time. While not an exhaustive account of what makes an election, and certainly not the sufficient conditions for a good election, defining an election as ‘the selection of people to act on behalf of others for a set period of time’ captures both the underlying democratic dynamic and the purpose of having this process in the first place. It also opens up that this selection could occur in a variety of ways, for instance through lotteries or some combination of lotteries and selection.²⁰⁶ Defining referendums as ‘votes on issues’ runs the same risks of defining elections as ‘votes for representatives.’ It sets the bar for what qualifies as a democratic process

²⁰⁴ Jocelyn Evans, *Voters & Voting: An Introduction* (SAGE 2004). 1

²⁰⁵ Katz (n 154).; Iain McLean, *Elections* (2nd ed, Longman 1980).; Peter Lane, *Elections* (Batsford 1973).

²⁰⁶ Katz (n 154). 99

too low. There are good reasons to set the bar higher when defining referendums, and this is the third reason to distinguish between referendums and votes.

The term referendum has a lot of power. Input from voters on specific issues is a significant legitimizing force in politics and law. This input is particularly significant because votes in large democracies are usually for a manifesto, a set of proposals rather than just one, so referendum outcomes offer stark public support for issues.²⁰⁷ Furthermore, that an issue is put to a referendum in a first place often reflects how significant the issue is. On top of all this, issues are often put to a referendum because they are irreversible, significant, or divisive. Setting the democratic standard for a referendum as a vote alone creates the possibility that vast amounts of political will are aggregated without a process to make sure the question is referred to the public in a productive way.²⁰⁸ This sets the bar too low when distinguishing between referendums and votes. The capacity of referendums to provide legitimacy can be seen

²⁰⁷ A good example of this is the 2016 Brexit referendum in the UK. A common rhetorical claim is that more people voted for Brexit than have ever voted for anything in the history of the United Kingdom. The political power of the claim that 17 million people cast their ballots for something has formidable rhetorical and political force.

²⁰⁸ Indeed, Chambers argues that referendums focused on votes undermine democratic deliberation and public debate rather than coming to outcomes with broad public support. ‘Referendums tend to undermine deliberation for two reasons. The first is that they introduce an extreme form of majoritarianism that is inappropriate for deep constitutional questions. Second, referendums often present the voter with the image of inflexibility (debate cannot alter the framing of the question) and irreversibility (constitutional proposals are entrenched outside the ongoing iterative processes of normal politics). Simone Chambers, ‘Constitutional Referendums and Democratic Deliberation’, *Referendum democracy: citizens, elites, and deliberation in referendum campaigns* (Palgrave 2001). 231-2. Chambers is right about this, but her concerns about the quality of the process can be addressed, at least in part, by distinguishing referendums from votes.

in the way that dictators both historical²⁰⁹ and contemporary²¹⁰ abuse them to shore up their individual, personal legitimacy.²¹¹ A bifurcated definition that distinguishes referendums from votes offers both conceptual clarity and better results by setting the democratic standard higher for a process to qualify as a referendum.²² Some of this work might arguably be being done with the word plebiscite which is sometimes used to indicate referendums that are undemocratic,²³ but the use of plebiscite has so far been inconsistent.²⁴ The distinction between referendums and votes distinguishes better between those processes which meaningfully refer matters back to the public and those that do not by the tactical use of votes alone.

To reiterate: theorists outlined above agree that in order to work well referendums must not be understood as votes alone. Nevertheless, the overwhelming consensus is to treat referendums and votes as synonymous in their definition. This is a needlessly limiting equivalence to draw. By identifying referendums by an action, rather than the purpose, the case for referendums goes in the wrong direction from the very beginning. The distinction between referendums and bare votes goes some way to addressing the risks of separating voting from the rest of the referendum process in the round. If there is a consensus that a good referendum process requires deliberation, consultation, and meaningful input from the public, why not build at least some minimal account of that into the definition? Why not set the democratic

²⁰⁹ 'Both internally and domestically, Hitler needed authority from an "unassailable source" to legitimize himself.' He used referendums. Arnold Zurcher, 'The Hitler Referenda' (1935) 29 *American Political Science Review* 91. 98; Another instance of authoritarian abuses of referendums is 'the six times they were used by Napoleon to consolidate his power from Consul to Emperor between 1800 and 1852.' Qvortrup (n 1). 9

²¹⁰ 'Orban Says He Seeks to End Liberal Democracy in Hungary' *Bloomberg.com* (28 July 2014) <<https://www.bloomberg.com/news/articles/2014-07-28/orban-says-he-seeks-to-end-liberal-democracy-in-hungary>> accessed 6 April 2017.

²¹¹ Setälä says that referendums are 'handy tools for dictators in boosting their legitimacy, and were used to consolidate the powers of the Nazis, and among former communist countries in Eastern Europe.' Setälä (n 14). 1-2

standard higher? This is particularly important when labelling a process as a referendum has so much legitimizing power. More will be said about the implications of treating referendums as synonymous with votes for purposes constitutional design in Chapters Six and Seven. First, though, understand the importance of stressing the distinction between votes and referendums for understanding them as methods of decision-making in the round. All democratic processes are devices of decision-making and referendums are no different, but treating referendums as votes alone is not sufficient for this.

3. Referendums and Decision-Making

Democracy and referendums are varied phenomena that perform many functions. One function that is essential to what both referendums and democracy are, however, is that they are both methods of making decisions.²¹² What is less clear is (a) what it means to make a decision and (b) how the act of decision-making is reflected in the different parts of the referendum process. Answering these questions requires asking a further set of questions including who is deciding what in a referendum and how. As with challenging the presumptions in the last chapter, interrogating the idea of decision-making is about challenging the view of referendums as exceptional democratic processes. The idea that referendums are instances of The People making decisions rather than representatives is foundational to the success of two-track democracy. If referendums are autonomous decision-making processes apart from the institutions of representative democracy then the case for their exceptionality is strong. I will argue, however, that the view that referendums are autonomous and distinct decision-making processes is unpersuasive.

²¹² Christiano (n 64). 2

3.1 What is a Decision?

The literature on decision-making stresses a cluster of features. That decisions are (i) certain types of actions, (ii) taken with a certain state of mind by the actor, and (iii) the state of mind of the actor matters both (a) prior to the act of deciding and (b) in the act of deciding itself. There is general agreement in the literature about what the elements of decision-making are, but theorists give them different names and carve them up differently. Raz draws on Meiland to stipulate four features of ‘fully-fledged decision making.’²¹³ Raz’s criteria are useful for three reasons. First because of their conceptual power and clarity. Second because they would be acceptable to those who think that in referendums The People make decisions directly instead of representatives. This second point is especially important. Often those who take the view that referendum votes are instances of The People making decisions collectively agree that deliberation is required for decision-making. So Raz’s distillation of the requirements of fully-fledged decision-making offers a shared language to establish the mechanics of referendums. The third reason to use Raz’s account of what makes is a decision is useful is that, while of course there is disagreement in carving up the elements of fully-fledged decision-making, his argument distills core ideas that are widely present in the literature. Raz says:

- (i) To decide is to form an intention;
- (ii) Decisions are reached as a result of deliberation;
- (iii) Decisions are taken sometime before the action;
- (iv) Decisions are reasons.²¹⁴

²¹³ Joseph Raz, ‘Reasons for Action, Decisions and Norms’ (1975) 84 *Mind* 481. 488; Meiland (n 44). 55

²¹⁴ Raz (n 213). 488-489

The first three of Raz's requirements are very similar to Meiland's²¹⁵ and Oldenquist's.²¹⁶ Raz's account is different from Meiland's in that he stresses that a decision is a reason. There is strong agreement among these theorists on the necessity of deliberation as part of the process of decision-making. Meiland, for instance, says that a 'decision is the formation of an intention after deliberation takes place.'²¹⁷ Raz says: 'Decisions are reached as a result of deliberations. X decides to do A only if he forms the intention to do A as a result of a process of deliberating whether to do.'²¹⁸ Similarly, Meiland says 'It seems that nothing can count as a decision to do X unless the agent has deliberated about doing X.'²¹⁹ In this body of literature on decision-making, what it means to deliberate appears to be something like: 'Bringing to mind ideas or images meant to have some rational relation to the topic being considered, in the service of reaching a conclusion about what to think or do.'²²⁰ The idea of deliberation is that there a process of reflecting on how to act, and – crucially – that this process precedes rather than follows the act of doing. This is Raz's third requirement of decisions: they are (usually) to be taken before action. He says 'normally one decides to perform an action some time in the future.'²²¹ The relationship between deliberation and decision-making is crucial. Sometimes in the literature on referendums, the terms deliberation and decision-making are treated as nearly synonymous. Meiland, Raz, and Oldenquist suggest this is not the case. Deliberation is a prerequisite for decision-making, it is not the same as decision-making.

²¹⁵ 'To decide is to form an intention to do after deliberation takes place. Meiland (n 44). 65

²¹⁶ Oldenquist also says that decisions are reasons in Oldenquist (n 42). 99

²¹⁷ Meiland (n 44). 60

²¹⁸ Raz (n 213). 489

²¹⁹ Meiland (n 44). 56

²²⁰ Nomy Arpaly and Timothy Schroeder, 'Deliberating and Acting for Reasons' (2012) 121 *Philosophical Review*. 212

²²¹ Raz (n 213). 489

Further, the relationship between deliberation and decision-making is also significant because it is one way that Raz, Meiland, and Oldenquist distinguish between decisions and other types of acts, particularly between decisions and choices. As Oldenquist says, it is possible to speak of habitual choices but not habitual decisions because choices do not require deliberation in that way that decisions do.²²² Oldenquist says that decisions are intentional actions that are the result of deliberation, and so decisions cannot be made randomly or habitually or like choices can. Raz also distinguishes between decisions and choices. He says: ‘Not every intention to perform an action is a result of a decision. It is the process of deliberation... which distinguishes decision-based intentions from other intentions.’²²³ This distinction between decisions and other intentional acts that are not the result of deliberation is helpful for thinking about voting, so consider the relationship between decisions and choices in more detail now.

3.2 Decisions and Choices

Raz, Oldenquist, and Meiland all think that there is a difference between decisions and choices and they largely agree on what the difference is. Some decisions are choices, not all choices are decisions. Choices are a less demanding sort of act that do not necessarily require deliberation. Choices may involve deliberation but they do not rely on deliberation in the way that decisions do. Raz and Oldenquist – in different ways – use the examples of Jones and the martini to illustrate the difference between decisions and choices.

If Jones is offered a tray of different kinds of drinks and takes a martini it would be correct to say that he chose the martini but not that he decided to take the martini. If Jones decided to take the martini, then we expect that prior to the action there was deliberation, or that at least preference and

²²² Oldenquist (n 42). 98

²²³ Raz (n 213). 489

resolution, and *that between the time he decided and the time reacted we could correctly say that he intended to take the martini.*²²⁴

As this example demonstrates, it may well be that Jones decided to take the martini: but not necessarily. If he had thought about what he should drink on the basis of whether he wanted to make a good impression at the party, or to be healthy then he would have decided to take the martini. If, however, he had made a selection without pausing his conversation to consider his options, then he did not decide to take a martini he choose to drink a martini.²²⁵ Furthermore, this example also shows that (usually) deliberation is not enough in order for decision-making to occur, this deliberation must precede decision-making.²²⁶ If Jones selects a glass of water instead of a martini without thinking about it, and retrospectively conclude this is a good idea because he is driving home, then it is incorrect to say he decided to drink the water. The deliberation must be related to the decision-making in a particular way. This is connected to Raz's claim that a decision is a certain type of reason.

A decision is always for the agent a reason for performing the act he decided to perform and for disregarding further reasons and arguments. It is always a first order and an exclusionary reason...a decision is only reached when the agent (I) reaches a conclusion as to what he ought to do and (II) forms the belief that it is time to terminate his deliberations.²²⁷

Oldenquist agrees that a decision is a reason (and that a choice cannot be a reason.)²²⁸ Frankfurt also draws the distinction between decisions and choices too. He says:

²²⁴ ibid. (emphasis in original); 'In the preceding example Jones did not *decide* to take a martini because decision is more closely tied to deliberation and intention than is choice.' Oldenquist (n 42). 98

²²⁵ Meiland draws a similar analogy but on the question of taking various trips. Meiland (n 44). 55-56

²²⁶ Raz (n 213). 489

²²⁷ ibid. 490

²²⁸ Oldenquist (n 42). 99

The difference between deciding and choosing accounts for the fact that deciding to make a certain choice is not the same as actually making it (after all, the time or occasion for doing that may not yet have arrived), whereas deciding to make a particular decision (that is deciding to decide things a certain way) cannot be distinguished from making the decision itself.²²⁹

I think Frankfurt is right about this. If Jones decides that he will have a martini at the party on Thursday, that is different from physically taking the drink off the table. What is important about the decision is its connection to deliberation, not its connection to the physical act itself. This is connected to one final feature of choices as opposed to decisions: choices tend to be relative rather than absolute. Oldenquist puts this point stronger saying: ‘Doing x rather than y is the *fundamental* meaning of choose.’²³⁰ This relative nature of choosing is not mentioned by Raz, but at least implies something significant. If there has not been deliberation about what I ought to do, for instance what I ought to drink at a party, it seems essential that the intentional action taken is in response to a given set of actions offered to me and so exists in relative terms. Put differently: perhaps the relative nature of the act is not essential to what it is to make a choice, but that the act is relative to a number of options it is a common contingent feature of the kinds of intentional acts that do not follow the requisite kind of deliberation to count as a decision.

This discussion must be caveated by noting that there is no consensus on the difference between choosing and deciding. According to Wiggins Aristotle says that choice is ‘a voluntary act preceded by deliberation.’²³¹ So the degree of agreement about what it means to make a choice versus decide should not be overstated. Although given the importance of deliberation

²²⁹ Harry G Frankfurt, *The Importance of What We Care About: Philosophical Essays* (Cambridge University Press 1988). 172

²³⁰ Oldenquist (n 42). 97

²³¹ David Wiggins, ‘Deliberation and Practical Reason’ (1975) 76 *Proceedings of the Aristotelian Society* 29. 30

in Aristotle's meaning of choice, and given what he thinks choices demonstrate about one's virtue,²³² I wonder if Wiggins through Aristotle is drawing the same kind of distinction but in a different way. If the salient point is that there is a difference between acts that follow and conclude²³³ deliberation, and those where deliberation is not a necessary prerequisite for the act. This distinction is useful for thinking about what voters do when they vote, and whether they do really make a decision at all.

4. Voting, Choices, and Deliberation

The examples of Jones and the Martini draws out some of the differences between decisions and choices. The same is true of voting. A voter may well have deliberated and decided to vote for the 'Wolf in Sheep's Clothing' party: but not necessarily. Voters need not have deliberated and come to a decision about how to vote. They might have flipped a coin, they might have chosen randomly. This is the prerogative of voters in democracies. If I do decide to vote for a particular candidate or particular party, though, I make that decision individually. How will *I* vote; which box will *I* place an X in? Even if I think I have a duty to vote in the best interests of the country, the decision I reach about how to vote is my decision about what I think is best. It is not what my community or family think is best for everyone, although those decisions might overlap, that is not what my choice is when I vote myself. Whatever other processes are happening in a democracy, which may well include a series of deliberative forums, the act of voting itself is a choice that must be decoupled from that deliberative process. Those processes

²³² 'Choice is thought to be most closely bound up with virtue, and to discriminate characters better than actions do.' *ibid.* 30-31

²³³ It is a key feature of a decision for Raz that it brings an end to deliberation. He says 'To make a decision is to put an end to deliberation. It is also to refuse to go on looking for more information and arguments and to decline to listen to them when they crop up in one's mind or are suggested by other people.' Raz (n 213). 490.

may well involve deliberation *about* a decision, but this is not deliberation to *make* a decision. Additionally, and as Frankfurt's point above makes clear, the decision to vote for X is not the same as voting for X. The decision is the intention to act as a result of the deliberation. Let me say more about the difference between deliberating *about* a decision and deliberating to *make* a decision.

Those who argue that referendums are instances of group deliberation and decision-making are right to argue that deliberation is a necessary response to disagreement, and a necessary feature of democratic decision-making. Where this argument goes astray is with the problem of large numbers and the act of voting itself. These are problems that deliberative democrats are well aware. Tierney argues:

The kind of discursive deliberation that can take place within a small group is not possible, at least not in the same way, at the macro level. But still there is the possibility that people can be encouraged to reflect on the issues, to learn more about them, and then to engage in a more attenuated national process of communicative deliberation.²³⁴

The challenge is what exactly Tierney means by a national process of communicative deliberation. I have no quarrel with this view if this attenuated national deliberation is *about* a decision, but that does not seem to be either Tierney's view in particular or the view deliberative democrats in general. His view seems to be that this deliberation is a necessary part of how citizens come together to *make* a decision. Deliberative democrats are right to argue that deliberation is demanding and that it is an essential part of the response to disagreement, but it is unpersuasive to argue that this is what is happening when voters cast their ballots in referendums or indeed other democratic processes. It may well be that voters

²³⁴ Tierney (n 22), 213

individually deliberate before they cast their ballots, and that they will vote is an additional reason to deliberate it, but if that deliberation exists it precedes a series of individual choices that are aggregated; not a collective choice. The electorate is not the right kind of group, and voting the right kind of action, for the requisite deliberation to occur for decision-making. The electorate is not the right kind of group because it does not have (i) a clear membership where (ii) the meaning of that membership is uncontested. Voters might even, for instance, come to the voting process with different views about whether a referendum or election is rigged. They may well participate in an attenuated process of communicative deliberation as Tierney suggests, but not necessarily. Given that deliberation is necessary for decision-making, and that it is not necessarily the case that voters participate in this collective deliberation process, I am not persuaded that a vote should be understood as an instance of collective decision-making. Voting may well be an individual decision, but I do not think it can be a collective one. Instead, for large groups, representatives must deliberate on behalf of the group and supply this joint intention. The distinction between choices and decisions better reflects the options and opportunities voters had when they vote. When I vote I cannot propose the candidate I wish were on the ballot, or answer the referendum question I think ought to have been asked. I am not deliberating from first principles; I am making a choice given the options available to me. Before I vote there was a prior decision-making process about what the options would be. Distinguishing between the acts of choosing and deciding is necessary for understanding their relationship to deliberation.

Voting is one of the most important, if not the most important actions in a democracy. None of this is to suggest that voting is not an important decision, or that making a decision is never part of the act of voting. The claims instead are these: (i) the act of voting is not the same as the decision of who or what to vote for, (ii) the act of voting might be the result of a decision

to vote for someone in particular but not necessarily (it could be the result of a coin flip), (iii) even if one votes thinking about how their decisions affect others, it is still an individual rather than a collective decision. This third claim has not been defended in sufficient depth, so I will now endorse an alternative account of voting itself drawn from the tradition of liberal democracy.

5. An Alternative Conception of Voting

Is voting an instance of voters, or The People, making a decision together? Do voters form a joint intention to deliberate and take a particular action? It will be argued here that voters do not decide together, but first consider the best argument that they do. Kutz argues that voting must be a collective act because voting has no point unless people vote together Kutz says:

To put the point positively, individual voting will be reasonable when collective voting is conceived as a genuinely joint exercise of self-determination—when it is, for example, conceived “epistemically,” in Jules Coleman’s and John Ferejohn’s phrase, as an attempt to work out a collective judgment of what we together ought to do.²³⁵

Kutz is arguing here that individual voting is only reasonable when it is collectively reasonable. I am not persuaded by this view. The fact that other people are not turning out to vote, for instance, does not mean I have no reason to. Perhaps Kutz would say this is not what he means here. The point is that individual voting is constitutive of a larger collective process of voting, the whole process is necessarily a collective act. This idea that voting is a joint, collective,

²³⁵

Christopher Kutz, ‘The Collective Work of Citizenship’ (2002) 8 *Legal Theory* 471. 491

expression of self-determination is a view shared supporters of referendums in both general and in particular. Gardner rightly challenges Kutz's approach and offers a better view:

Voters, it seems to me, are best regarded as individual petty bureaucrats who each play an individual role as a tiny individual cog in a huge political machine, each serving as a distinct check and balance on the overmightiness of other larger cogs (such as the legislature and the executive.)²³⁶

On Gardner's view, voters' actions interact, as cogs in a machine do, without voters intending to act together, or intending to act together in such a way as to amount to an instance of collective decision-making.³ Gardner goes onto say:

When democracy is faring well, mutual voter ignorance and the consequent impossibility of adjusting one's intentions to other people's intentions (let alone having *joint* intentions) are a strength of the system not a weakness...The importance of there being a large number of cogs with widely different views and attitudes is sufficient to justify the existence of a social rule...that all are to vote. It is also a reason for each voter to vote irrespective of whether he or she is aware of the case for its existence. Conformity to the rule works as an invisible hand mechanism.

He also says that:

To fulfil their constitutional rule well, individual voters need not be aware of the intentions and actions of their fellow voters and indeed have reason not to adjust their own actions and intentions to the intentions and actions of their fellow voters even when they do know.²³⁷

In this passage Gardner identifies the central challenge for those who seek to show that voting involves joint intentions. What is being jointly intended? Without a satisfactory answer to this question of what is being jointly intended, the claim that The People as a collective agent make decisions together is difficult to make. So consider some possibilities of what the joint intention might be. Is the joint intention of voters to participate in the process of voting or to endorse a

²³⁶ John Gardner, 'Reasons for Teamwork' (2002) 8 Legal Theory 495. 509

²³⁷ *ibid.*

particular outcome? The view seems to be the former, to participate in the process of voting, but this view creates another set of problems for the argument. These problems include (i) the intention to participate in a process is not same as an intention to make a decision, and more generally (ii) it is unclear what this intention to participate entails and requires. If the claim is that voters intend to participate by voting, this is analogous to arguing that the players on both teams in a football match intend to play the game. All of the players playing together may have a loose sense of collective intentionality, but instances of joint intention require more than this. They require participants to intend to work together for a shared goal, for instance to win a match. The aim is more than to participate. Kutz might claim that two sides playing together require joint intentions because, for instance, all of the players share acknowledgement of the referee's authority and accept the rules of the game and outcome as legitimate. Shapiro makes a related claim arguing that the acceptance of a shared plan is enough for massively shared agency.²³⁸ I agree with Shapiro and Kutz that playing together requires collective intentions, but I disagree about how players and referees interact and whether their intentions and goals are shared. This distinction between collective intentionality and joint intentions is part of Gardner's point about the cogs in the machine. While Gardner argues that it is a mistake to see voting as an instance of collective decision-making, he does say that the actions of voters are connected. The question is how the actions and intentions of voters are connected and whether the act of voting is in any sense shared. I think that when voters cast their ballots they all individually make choices that, when aggregated together, amount to a choice taken by the group. The choices of all voters are connected because they are made (i) through the same

²³⁸ 'We can now see that massively shared agency is indeed possible in the face of alienation. In order for a group to act together, they need not intend the success of the joint enterprise. They need only share a plan. That plan, in turn, can be developed by someone who does intend the success of the joint activity, or at least so hopes. As long as participants accept the plan, intentionally play their parts, resolve their disputes peacefully and openly, and all of this is common knowledge, they are acting together intentionally.' Scott Shapiro, 'Massively Shared Agency' in Manuel Vargas and Gideon Yaffe (eds), *Rational and Social Agency: The Philosophy of Michael Bratman* (OUP 2014). 39

mechanism (ii) all voters are presented with the same choice. Aggregation is different from joint intention, though, because compiling many choices made discreetly by different individuals is fundamentally different from deciding jointly. Furthermore, there is a difference between shared actions and intentions. While it might be the case that the *physical act of voting* is shared, everyone participates in the same process, the intentions to participate in that process are not shared. It is something more like running a marathon rather than playing in a symphony or on a football team. All individuals undertaking that activity share in the same process, run the same race, but they do not the requisite intention to undertake that activity jointly. It is possible to run a marathon as a team, to vote as a block, but this is not constitutive of the act of running a marathon.²³⁹ When determining what is held in common when voting, it is necessary to distinguish between shared physical intentions and shared mental intentions. Just because voting on its own is not an instance of group decision-making, though, does not mean it has no significance. Referendums are decision-making processes, but the *voting stage of referendums alone* is not an instance of decision-making. The point instead that decision-making is not the best way to characterize the *voting stage* of a referendum, and that when this stage is not understood as an instance of decision-making, the arguments for direct and two-track democracy are harder to make.

The approach to voting taken here reflects what Riker calls the liberal view, which he contrasts with the populist approach to voting which is closer in line to the position advocated by Kutz. Kutz argues that voting is an intrinsically valuable process and constitutive of collective participation in democracy, which reflects the Rousseauian instincts in the

²³⁹ I think this example of running in a marathon is also salient because of the way that runners might experience it. There is a sense of excitement and belonging that might follow from undertaking this act with a large group of other people, but nothing follows from that about the character of the act itself.

populist tradition of voting.²⁴⁰ The aim here is to challenge this approach and to endorse an alternative, liberal approach to voting. On the liberal or Madisonian approach, voting is a way of limiting the power of representatives.²⁴¹ The liberal approach to voting is only committed to arguing that voting is a relative expression of preference given a finite set of options, and that expressing these preferences are a way of giving direction to representatives. While voting may well have many purposes and other sources of value, it should not be understood as an act of consent, the embodiment of political will, or making a decision-directly.

One reason that the liberal approach to voting is to be preferred to the Rousseauian version, particularly in the democracies of interest to this thesis that are large and pluralist, is for social choice reasons: particularly as applied by Riker.²⁴² Riker demonstrates the many different reasons that motivate individual preferences, and how quickly mandates for people and propositions can be disaggregated, and how seemingly massive coalitions can quickly come apart.²⁴³ Indeed, the larger the coalition is, the more likely it is to dissolve.²⁴⁴ Riker's essential idea is that: 'The outcomes of voting are not necessarily fair and true amalgamations of voters' values...these outcomes may be meaningless, and the majorities that make outcomes are

²⁴⁰ William Riker, *Liberalism Against Populism* (Freeman and Company 1982). 11

²⁴¹ *ibid.* 12

²⁴² It might be countered that the concerns of social choice theorists doom liberal advocates of voting as well as populist ones. Not so. The reason that the social choice arguments do not damage the liberal arguments in the same way is that the liberal arguments make different claims about what voting can achieve and is for. For liberals, voting is an imperfect tool as part of a democratic machine. Social choice arguments do create some problems for the liberal conception of voting, namely how can votes be used to give direction to representatives if the meaning of those votes is necessarily unclear? The difference is by treating votes as a tool to guide representatives, the necessity of looking beyond votes to understand voters' reasons, conduct on-going consultations etc. is clear. If voting is an embodiment of the will of the people then the dangers are of inflexibility and treating votes on matters of policy static and finite expressions of preference rather than an on-going process of providing direction to those who act on their behalf.

²⁴³ *ibid.* 233

²⁴⁴ *ibid.* 214

themselves in flux.’²⁴⁵ The aim here is not to argue that votes are meaningless, but rather that the language of treating votes in referendums as clear decisions is misleading.

6. The Case for Voting as an Authoritative, Exceptional Act

It might be argued that voting in a referendum with a constitutional content is not itself an instance of a decision, but it remains an authoritative act. That is to say that the outcome vote in a referendum binding in a way that, for instance, commitments made in a manifesto pledge are not. It might be too that even if the outcome of a vote is not a decision in a philosophical sense, there are nevertheless good reasons to *treat it as if it were*. It might be useful to treat a referendum vote as an authoritative act for the same reason that decisions by judges can be treated as authoritative, higher-order utterances. That is to say: there are a set of myths that are required to hold democracies together, and these myths themselves can offer legitimacy.²⁴⁶ These sorts of myths can offer legitimacy because actions are real if they are real in their consequences.²⁴⁷ My support for the view that there are good reasons to treat referendum votes as authoritative depends on the meaning of authoritative. I agree that politically a referendum might be a far stronger political limitation on the actions of representatives, even if it is not legally binding. There are all kinds of contingent political reasons why the outcomes of votes in referendums may be more politically salient than protests and elections. These contingencies themselves, however, are not demonstrations that referendums are exceptional processes or instances of high-order lawmaking. Referendum outcomes may be more politically influential

²⁴⁵ *ibid.*

²⁴⁶ ‘Myths accomplish real tasks such as the justification of power, authority, ideologies and political acts. ‘David Adams Leeming, *The World of Myth: An Anthology* (OUP 1992). 2

²⁴⁷ The Thomas theorem was originally formulated in William Isaac Thomas and Dorothy Swaine Thomas Thomas, *The Child in America: Behavior Problems and Programs* (A A Knopf 1928).

than protests or manifesto pledges, but that influence itself reflects structural features of referendums rather than a philosophical rationale that those outcomes are authoritative in a way that votes in elections are not. It is unquestionably rhetorically powerful to say that more people voted for Brexit, for instance, than have ever voted for any political proposition. This does not reflect any higher order feature of the referendum, it reflects a set of political contingencies about how political will is aggregated in the United Kingdom. Furthermore, given the necessity of representatives in the process of decision-making, I do not think the normative reasons to treat the outcomes of votes as decisions or authoritative utterances succeed either. Indeed, the reverse is true. Referendums are more effective when voting is only one part of a referendum process with opportunities for voters to engage at different stages. It is right to say that referendum votes are sometimes treated as authoritative decisions, but I do not think this reflects the best way to think about what they are either philosophically or practically.

7. Conclusion

Challenging the treatment of referendums, especially referendums with constitutional content, as exceptional democratic processes requires challenging a set of connected ideas. Some of those ideas concern the character of voting and what it means to make a decision. This chapter has argued that the treatment of voting as an instance of decision-making misrepresents the process both practically and normatively. The better approach is to treat referendums as limits on the actions of representatives, and as choices about decisions made by representatives rather than decisions themselves. This distinction between decisions and choices is carved up in different ways by different theorists, but it reflects a common distinction between actions that require deliberation and those that do not. Deliberative democrats are right to argue that deliberation is a necessary feature of both decision-making in general and referendums in

particular. My disagreement with deliberative democrats is that I do not think the electorate is the sort of group that can deliberate, or that voting and its attendant processes are instances of deliberation. Voters may well deliberate about a decision, but they do not deliberate to *make a decision*. Representatives are required for deliberation and consequently for decision-making. The required representatives need not be legislators, they can be citizens acting in a constitutional convention, but representatives are necessary for all decision-making: including referendums. The necessity of representatives for all decision-making processes creates a difficulty for two-track democracy. This challenge is the subject of the next chapter.

Chapter Five: The Normalization of Referendums

1. Introduction

The presuppositions that have been challenged in this thesis so far are that referendums are (i) synonymous with votes, (ii) instances of direct democracy, (iii) votes for issues instead of representatives, (iv) moments when The People come together as a collective body, (v) to make decisions and (vi) express consent to propositions. Together, these presuppositions form a view of referendums and another presupposition: referendums with constitutional content are themselves constitutional processes. These presuppositions reflect a view of democracy with two-tracks: one for people and one for politicians. Two-track democracy is the foundation for the case of referendums as exceptional democratic processes. This chapter will challenge this view of democracy in order to challenge two ideas: (i) that there are some decisions that should not be made by representatives (ii) the second is that when representatives should not make decisions then the decisions should be made by referendum instead. The aim of challenging these two ideas is to contest arguments that go like this: (i) certain questions (particularly constitutional questions) should be answered directly by The People rather than representatives, (ii) referendums put questions directly to The People, (iii) therefore referendums are either the best, or only, democratic device to be used to answer these questions. Supporters of two-track democracy disagree about why democracy has these two tracks and how they are related, but they think there are some (types of constitutional) decisions that cannot or should not be made by representatives and instead should be made by The People through direct democracy. It is worth stressing that the disagreement here is not with the conclusions of those who think democracy has two tracks, but rather with their arguments. It is often useful to when questions with constitutional content are put to a referendum. The point

is that constitutional referendums should not be used *because* democracy has two tracks; this is not the right rationale. It is not that representatives are unable to make decisions because those powers were never passed to them by voters, or because of the constituent nature of popular sovereignty. It is because there are good reasons in particular cases to put questions to a referendum. This chapter will conclude by introducing an alternative justification for democracy, a piecemeal account, to demonstrate the limitations of two-track democracy in making a case for referendums.

This challenge to two-track democracy has three parts. I will first introduce a range of different versions of two-track democracy to explain what this position is and what its commitments entail. Second, I will raise some challenges to two-track democracy. Third, I will show that two-track democracy sometimes gets the right answers, but for the wrong reasons. I suggest an alternative account of democracy provides a better foundation for referendums. My alternative is to suggest that democracy is justified for both instrumental and procedural reasons, that there are broad instrumental and procedural reasons to hold referendums in general, but that those reasons will play out differently from case to case.

2. Two-Track Democracy

The idea that democracy has two tracks is a familiar one and comes in a variety of forms. To say someone takes a two-track view of democracy is to say that they think there are some decisions that should not be made by the representatives and ought to be made by people, or The People, instead. One version of this view is dualism. The term dualism comes from Ackerman, who says that it is a feature of certain constitutions.

Above all else, a dualist Constitution seeks to distinguish between two different decisions that may be made in a democracy. The first is a decision by the American people; the second, by their government.²⁴⁸

The politics of politicians is the ordinary first-order process of lawmaking; the politics of ‘We The People’ is a higher-order level of lawmaking. This is because The People are the ultimate source of authority in a democracy. While decisions made by the government occur daily, decisions made by The People are exceptional moments in which people: ‘Engage in acts of citizenship that, when successful, culminates in the proclamation of higher law in the name of We the People.’²⁴⁹For Ackerman, this process where The People proclaim higher-order law is very demanding. He describes it as an instance of quasi-direct democracy in which there is a referendum, but only after a constitutional convention.²⁵⁰ Ackerman’s version of dualism is unique in that he does not employ the idea of direct democracy in the way that other two-track theorists like Tierney, Leyland, and Galligan do. He recognizes that constitutional referendums are contingent on what he calls quasi-direct democracy.²⁵¹ Nevertheless, Ackerman is committed to the idea that in the higher-order process of lawmaking The People make decisions collectively instead of their representatives. His commitment to this position can be seen already in his definition of dualism distinguishing two distinct orders of decision-making: one for ‘We the People, higher-order lawmaking, and one for ‘We the Politicians,’ ordinary lawmaking.

²⁴⁸ Ackerman (n 1). 6

²⁴⁹ *ibid.* 8

²⁵⁰ *ibid.* 7

²⁵¹ Bruce Ackerman, *We the People, Volume 2: Transformations* (Belknap Press 1998). 83

Two-track and direct democracy are connected. Tierney, Bogdanor, and Galligan say that direct democracy in general, and constitutional referendums in particular, are required for certain types of constitutional change. Constitutional referendums are necessary given the nature of democracy and popular sovereignty. In these circumstances, that referendums are instances of direct democracy and bypass representatives is part of their rationale. Challenging the necessity of direct democracy in the process of constitutional change involves challenging two ideas. While Ackerman builds his dualism on quasi-direct democracy, Tierney explicitly uses the idea of direct democracy for one of his tracks of decision-making. Like Ackerman, Tierney argues that there are two tracks of decision-making, one for ‘We the People’ and one for ‘We the Politicians.’²⁵² There is an ordinary level of lawmaking in which politicians make decisions and represent people on a daily basis, but constitutional referendums are a collective form of decision-making which expresses the higher-order will of The People. Tierney argues that constitutional referendums, and only constitutional referendums, can be referred to as devices of direct democracy. For Tierney a referendum on a legislative question is an instance of representative democracy, but a constitutional referendum is a device of ‘direct democracy.’ He says: ‘...Even the categorization of legislative referendums as an instance of *direct* as opposed to *representative* democracy is perhaps something of an over-simplification.’²⁵³ These constitutional referendums are instances of direct democracy because they invert the social contract and replace representatives. He says that constitutional referendums are:

A means by which representation is itself supplanted, returning *direct* power to the people; in other words as some kind of reversal of the original act of

²⁵² ‘This builds upon work within the republican revival that focuses upon constitutional politics as distinct from ordinary politics and in doing so stresses the desirability of engaging more overtly with ordinary citizens, particularly at the constitutional level per Ackerman’s distinction between “the will of We the People” and “The acts of “We the Politicians.”’ Tierney (n 22). 10

²⁵³ Tierney (n 1). 365 (emphasis in original).

transference, or at least as a temporary return of power to the people. In such a conceptualisation it is important to maintain the distinction between those referendums which displace only first order (legislative/functional) representation and those that interpose direct popular decision-making at the second order (constitutional/symbolic) level, since what is being reclaimed in the name of the people directly in the latter situation is not just the capacity for direct will-formation and expression, but also competence to control the definition of a people's self-identity, and that identity's constitutional manifestation. This distinction between the two levels of representation therefore has implications for the legitimacy of referendums.²⁵⁴

Referendums supplant representatives because, like Ackerman, Tierney thinks that constitutional referendums are instances of higher-order lawmaking in which The People come together and proclaim the higher-order law in their name. He says:

At the first order level of ordinary legislation, politicians and political institutions represent the people functionally in terms of will-formation and expression. And at the constitutional level...the institutions of the constitution come to represent the people in acts of will-formation and expression when the constitution is amended by institutions in place of and in the name of the people.²⁵⁵

There are another group of theorists who advocate for the use of constitutional referendums on a similar rationale to Tierney and Ackerman's, but they make a different argumentative move in claiming that democracy has a second track. This argumentative move is to invoke Locke's claim that some decisions cannot be made by representatives because the power to make such decisions was never transferred to them by The People. Bogdanor, for instance, lays out his case for constitutional referendums in Lockean terms saying:

The electorate, it might be said, entrust their MPs as agents with legislative power; but they give them no authority to transfer this power. Such authority, it is natural to suggest, can be obtained only through a specific

²⁵⁴ *ibid.* 365 (emphasis in original).

²⁵⁵ *ibid.* 367

mandate, that is, a referendum. The idea that power is entrusted to the nation's representatives only for specific purposes reflects one of the central principles of liberal constitutionalism, and has its origins in Locke. 'The Legislature' he claims 'cannot transfer the power of making laws to any other hands. For it being but a delegated power from the People, they who have it cannot pass it to others.' There is thus a clear and principled justification for requiring a referendum to be called whenever it is proposed to transfer the powers of Parliament.²⁵⁶

Bogdanor's point here is that because people entrust their power to their representatives, these representatives cannot transfer it on further. So, for Bogdanor, there is 'a clear and principled justification' for holding constitutional referendums on questions which transfer powers to and from Parliament. Galligan makes a similar claim. Like Bogdanor, he says that the case for constitutional referendums is a natural extension of Locke's arguments:

According to the early champion of liberal politics, John Locke, only government that has the consent of the governed is legitimate. While Locke did not advocate popular referendums and was no democrat, his theory of legitimate government is based squarely on the consent of those governed, and in a constitutional democracy, the appropriate mechanism for consent, by way of extending Locke is the constitutional referendum.²⁵⁷

Again, Galligan is arguing that constitutional referendums are opportunities for voters to:

Express their democratic sovereignty through consent and in so doing they constitute themselves as the sovereign body that makes authoritative decisions about their system of government.²⁵⁸

As Galligan notes above Locke was no democrat. Locke was not arguing for two-tracks for democracy in the way that those who invoke his arguments are. The claim is only this: certain arguments for constitutional referendums employ one part of Locke's argument to make the case that democracy has two tracks. The thought is that democracy must have two tracks

²⁵⁶ Bogdanor (n 2). 76-77

²⁵⁷ Galligan (n 9). 111

²⁵⁸ *ibid.* 109

because representatives cannot make certain decisions. They cannot make certain decisions because to do so would be *ultra vires*. The power to make those decisions was never given to them by people. Even though they do not invoke it directly, this type of approach to legitimate authority informs Ackerman and Tierney's two-track approach to democracy too. Consider Locke's argument in more detail.

3. Locke and the Limits of the Legislature

When theorists like Bogdanor and Galligan draw on Locke, the passage they have in mind is where Locke says:

*The legislative cannot transfer the power of making laws to any other hands: for it being but a delegated power from the people, they who have it cannot pass it over to others. The people alone can appoint the form of the commonwealth, which is by constituting the legislative, and appointing in whose hands that shall be. And when the people have said, We will submit to rules, and be governed by laws made by such men, and in such forms, no body else can say other men shall make laws for them. The power of the legislative, being derived from the people by a positive voluntary grant and institution, can be no other than what that positive grant conveyed, which being only to make laws, and not to make legislators, the legislative can have no power to transfer their authority of making laws, and place it in other hands.*²⁵⁹

The limit Locke places on legislatures is on their capacity to change or transfer the powers transferred to them from the people. Locke's point is that because power resides in the people, it is merely delegated to representatives. To repeat, Locke says: 'the *legislative* neither must nor can transfer the power of making laws to any body else, or place it any where, but where the people have.'² This is the *nemo dat quod non habet* principle; representatives cannot transfer on what they do not have.

²⁵⁹ John Locke, *The Second Treatise of Government* (C. Macpherson ed, Hackett 1980). §141

For Bogdanor and Galligan, it is a short move from Locke's account of the limits of the legislature to the case for constitutional referendums. Bogdanor says it is a 'principled extension'²⁶⁰ and Galligan says the constitutional referendum 'must be the appropriate mechanism.'²⁶¹ They think this move is a short one because if the power given to the legislature is merely temporarily delegated from The People, there is then a need to consent to any changes to the terms of this delegation. Referendums are devices that are sufficient to evince that consent. This sort of rationale is in line with the rationale offered by Tierney's version of two-track democracy. Tierney also thinks that The People are the ultimate source of authority and so only they can change the terms of that authority through a process of higher-order lawmaking where they make decisions directly. For Tierney, this requires a series of processes that culminate in a referendum but not for explicitly Lockean reasons. Supporters of two-track democracies are committed to the idea that there are some decisions that should not be made by representatives and that there are some decisions that should be made by people (or The People.)

This first third of this chapter introduced two strands of argument that mostly run in parallel to each other but overlap in certain places. They both argue that there are two tracks of decision-making, ordinary first-order decision-making and higher-order decision-making, but some invoke Locke's argument in support of this claim and others do not. Even without invoking Locke directly, though, his approach to authority informs all arguments for two-track democracy. It will be argued that this is not a good way to think either about democratic

²⁶⁰ Bogdanor (n 2). 77

²⁶¹ Galligan (n 9). 110

authority. The further problem is that even if this approach to democratic authority were correct, the case for constitutional referendums would not follow from it. The next section of this chapter raises three challenges to the idea that there are two tracks of decision-making in democracies.

4. Three Challenges to Two-Track Democracies

Two-track democracy is not synonymous with a view of legitimate authority where The People consent to authorities by transferring their power to representatives in a limited way, but they are closely related. Two-track democracy reflects, at least in part, that view of legitimate authority. By challenging the act of consenting, the content of consent, and the possibility of delegating power in the first place, this section challenges not only this approach to democracy and legitimate authority, but the role for constitutional referendums in constitutional change too.

4.1 Consent

The first problem underlying the two-track case for democracy and constitutional referendums is the act of consent. There is a prevailing view in both strands of two-track democracy, those who rely on Locke directly and those who do not, that constitutional referendums are opportunities for The People to express their consent. Tierney says: ‘the one job that a

referendum can do that no other device can is to provide the legitimacy that comes with a mass act of consent'²⁶² and that:

We have observed that one way to understand the role of referendums is to envisage them as a means by which representation is itself supplanted, returning direct power to the people; in other words as some kind of reversal of the original act of transference, or at least a temporary return of power to the people.²⁶³

Similarly, Galligan thinks that constitutional referendums are the 'appropriate mechanism for consent.'²⁶⁴ Bogdanor uses a more Lockean phrase saying that constitutional referendums '[transfer] powers' to parliament.'²⁶⁵

It is unhelpful to think of referendums as devices that can express consent for some of the same reasons that it is unhelpful to think of referendums as instances of collective decision-making. It is not clear if The People consent collectively, which seems to be what Tierney is saying, or they are each individually consenting and the consent of different individuals is aggregated together. If the argument is the former then the same problems of joint intention hold from before. If the argument is the latter, then (at least some) people are not consenting at all. Or at least they are consenting to a process rather than a decision. There is a bigger problem with this approach to consent, though. Consent is used in theories of legitimate authority because it is a democratic act of moral and political significance. It is demanding because much is taken to follow from it. If I consent to something, then there has

²⁶² Tierney (n 22). 55

²⁶³ Tierney (n 1). 367

²⁶⁴ Galligan (n 9). 110

²⁶⁵ Bogdanor (n 2). 77

been a normative shift between the other party and me. Consider the character of this normative shift in more detail.

It is not clear if a constitutional referendum is meant to be an instance of explicit or tacit consent. This is a distinction that Locke makes, but advocates of neither strand of direct democracy do. When Locke distinguishes between explicit and implicit consent he says:

There is a common distinction between express and a tacit consent, which will concern our present case. No body doubts but an express *consent* of any man entering into any society, makes him a perfect member of that society, a subject of that government. The difficulty is what ought to be looked upon as a tacit consent, and how far it binds, i.e. how far any one should be looked on to have consented, and thereby submitted to any government, where he has made no expressions of it at all.²⁶⁶

The case for constitutional referendums seems to rely on the idea of explicit consent. How else to read arguments like: constitutional referendums invert the social contract, as Tierney says? Or that they are authoritative expressions of popular sovereignty, as Galligan argues? When the argument is made that ‘The People intervene directly’ or ‘The People make decisions,’ it seems the commitment of the argument is closer to explicit consent. Further, the thought seems to be that a vote is an explicit expression of consent to a process. This is not a good way to think about voting or consent, but it is widely held. In writing about political obligation, Steinberger says that when voting, ‘participation itself is a consent-constituting activity.’²⁶⁷ He goes onto say:

²⁶⁶ Locke (n 259). §119

²⁶⁷ Steinberger (n 136). 219

The fact is that going to the polls and casting a vote in an election is analogous to sitting down at the poker table. It is a kind of engagement that signals prima facie a belief in the legitimacy of the electoral process and a willingness to accept its outcomes...my decision to join in... indicates not only active acceptance of winnings, should I win, but also an active acceptance of losses should I lose.²⁶⁸

Plamenatz gestures towards a slightly better view, but the tension in his argument shows that there are three unenviable options for those who think voting is an act of consent. Plamenatz says:

When a man votes for a successful candidate to an office he need not express any wish about him; he need do no more than make a mark on a piece of paper or put a pebble into an urn or raise his hand. It might perhaps be said of any one of these actions, that it is an expression of wish, though not in so many words. Surely, to put a cross against the name Smith on a ballot paper at an election is to express the wish that Smith should hold the office for which he is a candidate? But the voter may not want Smith to hold the office; he might think that Smith has no chance of getting elected and may vote for him only for the sake of preventing the election of Brown. Yet, if Smith were in fact elected, it would be odd to say of anyone who had voted for him that he did not consent to him holding office.²⁶⁹

The final sentence from the Plamenatz passage is important because it raises the three unenviable possibilities of what voters are consenting to. If voting is an act of consent, is it consent to a process, an outcome, or to a process leading to a particular outcome? If it is consent to both a process and an outcome, how are those two types of consent related? Is this consent absolute or qualified? Different ways of answering this question have different problems. If the view is that voters are consenting to a process, then it is difficult (for reasons discussed in Chapters Three and Four) to see how this is The People making the decision to consent directly. Further, Tierney says that constitutional referendums are mass acts of consent, not that they are the aggregated consent of many individual acts of consent. This suggests more than consent

²⁶⁸ Steinberger (n 141).

²⁶⁹ John Plamenatz, *Consent, Freedom and Political Obligation* (2nd edn, OUP 1968). 168

to a process. On the other hand, Tierney does not claim that voting is consenting to a particular outcome.²⁷⁰ He must be right about this. The requirement of consent to outcomes goes against the tradition of loyal opposition as built into both presidential and parliamentary systems.²⁷¹ Further, it is anti-pluralist to require that everyone consent or endorse democratic outcomes because it claims universal agreement where none is likely to exist. Instead he says that the aim of a constitutional referendum is to bring people together *to* the point of agreeing.²⁷² Tierney cites Bellamy as saying the aim of a democratic process is for everyone to agree ‘*to* a particular outcome, if not *with* that outcome.’²⁷³ Agreeing *to* an outcome is not exactly the same as agreeing to participate in a process, but it is pretty close. Nevertheless, this approach does not address my concern in Chapter Four that the intention when agreeing *to* an outcome is still not the same as that required *to make* a decision. Even if such an intention does exist, it is an intention to agree to *how* a decision process is made, and indeed to the legitimacy of the outcome provided it has been reached in the right way. This is not sufficient for decision-making and undermines the case for constitutional referendums as devices of direct democracy.

Steinberger, Plamenatz, Tierney, and Bellamy’s larger point is right. Democracies require people to participate in processes such as voting full in the knowledge that their choices may not prevail. The difficulty is in making this argument through the device of consent. The act of consent does not either politically or conceptually capture what is at stake

²⁷⁰ He explains this in his response to Peter Oliver in Peter Oliver and Stephen Tierney, ‘Book Review/Response Constitutional Referendums’ (*International Journal of Constitutional Law*, 25 February 2014) <<http://www.icconnectblog.com/2014/02/book-reviewresponse-stephen-tierney-and-peter-oliver/>> accessed 1 June 2016.

²⁷¹ Grégoire Webber, ‘Loyal Opposition and Political Constitutionalism’ [2016] *Oxford Journal of Legal Studies* 1. 1

²⁷² Oliver and Tierney (n 270).

²⁷³ Richard Bellamy, *Political Constitutionalism: A Republican Defence of the Constitutionality of Democracy* (Cambridge University Press 2007) 74

in these processes. Challenging this idea of consent first requires breaking it down and identifying who exactly is thought to be consenting to what and how. As Kleinig says, consent is a normative sanction that changes the relationship between A and B. He says:

Consent is a three-place transaction in which consent to do something— ϕ — is always given to another party or agent, to whom we will refer as B. So, ‘A consented (to B) to ϕ .’²⁷⁴

What are the three parts of the transaction in the case of a constitutional referendum? A, the party giving the consent, seems to be individuals who are voting. Remember, though, that this approach creates problems for the idea of The People consenting. Collective agents can give consent, but that the electorate can be understood as a collective agent was challenged in Chapter Two. Consider now B, B must also be an agent of some kind. In the case of a constitutional referendum, what does B stand for? It depends on the referendum in question. It might be representatives, the state in general, or the government in particular. This question of the identity of party B is, I think, a serious problem for those who think that referendums are instances of consent. In general, however, the idea of consent is too demanding and an inaccurate representation of the relationship between voters and representatives in constitutional referendums. It is not only the act of consent that is problematic. The content of what is being consented to in referendums creates problems too.

4.2 Content

The second reason to challenge the two-track approach to democracy is the division of labor it proposes between the two-tracks. Can the matters reserved for The People be defined? Recall

²⁷⁴ Kleinig (n 134). 5

that the case for two-track democracy rests on the idea that there are some questions that should not be made by representatives and should instead be made by The People directly. Tierney says that constitutional referendums should be used when questions: ‘Address the location or distribution of ultimate lawful authority within the polity and in doing so implicate sovereign relations between people and government.’²⁷⁵ What does it mean to say that an issue implicates sovereign relations? While he does not invoke Locke as Bogdanor and Galligan do, the thought is still related. The idea is something like this: anything that amends or establishes the terms of the social contract implicates sovereign relations. This is because Tierney says that in a constitutional referendum ‘there is a reversal of the original act of transference originally bringing the power to the people.’²⁷⁶ So while Tierney does not invoke Locke directly, a similar approach to Locke’s underlies his view. There are four situations in which Tierney thinks that sovereign relations are modified and that constitutional referendums are required. For Tierney constitutional referendums are required:

...[to] found new states; to create or radically change constitutions; to establish complex new models of sub-state autonomy; and to transfer sovereign powers from the state to international institutions.²⁷⁷

Tierney’s view seems to be that sovereign relations are restricted to formal constitutional matters, questions about the location and distribution of constitutional authority rather than substantive constitutional provisions. I am not sure how strong this formal and substantive distinction is. Anyone being asked to serve in the military through conscription could reasonably feel that their sovereign relations with authorities had changed. Tierney might reply

²⁷⁵ Tierney (n 1). 360-361

²⁷⁶ *ibid.* 367

²⁷⁷ *ibid.* 360

that while admittedly lines cannot be drawn sharply around what changes sovereign relations, there are clear-cut cases. If you accept that the ultimate source of authority is in The People, then it must be that only The People can change the location and distribution of that authority, and so that constitutional referendums are necessary for certain types of formal, rather than substantive, constitutional changes. I do not think this is the case but assume for the sake of argument that there is a category of formal, constitutional changes of the type Tierney suggests. Tierney is right that there are good reasons to hold referendums in these sorts of cases but not (i) for the reasons he suggests and (ii) constitutional referendums do not perform the role that he suggests they do. To see why Tierney is right for the wrong reasons, consider the character of delegation itself.

4.3 Delegation and Legitimate Authority

The idea of two-track democracy, that there are two tracks of decision-making one for The People and one delegated to politicians, is informed by a view of legitimate authority which in turn is informed by a particular version of the social contract. This can be seen in Tierney's argument when he argues:

The people as democratic reality rather than as represented constitutional symbol is *the only* legitimate source of democratic authority. It is a short step to argue for a constitutional referendum on the basis that when an issue that goes to the heart of the constitutional settlement is implicated, then the people should be directly engaged in the decision-making process.²⁷⁸

Further, and as seen already, Bogdanor and Galligan invoke Locke's argument directly. So the view, explicitly or implicitly, is that constitutional referendums are devices that can amend the

²⁷⁸ *ibid.* 372 (emphasis in original).

social contract. The social contract is not the only way of expressing popular sovereignty, and there are reasons to question it. Is the idea that powers are transferred to representatives on a limited basis the best way to understand legitimate authority? Are powers transferred to representatives at all? I am doubtful on both counts.

The root of the idea of two-track democracy is that there are some decisions that cannot, or should not, be delegated to representatives. This section challenges the claim directly by challenging the idea that any issues are ever delegated to representatives in the first place, or if this is the right way to think about what representatives do. Representatives can be delegates of their constituents without taking the view that people delegated their power to them through some sort of contractual or quasi-contractual mechanism, implicit, explicit, or otherwise. Two-track democracy presupposes that there is a social contract and that this is the best way to understand legitimate authority. This is not the most compelling way to think about legitimate authority, and it is not obviously right. Recall Locke's claim once again:

The power of the legislative, being derived from the people by a positive voluntary grant and institution, can be no other than what that positive grant conveyed, which being only to make laws, and not to make legislators, the legislative can have no power to transfer their authority of making laws, and place it in other hands.²⁷⁹

The term 'voluntary grant' is important here. The power can come from The People without being transferred to representatives. Representatives can act on behalf of their constituents not because the power to do was transferred to them, but rather because this is the mechanism for decision-making that has evolved over time. The case for the social contract does not follow inexorably from popular sovereignty, even though Locke thinks it follows deductively. All

²⁷⁹ Locke (n 259). §141

sorts of authorities can be legitimate for all sorts of reasons without challenging the idea that the ultimate source of authority is The People. An account of what makes authority legitimate is of course far beyond the scope of this thesis. The claim here is just to say that I doubt legislators have authority *because* their powers were transferred to them by The People either through elections or by any other means. It is not obvious that the best way to think about representatives is that they have their powers delegated to them by The People. I suspect that representatives have these powers because those institutions developed that way over time. That gives them their *de facto* legitimacy. Their *de jure* legitimacy comes from their ability to make decisions that are defensible over time. In contrast to two-track democracy, mine is an unromantic view. Two-track democracy is built on the idea that the social contract is the foundation for legitimate authority and there are many well-known problems with such an approach which Locke himself engaged with and can be traced back to Hume.²⁸⁰ Who consents to the proposed change? How? What have they consented to? Some of these challenges can be bracketed through the idea of implicit rather than explicit consent to the social contract, but the danger of constitutional referendums is that they commit supporters of two-track democracy to explicit consent. In this way, two-track democracy undermines the case for constitutional referendums, and constitutional referendums undermine the case for two-track democracy too.

²⁸⁰ 'It is in vain to say, that all governments are, or should be, at first, founded on popular consent, as much as the necessity of human affairs will admit. This favours entirely my pretension. I maintain, that human affairs will never admit of this consent, seldom of the appearance of it; but that conquest or usurpation, that is, in plain terms, force, by dissolving the ancient governments, is the origin of almost all the new ones which were ever established in the world. And that in the few cases where consent may seem to have taken place, it was commonly so irregular, so confined, or so much intermixed either with fraud or violence, that it cannot have any great authority. My intention here is not to exclude the consent of the people from being one just foundation of government where it has a place. It is surely the best and most sacred of any. I only pretend, that it has very seldom had place in any degree, and never almost in its full extent; and that, therefore, some other foundation of government must also be admitted...Can we seriously say, that a poor peasant or artisan has a free choice to leave his country, when he knows no foreign language or manners, and lives, from day to day, by the small wages which he acquires? We may as well assert that a man, by remaining in a vessel, freely consents to the dominion of the master; though he was carried on board while asleep, and must leap into the ocean and perish, the moment he leaves her.' David Hume, *Essays Moral, Political, and Literary* (Eugene F Miller ed, Liberty 1777).

5. Right for the Wrong Reasons

Those who make two-track arguments for direct democracy come to the correct conclusion about constitutional referendums but for the wrong reasons. It is right that there are some decisions that should not be made by legislators. This is a different question, though, then whether or not these decisions should be made by representatives. Representatives and legislators are not synonymous. Legislators are a sub-category of representatives who might not be well placed to make decisions for various reasons. But it does not follow that decisions should then be made by The People instead. There are at least two alternatives available.

Some of the constitutional questions flagged as changing sovereign relations are better described as ‘changing the rules of the game.’ In those circumstances, it makes sense that those who benefit from changes to the rules to the game, such as legislators, not make the rules.²⁸¹ This argument is different from the *ultra vires* rationale that representatives never had such powers in the first place. The argument is instead that it would be a conflict of interest for legislators to make those decisions. Representatives who may benefit from changes to an electoral system, for instance, should not be making decisions about those systems. Constitutional changes are not necessarily of greater importance than other policy issues, but as matters of fundamental law they are by definition significant. Constitutional changes might

²⁸¹ It might be thought that the category of changes to the rules of the game is wider than suggested here. That legislators benefit from all sorts of substantive changes to the law, not only matters concerning how they are elected. This concern is right, but it touches on a different point. It is right, for instance, that questions of remuneration for representatives are delegated to an independent commission. There are many substantive questions that are not properly addressed by representatives. The question is in those cases if the appropriate response is to give voters choices instead. I think those issues which concern the election of representatives are rightly put back to those who will do the electing: voters.

also be more likely to give rise to the sorts of disagreements that referendums are better placed to address.²⁸² This is all to say: there are many contingent reasons to have referendums and those contingent reasons are likely to be especially prevalent for constitutional questions. This sort of reasons are informed by and inform the alternative view of democracy that this account is based on.

Supporters of two-track democracy are right for the wrong reasons. This matters because answering the question of why referendums should be used makes a difference in answering how they should be used. When referendums are seen as an alternative track of decision-making separate from representative processes, they are used for a different purpose and they are situated with respect to representatives in a different way. Chapter Seven sets out an alternative set of principles for the use of referendums based on their reliance on representatives and representative democracy.

6. Piecemeal One-Track Democracy

In contrast to two-track democracy, the alternative view of democracy put forward here is that there is only one track to democracy which is to say that there is only one order of decision making. One way to think about this alternative is to think about the vision put forward by Griffiths who says:

In this country we have stayed clear of one bit of nonsense which is commonly advanced in countries as diverse as the Chinese People's Republic, the Soviet Union, and the United States of America. I mean the view that sovereignty resides in the people who delegate it to their politicians who hold it in trust for them. I suppose John Locke is to blame for offering this particular cover-up for authoritarianism.²⁸³

²⁸² More on this in Chapters Six and Seven.

²⁸³ JAG Griffith, 'The Political Constitution' (1979) 42 *The Modern Law Review* 1. 3

What Griffith argues that there is no higher-order of constitutionalism that is distinct from what happens in politics.²⁸⁴ If constitutional referendums are constitutional processes, they are not constitutional in a way that they can be distinguished from other processes.²⁸⁵

One-track democracy is the view that representatives act on our behalf for a variety of contingent and context-dependent reasons. As argued already, though, that relationship remains constant and representation is part of the idea of democracy itself. One-track democracy is the view that we are always in many ways having many others act on our behalf and we are giving direction to them. That direction can take a variety of forms and does not include elections. That's why a more expansive view of what is constitutional which comes from Griffiths is so much more helpful. On this view representatives are a necessary part of acting on all issues at all times, albeit in different ways and for different reasons. Even in cases like secession that change the relationships between people and their representatives, representatives are still a necessary prerequisite for and part of the referendum process

One feature of two-track democracy which worries me, and one consequence of the presuppositions outlined above, is bracketing the necessity of representation. This is done in the name of democratic deficits and getting people closer to decision-making. This concerns me because it underplays an essential phenomenon in democracies: trust. It must be the case that people can rely on each other and count on others to act on their behalf. They may do this

²⁸⁴ 'The constitution of the United Kingdom lives on, changing from day to day for the constitution is no more or less than what happens. Everything that happens is constitutional. And if nothing happened that would be constitutional also.' *ibid.* 19

²⁸⁵ Griffith argues against a constitutional settlement with a role for referendums as approving laws thought to be of a sufficiently weighty nature. *ibid.* 9

for all kinds of reasons. The idea of supplanting representatives for The People directly even on certain issues concerns me. The core of one-track democracy is that all decision making is the result of a confluence of actions by people and different types of representatives all of the time.

7. Conclusion

This chapter has challenged two ideas. The first is that there are some decisions, usually about constitutional questions, that should not be made by representatives. The second is that when representatives should not make decisions, it follows that they should be made by constitutional referendum. These commitments follow from the vision of democracy as having two tracks. Arguments for two-track democracy vary but they agree that there are two orders of decision-making in democracies: one for ‘We the People’ and one for ‘We the Politicians.’ Supporters of two-track democracy disagree about why democracy has these two tracks and how they are related, but at root they think there are some decisions that should not be made by representatives and instead should be made by ‘direct democracy,’ particularly constitutional referendums. This chapter posed three challenges to two-track democracy. These challenges were (i) whether constitutional referendums were devices of consent, (ii) that the content of questions that modified sovereign relations between people and authorities could be defined, and (iii) whether ordinary law-making powers were transferred to representatives at all. These challenges contest the idea that constitutional referendums are devices of direct democracy by challenging the view of legitimate authority that they rely upon. It does not follow from the idea that the ultimate source of legitimate authority rests with The People, or even the consent of The People, that constitutional referendums are a device that can evince that consent. This is not to suggest, however, that referendums should not be used to help address disagreements

on constitutional matters. Those who take a two-track approach to democracy are right about the sorts of questions that should be put to a referendum but for the wrong reasons. Because they are right for the wrong reasons, they give a different answer to the question of how referendums should be used. There are many good instrumental reasons to hold referendums, particularly concerning constitutional questions. The argument in this chapter is against a particular justification of constitutional referendums, not against constitutional referendums themselves.

Direct democracy has a special salience with respect to constitutional referendums, but it has a special danger too. The danger is in thinking representatives are less important in these exercises, or ought to get out of the way, when in fact the reverse is true. In these circumstances referendums are necessary, but referendums must be understood as much more than votes. They must be understood as a series of stages with multiple opportunities for engagement. Those who support two-track democracy are right to say these questions are uniquely demanding, but wrong about why and wrong about how to respond to this demandingness.

Chapter Six: Referendums as Referring Back

1. Introduction

Having challenged the prevailing approach to referendums in theory, law, and politics, this chapter offers an alternative account of what referendums are. The alternative account I offer is that referendums are best understood as processes of referring questions back to voters. Further, rather than instances of direct democracy, referendums are better seen as instances of directed democracy where they are opportunities for voters to provide specific direction to representatives. This alternative view of referendums is informed by a different view of democracy and what makes democracy legitimate. To that end, this chapter has three functions. The first is to defend the merits of defining referendums as referring back specific questions to voters rather than as votes by citizens on matters of policy. The principal advantage of this alternative is that it sets the bar higher for what qualifies as a referendum. The second function of this chapter is to introduce the idea of directed democracy and to show why it does not run the risks that the term direct democracy does. The term directed democracy both captures better what is at stake in referendums practically, and offers a stronger philosophical basis for their use. Third and finally, this chapter develops the alternative understanding of what makes democratic authority legitimate that informs this understanding of referendums. The view put forward here is piecemeal. To say that a view of democratic authority is piecemeal is to say that different democracies, decisions, and decision-making processes may be justified for a range of reasons depending on the context. There are some core instrumental and procedural reasons that democracy is justified in general, reflecting the core relationships between representatives and the represented outlined in Chapter Two, but the specifics of why this relationship is valuable will vary from case to case. The thesis will conclude in the next and

final chapter by showing how this alternative understanding of referendums and democracy makes a difference to how they are used in practice.

One note before proceeding. Democratic terms are regularly defined in relation to each other. Direct democracy, for example, is defined in relation to representative democracy. Representative democracy is defined in terms of other processes such as elections. The alternative characterizations of direct democracy and referendums put forward here require carving up the democratic picture differently as a whole. A map of how my proposed changes amend the democratic landscape will be outlined in section five. There it will be argued that referendums and elections can be distinguished, but that they should not be put in different democratic categories. As argued in Chapters Two and Four, a referendum outcome may directly or indirectly offer a mandate to representatives or even involve the selection of representatives. There are differences between elections and referendums but they are differences of degree rather than kind, referendums are not in an exceptional democratic category.

2. Referendums as Referring Back

The meaning of the word referendum comes from the word *referre* which means ‘to refer back.’²⁸⁶ This is a far more helpful starting point than a vote (by citizens on a matter of policy) for three reasons. First, voting is not synonymous with referring back. There are many ways to refer questions back to the public, this is a much broader definition than putting a question to a vote. Citizens’ juries, constitutional conventions, a series of polls, even consulting people one-

²⁸⁶ ‘The word “referendum” comes from the Latin neuter of *referendus*, gerundive of *referre*, ‘to refer back.’ Qvortrup (n 1). 2

on-one are just a few of the ways that questions can be referred back to the public.²⁸⁷ Clearly, some of these approaches are unwieldy, especially in large democracies, but there is nothing logically or practically necessary about voting as the best or only way to refer a question to the public. It is not voting that is important and makes referendums referendums, it is the fact that the question is put back to the public in the first place. The second reason that it is better to define referendums as referring back rather than votes, is that it defines referendums by an action rather than an objective. Treating referendums as synonymous with votes puts the cart before the horse. Why is a vote being held in the first place, what is its objective? The standard definition of referendums in the literature defines them by an action without identifying what the reasons for holding this action are. By defining referendums without laying out their purpose, the overwhelming focus of the referendum becomes the vote rather than what that vote is trying to achieve. Voting has much to commend it in terms of equality of participation, low barriers to entry, and publicity of involvement,²⁸⁸ but it has its limitations too. Voting does not offer the opportunity for voters to provide substantive input about the content of proposals, and voters are unable to cast their ballots with reservations attached. Referendums are one tool in a democratic toolbox for referring a question back to the public, and votes should be understood as just one tool in the referendum toolbox too.

To further illustrate the dangers of the standard definition of referendums, contrast the definition of referendums with that of elections. To define elections as ‘voting for representatives’ is wholly inadequate and misses necessary features of their use. Different accounts of elections in the literature stress that defining elections as the selection of

²⁸⁷ For the best comparison of the different models by which questions may be referred back to the public, please see Tierney (n 22). Chapter Seven

²⁸⁸ Evans (n 204). 1

representatives is insufficient without including the broader democratic context.²⁸⁹ To define elections as ‘voting for representatives’ allows that such a representative could serve indefinitely, when it is a necessary feature of elections that they happen periodically.²⁹⁰ Elections cannot be permanent decisions. A far better definition of elections is something like: the selection of people to act on behalf of others for a set period of time. While not an exhaustive account of what makes an election, and certainly not the sufficient conditions for a good election, defining an election as ‘the selection of people to act on behalf of others for a set period of time’ captures both the underlying democratic dynamic and the purpose of having this process in the first place. It also opens up that this selection could occur in a variety of ways, for instance through lotteries or some combination of lotteries and selection.²⁹¹ Defining referendums as ‘votes on issues’ runs the same risks of defining elections as ‘votes for representatives.’ It sets the bar for what qualifies as a democratic process too low. There are good reasons to set the bar higher when defining referendums, and this is the third reason to distinguish between referendums and votes.

The term referendum has a lot of power. Input from voters on specific issues is a significant legitimizing force in politics and law. This input is particularly significant because votes in large democracies are usually for a manifesto, a set of proposals rather than just one, so referendum outcomes offer stark public support for issues.²⁹² Furthermore, that an issue is

²⁸⁹ Katz (n 154).; Lane (n 205).;McLean (n 205).

²⁹⁰ Katz (n 154). 99

²⁹¹ Peter Stone, ‘The Logic of Random Selection, The Logic of Random Selection’ (2009) 37 Political Theory 375. 380

²⁹² A good example of this is the 2016 Brexit referendum in the UK. A common rhetorical claim is that more people voted for Brexit than have ever voted for anything in the history of the United Kingdom. The political power of the claim that 17 million people cast their ballots for something has formidable rhetorical and political force.

put to a referendum in a first place often reflects how significant the issue is. On top of all this, issues are often put to a referendum because they are irreversible, significant, or divisive. Setting the democratic standard for a referendum as a vote alone creates the possibility that vast amounts of political will are aggregated without a process to make sure the question is referred to the public in a productive way.²⁹³ This sets the bar too low when distinguishing between referendums and votes. The capacity of referendums to provide legitimacy can be seen in the way that dictators both historical²⁹⁴ and contemporary²⁹⁵ abuse them to shore up their individual, personal legitimacy.²⁹⁶ A bifurcated definition that distinguishes referendums from votes offers both conceptual clarity and better results by setting the democratic standard higher for a process to qualify as a referendum.²⁹⁷ Some of this work might arguably be being done with the word plebiscite which is sometimes used to indicate referendums that are

²⁹³ Indeed, Chambers argues that referendums focused on votes undermine democratic deliberation and public debate rather than coming to outcomes with broad public support. ‘Referendums tend to undermine deliberation for two reasons. The first is that they introduce an extreme form of majoritarianism that is inappropriate for deep constitutional questions. Second, referendums often present the voter with the image of inflexibility (debate cannot alter the framing of the question) and irreversibility (constitutional proposals are entrenched outside the ongoing iterative processes of normal politics). Chambers (n 208). 231-2. Chambers is right about this, but her concerns about the quality of the process can be addressed, at least in part, by distinguishing referendums from votes.

²⁹⁴ ‘Both internally and domestically, Hitler needed authority from an “unassailable source” to legitimize himself.’ He used referendums. Zurcher (n 209).98; Another instance of authoritarian abuses of referendums is ‘the six times they were used by Napoleon to consolidate his power from Consul to Emperor between 1800 and 1852.’ Qvortrup (n 1). 9

²⁹⁵ ‘Orban Says He Seeks to End Liberal Democracy in Hungary’ (n 210).; Mehul Srivastava, ‘Erdogan Sews up Turkey’s “Second Revolution”’ *The Financial Times* (27 February 2017) <<https://www.ft.com/content/6337eb16-f85a-11e6-bd4e-68d53499ed71>> accessed 27 February 2017.

²⁹⁶ Setälä says that referendums are ‘handy tools for dictators in boosting their legitimacy, and were used to consolidate the powers of the Nazis, and among former communist countries in Eastern Europe.’ Setälä (n 14). 1-2

²⁹⁷ Australia has been deliberate in its definition of referendum in section 128 of the Constitution. A referendum must be a post-legislative approval to a change in the constitution, a plebiscite is advisory.

undemocratic,²⁹⁸ but the use of plebiscite has so far been inconsistent.²⁹⁹ The distinction between referendums and votes distinguishes better between those processes which meaningfully refer matters back to the public and those that do not by the tactical use of votes alone.

To reiterate: those who adopt the standard definition of referendums as votes by citizens on matters of policy agree that in order to work well referendums must not be understood as votes alone. Nevertheless, the overwhelming consensus is to treat referendums and votes as synonymous in their definition. This is a needlessly limiting equivalence to draw. By identifying referendums by an action, rather than the purpose, the case for referendums goes in the wrong direction from the very beginning. The distinction between referendums and bare votes goes some way to addressing the risks discussed above about separating voting from the rest of the referendum process in the round. If there is a consensus that a good referendum process requires deliberation, consultation, and meaningful input from the public, why not build at least some minimal account of that into the definition? Why not set the democratic standard higher? This is particularly important when labelling a process as a referendum has so much legitimizing power.

The idea of referendums as referring back might seem to be too broad. The idea is broad, but this breadth is a strength of the view, and there is a principled idea underlying it too. At the heart of the idea of referendums as referring back is the idea that additional direction is

²⁹⁸ ‘The term plebiscite...is probably the oldest of the three terms...general agreement on the distinction between plebiscite and referendum is lacking...the term plebiscite has been used, -particularly after World War I- to denote popular votes held to solve sovereignty conflicts over territories and boundaries...However in some countries, the term still has a negative connotation: it generally means something that is not democratic.’ Gallagher and Uleri (n 10). 3

²⁹⁹ ‘The term has an ‘ambiguous meaning and negative connotation’ Setälä (n 14). 506

given to representatives. While this might seem to be a weak requirement, note the argument from Chapter Four that a vote by the electorate is not itself enough to amount to a decision-making process. It is better understood as a choice. If the voting stage is a choice, however, this requires that decisions have been made from which voters can choose. This prior decision-making process requires representation. Consider this, and what else, defining referendums as instances of referring back requires.

3. What Does Referring Back Require?

There are a range of concerns that readers might have with the idea of referendums as referring back. Principally, it might be countered that the definition suggested here is too far away from the standard one. Is it really being proposed that a referendum could be satisfied by only a constitutional convention or consultative process? Allowing this possibility lowers the requirements for referendums and, most troublingly, could let representatives off the hook. Representatives could say that people are welcome to come in and comment on proposals between 2-5PM in London on the third Thursday in December and then argue that there were plenty of opportunities for people to have their say on a new constitution.³⁰⁰ Alternatively, a reader might argue that the act of voting is synonymous with referring a question back to the electorate. This is because the (i) equality (ii) publicity and (iii) low barriers to entry of voting mean that whatever its limits, voting has stronger democratic credentials than the amorphous requirement of referring back a question to the electorate. Indeed, the alternative definition of referendums put forward here seems less consistent with democratic values than referendums

³⁰⁰ A better version of this scenario is found in *The Hitchhiker's Guide to the Galaxy* when Arthur Dent questions Minister Prosser on the accessibility of a planning notice. 'Yes. It was on display in the bottom of a locked filing cabinet, stuck in a disused lavatory with a sign on the door saying "Beware of the Leopard." Ever thought of going into advertising?' Douglas Adams, *The Hitchhiker's Guide to the Galaxy* (Reissue edition, Ballantine Books 1995).

as votes on matters of policy does. Further, given the liberal approach to voting taken here, if liberals argue that voting is a check on representatives then why not argue that voting is a necessary feature of referendums? One can accept the limits of voting and yet still think that that voting is a necessary part of the referendum process. Defining referendums as votes on matters of policy is compatible with liberal democratic values, and indeed is more likely to guarantee these values than referendums as referring back.

While referendums as referring back is a broad definition as compared to referendums as votes as matters of policy, this counterargument understates the work that the requirement of referring back can do. While there is merit to the idea of requiring votes as parts of referendums there are risks on the other side too. Consider for the sake of argument a more charitable example that a concerned reader might raise. What if there were a constitutional convention that allowed every member of the public, not just voters, to participate. It invited people to provide long-form written feedback on a series of proposals at different times over a period. It also involved a series of hearings for people to share how the proposed changes would affect them. Suppose too that only 30% of people participated in the consultation. Would this satisfy the standard of referring a question back to voters? The concern the counterargument raises is that voting is a simpler and better way to give everyone an opportunity to participate. Even in this more charitable scenario, a reader might claim that a scenario where 75% of eligible voters voted is a better instance of referring a question back than 30% of the public offering evidence at hearings and long-form feedback. At a minimum this counterargument argues that the requirement of referring back cannot set a principled or clear standard, and that this opens up the possibility for manipulation by elites too.

At the heart of this counterargument is the concern of what it means to refer back. The idea of ‘referring back’ is broad, and deliberately so, and concerned readers are right to say that this cannot be defined for all contexts. While this approach opens up opportunities for abuse, there is ample evidence of referendums being manipulated as votes by citizens on matters of policy too. The abuses of democratic devices cannot be totally eliminated, but the idea of referendums as referring back sets a higher standard for democratic exercises to satisfy. The idea of referendums as referring back is a democratic standard to meet rather than a description that a process should match. Further, the question of whether or not a question has adequately been referred back to the public is a question for that electorate to decide. It is for voters to determine if their representatives referred back the appropriate questions to them in a satisfactory way. This is not a question that can be answered in the abstract; it varies from context to context and question to question. If their representatives failed to do so, it is necessary that they hold them to account. A referendum should be evaluated on the basis of how well it refers a question back to the public, and referring a question back to voters is more demanding than holding a vote.

Further, nothing here suggests that voting should not be included in a referendum process. Votes probably should be held given the merits of voting outlined above including equality of participation, the publicity of the process, and low barriers to entry. The question is of how to set the standard for referendums in defining what they are, and defining referendums as votes on matters of policy sets the standard too low. Furthermore, the standard definition can be limiting. It implies that a single vote constitutes a referendum when multiple votes may well be necessary.³⁰¹ It might be countered that the definition of referendums is meant to set

³⁰¹ This is a point made by UCL’s Independent Commission on referendums in 2018. Where pre-legislative referendums are used, is it essential that another vote is required at the end of the process. ‘Independent Commission on Referendums’ (n 54). 6.4

the floor not the ceiling. The definition of referendums should be the lowest common denominator, and that referendums as votes by citizens on matters of policy passes that test. The argument here is that voting alone is not even enough for a lowest common denominator.

4. What is Directed Democracy?

This thesis began by challenging the distinction between direct and representative democracy. The claim that direct and representative democracy are two distinct and mutually exclusive processes is particularly unhelpful. I challenged this distinction by arguing that direct democracy is reliant on representative democracy, not a substitute for it. As a consequence of this reliance, I propose redefining direct democracy as directed democracy. Directed democracy is the process of providing direction to representatives. References to democratic process that do not fit neatly into director representative democracy are not novel. Terms like hybrid,³⁰² quasi,³⁰³ or semi-direct³⁰⁴ democracy have been used in a variety of descriptive and justificatory ways. Terms like hybrid democracy reflect dissatisfaction with the idea of direct democracy. Ackerman, for instance, says that direct democracy is not the right label for the processes he has in mind, so he uses quasi-direct democracy as an approximation instead.³⁰⁵ Kobach recognizes that using the term direct democracy is inaccurate: he really means semi-direct democracy, but he uses direct democracy because it is too unwieldy to explain what

³⁰² 'Most Americans live in a "hybrid democracy." that is, they live where processes of both direct and representative democracy coexist as part of state government.' Shaun Bowler and Amihai Glazer (eds), *Direct Democracy's Impact on American Political Institutions* (Palgrave 2008). 1

³⁰³ Ackerman (n 251). 83

³⁰⁴ Kobach (n 60). 58

³⁰⁵ Ackerman (n 251). 83

semi-direct democracy means.³⁰⁶ An approach like Kobach's is unhelpful. Too much hinges on how these processes work for their meaning to be inchoate. The term directed democracy better captures what is at stake. Directed democracy is the process of giving direction to representatives. This definition is broad. It captures much of what happens in a democracy that does not fall under the heading of direct democracy. The direction given to representatives may take many forms. In addition to voting in a referendum, writing letters or lobbying representatives are examples of directed democracy. This is an unusual formulation and readers might resist it. One reason a reader might resist it is that the approach to representation it rests on is unfamiliar too. To understand the meaning of directed democracy, it is necessary to understand first the roles of representatives in democracies and the relationship between representative and directed democracy.

As argued in Chapter Three, I take Pitkin's definition of (substantive) representative arguing that to be a representative is to independently act on behalf of someone else in a manner responsive to them. There is a tension in this idea of representation but it is a productive one. On the one hand representatives must act independently, but they must be responsive to their constituents too. In this way, direction from constituents is a necessary part of representation and representative democracy, but representation is more than taking direction from one's constituents too. Representative and directed democracy are two sides of the same coin of representation, they capture two parts of the same process. Different representatives in different democracies will respond to this tension in different ways on different issues, but this tension between independence and responsiveness is necessarily at the heart of democratic politics. It will never be resolved in one direction or another.³⁰⁷ This account of representation is not as

³⁰⁶ Kobach (n 60). 58

³⁰⁷ Recall from Chapter Three that Pitkin's account of representation does not take a side in the delegate trustee controversy, although it does rule out the extreme versions of both views. I think this is a strength

radical as it might first seem. It is a different way of formulating Christiano's argument that representation is discretion within limits.³⁰⁸ This is how Urbinati suggests understanding representation too; she says 'The tension between commitment to the electors' cause and a representative's autonomous judgement, which animates advocacy, exemplifies the character of representative democracy.'³⁰⁹ Directed and representative democracy are each labels for processes that constitute representation. Directed democracy captures the direction and responsiveness that is required for representation, and representative democracy highlights the independence and judgment that is necessary too.

The 'directed' in directed democracy stands for the direction given to representatives, not the directness of the direction provided to representatives. The direction given to representatives ranges in degree, volume, content, and scope. There are many different mechanisms by which direction can be provided to representatives by both individuals and groups. Further, this direction may not be followed absolutely. As Manin says:

Promises or programs might be put forward, but representatives have, without exception, retained the freedom to decide whether to fulfil them. Representatives undoubtedly have an incentive to keep their promises. Keeping promises is a deep-rooted social norm, and breaking them carries a stigma that can lead to difficulties in being re-elected. Representatives remain, however, free to sacrifice the prospect of their re-election if, in exceptional circumstances, other considerations appear to them more important than their own careers... Since the link between the will of the electorate and the behavior of elected representatives is not rigorously guaranteed, the latter always retain a certain amount of discretion. Those

of her account of representation and shows that the trustee-delegate debate should not be seen in either-or terms. Part of what it is to be a representative is to find a balance between independence and responsiveness, too far in either direction and an actor ceases to be a representative at all. Pitkin (n 33). 166; Urbinati says this too, she says thinking about representation in this way is 'an alternative to the dichotomy of representative as delegate or representative as trustee.' Urbinati (n 28). 777

³⁰⁸ Christiano (n 64). 2

³⁰⁹ Urbinati (n 28). 774

who insist that in representative democracy the people govern through their representatives must at least acknowledge that this does not mean that representatives have to implement the wishes of the electorate.³¹⁰

Manin's point here is that sometimes the direction given to representatives will not be acted upon, even in cases when representatives have committed to do so. Not all manifesto promises will be kept, not all direction taken. Nevertheless, the act of providing direction is itself politically significant, and may have bearing beyond individual decision-making processes. A complete understanding of the direction provided to representatives requires considering not only a discrete set of actions by constituents, but by taking a step back to see systems and representatives over time and in the round. It is this general relationship of responsiveness that is necessary for representation.

The intuition that despite the reliance of referendums on representatives and representation there is nevertheless something direct about direct democracy is right, but the better way to express this intuition is to use the term specific rather than to reclaim or qualify the word direct. What the processes that are currently placed under the heading of direct democracy are often narrower in scope than other democratic exercises such as elections, this is not necessarily the case. In elections, representatives are selected and the manifestos they run on set their general direction while they are in office. There are also political parties and representatives who run on single issues. The processes currently labelled direct democracy give more specific direction than elections, but the specificity of this direction can vary too. If the outcome of a referendum is to build an airport, this direction is narrower in scope than to leave a supranational body.

³¹⁰ Manin (n 23). 167

5. Direction and Elections

If referendums are examples of directed democracy, what are examples of representative democracy: elections? I think that elections are exercises in directed as well as representative democracy. Elections are where directed and representative democracy meet. They are processes of selecting representatives, but also providing general direction to representatives too in the form of manifestos. Carving up democracy this unfamiliar way raises all sorts of questions such as: is this really what elections do? A reader might worry that very few voters in fact vote for manifestos. Voters primarily vote for representatives instead.³¹¹ Further, if representatives are essential to all democratic processes, and there is no political or conceptual way around them, why make a claim for directed democracy at all? Why not say these are different processes within representative democracies? Or why even try to carve up democracy in the first place?

It is right that something different is happening in elections than in referendums. It is important as well to understand what this difference is. My claim is that the difference between these processes is not a sharp either-or proposition. The main difference between referendums and elections is one of degree rather than kind. The distinction is not: in elections voters vote for representatives and in referendums they vote for issues. This is not the right way to carve

³¹¹ Alan Renwick, *Faces on the Ballot: The Personalization of Electoral Systems in Europe* (First edition, Oxford University Press 2016). 1

up these two processes. In referendums voters vote for issues, but also for those who are advocating particular issues. We see in referendums that issues and those advocating for them are regularly conflated.³¹² Similarly, while many voters may not read manifestos, they nevertheless elect political parties that must put forward (at least rough) guidelines of what they stand for and seek to do. While referendums do not pick representatives exactly, they do lend legitimacy to those who representatives who are advocating for particular issues and arguments.³¹³ The real difference between referendums and elections is that the direction being given to representatives in referendums is usually more specific, and narrower than it is in elections. A better example than elections of a process that is an instance of representative democracy is a vote in a legislature taken independently from the direction of one's constituents.

Directed democracy is a process. It is the process of giving direction to representatives. Referendums are one process of providing this direction, but there are other ways too. Directed and representative democracy are two sides of the same coin, because both responsiveness and independence are necessary for the act of representing someone. The act of representation requires both being responsive to the interests of constituents, and acting independently where that is required too. Going too far away either from responsiveness to constituents, or

³¹² Think of the referendum in Italy in 2016 and Prime Minister Matteo Renzi deliberately conflating the constitutional reforms on the ballot with his personal mandate, for instance. 'The referendum was more than a vote on constitutional reform; it was widely regarded as a chance to reject establishment politics. It was a resounding victory for the No camp, a medley of populist parties headed by the Five Star Movement, which capitalised on Mr Renzi's declining popularity, years of economic stagnation, and the problems caused by tens of thousands of migrants arriving in Italy from Africa.' 'Poll Defeat Risks Italy Political Crisis' *BBC News* (5 December 2016) <<http://www.bbc.co.uk/news/world-europe-38204189>> accessed 25 September 2017.

³¹³ After surveying the use of referendums in France, Chile, the Soviet Union and the Post-Soviet states, Walker concludes: '(1) That referendums are part of a bargaining process between elites who have their basis of power in different institutional settings. (2) Referendums give political actors the political legitimacy to pursue change and potentially alter status quo institutions. Walker (n 127). 91

exercising no independent judgment, and an actor ceases to be a representative at all.³¹⁴ Directed democracy shows how processes such as referendums are connected to representative process, not a way around them. Additionally, rather than two-track democracy, the idea directed democracy is based on an alternative account of democracy and what makes it legitimate. Consider this alternative, piecemeal rationale now.

6. The Procedural-Instrumental Distinction

I will argue here that democracy in general, and consequently referendums in particular, are justified for a range of both instrumental and procedural reasons. Both in the case of referendums and democracies, these broad rationales hold in general, but will manifest themselves differently depending on the context. The helpfulness of the instrumental-procedural distinction in justifying democracy is limited. It is not hard and fast, and most theorists support both approaches to some extent. These two traditions are not mutually exclusive³¹⁵ and they may be labelled in different ways.³¹⁶ Despite these limitations, the distinction is helpful because it broadly identifies two different ways to justify democracy. Instrumental and procedural arguments focus on two different rationales for democracy and

³¹⁴ ‘The conceptual principle sets the limits of representation, of what we are willing to recognize as representing (or a representative) and what no longer qualifies. If a state of affairs deviates too much in one direction or another, we shall say that it is no longer representation at all, there is room for a variety of views on what a good representative should and should not do.’ Pitkin (n 33). 166

³¹⁵ ‘Democratic decision-making has two very different evaluative aspects that sometimes collide but usually complement each other to some degree. On the one hand, we judge democratic decisions from the point of view of the quality of outcomes. We concern ourselves with whether the outcomes are just of efficient or protect liberty and promote the common good. On the other hand we evaluate decisions by the quality of the procedure. We are concerned to make the decision in a way that includes everyone who by right ought to be included and that is fair to all participants. Thomas Christiano, ‘The Authority of Democracy’ (2004) 12 *Journal of Political Philosophy* 266. 266

³¹⁶ *ibid.* 266-267

emphasize different features. As Dworkin says, each tradition offers different answers to the question ‘what is good about democracy?’³¹⁷ ‘Are good...democratic outcomes good because they are democratically chosen, or are they democratically chosen because they are good?’³¹⁸ Proceduralists take the former view arguing that democratic decisions are good principally because of the way democratic decisions are made. Instrumentalists take the latter view arguing that democracies are good because they produce good outcomes, or better outcomes than alternative systems. The aim of identifying these two traditions is not to oversimplify them. Proceduralists think that democratic processes have instrumental value. Proceduralists such as deliberative democrats, for instance, think that the process of engaging citizens in the terms of their governance is almost certain to lead to better decisions. Take Tierney for instance. He argues that referendums are justified, in part, because they re-engage people in democracies. He writes in support of the Civic Republican tradition by arguing:

Republicans, by contrast, are more concerned with the *process* of decision-making, hence their emphasis on the active participation of the people in decision-making as a political good. They contend that through participation and deliberation people will come together to find common cause before decisions are taken, and they will often conclude that majority decision-making, while not an inherent good, is the fairest way in which to make a decision in many circumstances...it is difficult and often impossible to find a fairer alternative.³¹⁹

This passage is important for two reasons. The first is that it stresses that for Tierney it is the *process* of decision-making that is important. It is the process and active participation making that makes decision-making a political good. There is instrumental value in democratic processes, but this value is derived from procedural justifications and is not independent of

³¹⁷ Ronald Dworkin, *Is Democracy Possible Here?: Principles for a New Political Debate* (Princeton University Press 2008). 66

³¹⁸ *ibid.*

³¹⁹ Tierney (n 22). 41 (emphasis in original).

them. The second feature of this passage is that it is offered in response to a familiar worry about proceduralism from instrumentalist justifications of democracy: concerns about majority decision-making. The disagreement about whether majority decision-making is justified is at the heart of the procedural-instrumental distinction, and why (despite its limitations) the distinction remains helpful.

Different answers to the question of whether and why majority decision-making is justified reflect different worries about democracy. Tierney's passage above reflects the proceduralist approach: there are risks to majority decision-making but high-quality processes, particularly those informed by deliberative democracy, are a solid insurance policy against unacceptable outcomes.³²⁰ How can genuinely deliberative processes result in conclusions that are substantively unjust? Indeed, given choosing between different 'worst case scenarios,' the proceduralist point is that the risks of placing substantive limits on the majority are more dangerous than the whims of the majority itself.³²¹ The debate about majority decision-making is really about which risks are more dangerous to democracy. Proceduralists think that constraining the majority is more dangerous than the majority itself, my view is that it is the other way around.

Limits on the majority can be unjust.³²² The aim here is not to assess the relative risks of the unchecked or checked majority; there are dangers in both directions. The concern is

³²⁰ In response to the worry about homogenization Tierney says 'Much will then depend upon the process of the particular referendum and how it meets the tests of inclusion and open deliberation.' Tierney (n 1). 381

³²¹ *ibid.* 382

³²² Think of an abhorrent example like apartheid South Africa where a small minority controlled the country.

justificatory: can a good process ever override an unjust outcome? Proceduralists seem to think there is the possibility that they can, or at least that this is the scenario that should be less troubling. Dworkin has the best response to arguments like this. He argues that democracy by definition must be more than majority decision-making. It must be more than a procedural ideal. It must be more than a procedural ideal because without substantive limits to protect underlying procedures, democratic decisions can undermine themselves.³²³ An example of this is a democratic decision to disenfranchise certain voters, for instance.³²⁴ Another related reason that process-independents standards are necessary is that without substantive commitments to principles such as equality, it is not established what makes such processes valuable in the first place.³²⁵ This thesis does not require taking a position on whether procedural or instrumental justifications for democracy should ultimately prevail where there is a conflict between the two. It is only to say this: (i) the case for referendums primarily rests on proceduralist rationales such as, it is valuable to engage voters in decision-making processes because participation is an intrinsically valuable exercise which treats citizens as equals and (ii) this should not be the whole story of justifying referendums. As with democracy in general, referendums should be justified and evaluated not only by how they are conducted but by the outcomes they reach. Consider in more detail now how instrumental and procedural arguments might support the case for referendums.

³²³ 'An adequate doctrine of political fairness should make a place for both...[procedural and outcome-based] considerations.' Charles Beitz, *Political Equality* (Princeton University Press 1989). 95

³²⁴ Indeed, referendums were used this way, particularly in the United States, in an effort to limit the expansion of suffrage. In a contemporary context they have been used to limit civil rights of minorities across a range of policy areas including: housing, schooling, marriage and 'only partial protection has been provid[ed] to the minorities whose rights have been taken away by popular vote.' Gamble (n 108). 246. Indeed, there was a movement to use a referendum to block the expansion of women's suffrage in the United Kingdom. 'During the controversy over women's suffrage in the first two decades of the century, the anti-suffragists seriously considered whether they ought to call for a referendum on the issue. Lord Curzon, a leader of the anti-suffragists, composed a memorandum in February 1913, entitled 'Woman Suffrage and the Referendum' in which he debated this question...53 peers signed a memorial letter to *The Times* calling for a referendum on women's suffrage.' Bogdanor (n 2). 34-35

³²⁵ Beitz (n 323). 96

7. The Procedural and Instrumental Case for Referendums

The case for referendums slides into the case for democracy. To argue against people making certain decisions, Budge argues, is to argue against people making any decisions at all.³²⁶ As Bogdanor puts it: ‘Arguments against the referendum are also arguments against democracy, while acceptance of the referendum is but a logical consequence of accepting a democratic form of government.’³²⁷ While Bogdanor is right that arguments about democracy and referendums are connected, it is more helpful to think about this the other way around. It is arguments for democracy that slide into arguments about referendums, or at least they should. It would be odd if the rationale for democracy in general were out of step with arguments for referendums in particular. This odd situation is, however, the case. While democratic theorists overwhelmingly think that democracy justified both instrumentally and procedurally and that the justifications for democratic systems vary from case to case,³²⁸ referendum decision-making processes and outcomes are principally justified procedurally. This is right, at least in part. Referendums should be justified procedurally, all democratic processes should; at least to

³²⁶ ‘It is very difficult to stop arguments against direct democracy developing into arguments against democracy itself, including modern representative democracies. For if one argues that ordinary people are too ill-informed, unstable or fickle to be entrusted directly with making important decisions, the question immediately arises: “Why should they be allowed to choose governments to make decisions for them?”’ Budge (n 72). 3

³²⁷ Bogdanor (n 2). 93

³²⁸ Christiano, ‘The Authority of Democracy’ (n 336). 266-267

some extent. My claim is that referendums must *also* be justified instrumentally. Democracy in general, and referendums in particular, must be justified instrumentally for two connected reasons. The first is that without substantive, process-independent standards, democratic processes are straightforward majoritarian exercises. Democracy must mean more than majority rule, and so must be justified instrumentally as well as procedurally. Tierney acknowledges the risks of majority decision-making but says:

While the danger to minorities in majority decision-making can be very real, we should also be alive to the opposite concern. To grant minority vetoes can be to replace the tyranny of the majority with the hegemony of the minority.³²⁹

Tierney is right that the minority ought not to have a privileged position. It is right too to suggest that representative democracy itself relies on the logic of majority decision-making in many cases.³³⁰ The questions instead are twofold. The first, as Dworkin asks, is there a *prima facie* reason to think that a policy outcome is justified because the majority prefers it?³³¹ He rightly concludes that there is not. Dworkin says:

The majoritarian conception of democracy is defective because it cannot explain, on its own, what is good about democracy. Mere weight of numbers, on its own, contributes nothing of value to a political decision. We need a deeper and more elaborate account that tells us what conditions must be met and protected in a political community before majority rule is appropriate for that community.³³²

³²⁹ Tierney (n 22). 41

³³⁰ Legislatures and courts employ majority decision-making too.

³³¹ Dworkin (n 317). 70

³³² *ibid.* 70

Dworkin says that majority decision-making may be justified, but only for additional procedure-independent reasons. The second question is whether the quality of deliberation is enough to mitigate against the dangers of majority decision-making? It is not. While the principles and approach to democracy advocated by deliberative democrats are *prima facie* good and *ceteris paribus*, decisions made under conditions of reciprocity and accountability are better than those that are not, they do not necessarily lead to good or better outcomes than alternative processes. Such processes are instruments that can be used to a variety of ends. This is all to say: the proceduralist account of referendums and democracy are compelling, but it does not offer a sufficient basis to justify democracy or to evaluate the success of particular democratic processes such as referendums.

If democracy in general and referendums in particular are justified only on a proceduralist rationale, then there is the risk that a decision is nothing more than the view of the majority. This argument cannot be right either conceptually or politically. It cannot be conceptually right because as Beitz argues in response to the question of whether a good procedure can ever justify an undemocratic outcome:

If one wishes to maintain a procedural view, this question must be answered by showing that the favoured procedures have a value whose value is both overriding and independent of considerations about the political result that the normal operation of these procedures would produce.³³³

It cannot be politically right because democracy is a method of decision-making where those who disagree with decisions need some reason to go along with them. One of the ways in which such reasons are maintained is through protection for minorities. I accept outcomes I disagree with because I know that I still have a set of rights irrespective of what the majority decides.

³³³ Beitz (n 323). 95

These protections are part of the justification for democracy itself. Democracy, as Dworkin says, must be a substantive not merely a procedural ideal in order for the outcomes of democratic decisions not to undermine their constituent processes.

The argument here is complex so it is worth restating its commitments up front. The moves go like this: (i) democracy cannot be understood as only a procedural ideal because substantive limitations, protections on equality (for instance) must be in place in order to protect the very possibility of procedural ideals at all. (ii) These substantive limitations and ideals mean that democracy must involve more than rule by the majority. (iii) Unlike arguments for democracy in general, referendums are often justified in an outcome-independent way. (iv) The principles for democracy in general should apply to referendums in particular. Why think that the justification for a particular type of democratic process such as a referendum would be different than for the system in general? The better view is that there are good reasons both instrumental and procedural to hold referendums, and these reasons are mutually supporting. Consider some of those reasons now.

7.1 The Procedural Case for Referendums

The case for referendums is often tied to the case for deliberative democracy. On this view, referendums are justified procedurally as opportunities for deliberation. Tierney³³⁴ and

³³⁴ Writing in the tradition of deliberative democracy and civic republicanism himself, Tierney says that: 'Deliberation...performs the instrumental task of facilitating the republican self-government of citizens in processes of constitution-making and changing. The primary claim of the deliberative democrat is that the more deliberative a decision-making process, the more legitimate the decisions it reaches; the overriding concern for the civic republican is that this process of deliberation must itself fully engage ordinary citizens for the process to be properly democratic. Tierney (n 22). 285

Ackerman,³³⁵ make versions of this argument for constitutional referendums in particular, Barber³³⁶ makes this argument for referendums in general. Bogdanor³³⁷ and Setälä³³⁸ do not go so far as to justify referendums procedurally, but they think that the deliberative function of referendums is important. All of these theorists make different versions of the point that referendums bring people (or The People) together to consider a matter. They disagree about what qualifies as deliberation and how demanding it is, and Bogdanor makes a looser argument that referendums serve an educative function forcing voters to inform themselves rather than to deliberate either individually or together.³³⁹ Even critics of referendums like Chambers think that referendums are opportunities for citizens to engage in deliberation on subjects of higher-order law-making.³⁴⁰

The core of deliberative democracy is Habermas's idea that 'democracy revolves around the transformation rather than simply the aggregation of preferences.'³⁴¹ This transformation of preferences comes in the form of deliberation. This deliberative turn of the 90s marked a shift away from vote-centric approaches of democracy to talk-centric approaches

³³⁵ 'The maximal goal [of constitutional processes] should be deliberative democracy.' Ackerman (n 1). 98

³³⁶ Or as Barber labels it 'talk democracy' Barber (n 25). 173

³³⁷ Bogdanor (n 2). 84

³³⁸ 'To sum up, the potentiality of referendums to increase democratic virtues hinges largely on the extent to which referendum campaigns enhance inclusive and informed public deliberation on the issue at hand, and, further, on the extent to which voters' choices are based on this kind of deliberation Setälä (n 14).10

³³⁹ Bogdanor says that a referendum may 'Have a profoundly educative effect upon the electorate' Bogdanor (n 2). 84 but that these are different types of arguments for referendums 77.

³⁴⁰ 'Although risky, I do not want to say, however, that referendums are always out of the question from the point of view of deliberation and democratic legitimacy....Furthermore, Ackerman is right to say that referendums contain a potential galvanizing impetus to get citizens concerned and involved Chambers (n 208). 250

³⁴¹ John Dryzek, *Deliberative Democracy and Beyond: Liberals, Critics, Contestations* (Oxford University Press 2000). 22

to democracy.³⁴² Deliberative democrats think that the legitimacy of democracy comes from the way in which it engages citizens in the decision-making process. As Dryzek says, ‘the essence of democratic legitimacy should be sought in the ability of all individuals subject to a collective decision to engage in authentic deliberation about that decision.’³⁴³ This deliberation Dryzek outlines is very demanding. He says it requires the following from its participants: responsiveness, listening as well as talking, and a willingness to change one’s mind. While other advocates for deliberative democracy agree about the importance of deliberation, they disagree on the margin about what it requires. Gutmann and Thompson say that the six principles of deliberative democracy are: reciprocity, publicity, accountability, basic liberty, basic opportunity, and fair opportunity.³⁴⁴ Tierney’s principles of deliberative democracy are similar, but he carves them up in a different way as: participation, public reasoning, equality and parity of esteem, consent and collective decision-making.³⁴⁵ Deliberative democrats are united in arguing that deliberative democracy is either a powerful legitimizing force in democracies or the source of democratic legitimacy altogether.³⁴⁶ Recall too that this thesis does not make the case against deliberation as an essential component of decision-making, only that the voting stage of the process is not where that occurs to *make a decision*. Instead this action occurs via representatives before and after the voting stage, or both. It may well be, however, that voters deliberate about a decision, and that this deliberative process provides

³⁴² ‘Democratic theory has taken a deliberative turn. More and more theorists are turning away from liberal, pluralist, or economic understandings of democracy and toward a view anchored in conceptions of accountability and discussion. Vote-centric democratic theory is being replaced by talk-centric democratic theory. Chambers (n 208). 231

³⁴³ Dryzek (n 341). 1

³⁴⁴ Gutmann and Thompson (n 70). 348

³⁴⁵ Tierney (n 22). 45

³⁴⁶ Emily Hauptmann, ‘Deliberation = Legitimacy = Democracy’ (1999) 27 *Political Theory* 857.

some justification for referendums. At most, however, this offers a necessary but not sufficient justification for referendums.

8. Conclusion

This chapter has argued that referendums are best defined as instances of referring back and as exercises in directed democracy. It has argued that this account of referendums reflects a piecemeal account of democratic legitimacy where both procedural and instrumental arguments are necessary but neither is sufficient for justifying referendums. A good process never guarantees a good outcome, so procedural reasons cannot stand alone, but neither is a good outcome sufficient without a good process. There is a core relationship between the representor and the represented that holds in general and may be justified procedurally and instrumentally too. This picture of democracy and consequently referendums is messy and contingent, and does not provide one answer for all situations. The aim here was not to offer an exhaustive account, but rather the broad strokes in general. It offers this general justification by identifying the core democratic dynamics at stake in a referendum, and to then consider why those dynamics might be procedurally and instrumentally valuable in particular circumstances. The next chapter argues that are good both instrumental and procedural reasons to hold referendums that are contingent. For instance, it may be that there has been a significant development since an election or that there is a conflict of interest on an issue of electoral reform, some of these reasons are principally instrumental (the quality of the decision) versus procedural (seeking input from voters) but it is all of these reasons taken together that provide the best justification for the use of referendums.

Chapter Seven: Conclusion

1. Introduction

This concluding chapter has three functions. The three functions of this chapter reflect three of the thesis' overall aims. The first aim of this chapter is to show why the account of referendums offered here makes the case for their use stronger, not weaker. This thesis challenged the philosophical presuppositions that underlie the treatment of referendums in politics, philosophy, and law, but did not contest the use of referendums in general. The aim instead was to argue that the intellectual foundations of the use of referendums could be stronger. This chapter shows why the general, alternative account of referendums offered here is better placed to respond to the case against referendums than the standard view is. For instance, one line of criticism against the use of referendums is that they undermine representative democracy. By arguing that referendums are contingent on representative democracy, rather than a substitute for it, this general account anticipates many of the counterarguments that are made against the use of referendums. The second function of this chapter is to suggest some of the practical implications that follow from the general account of referendums offered here. As argued in Chapter Six, the justification for specific referendums varies depending on the context. However, and as argued in Chapters Two and Three, there are core dynamics at stake in democracies that hold in general. This section identifies best practices for the relationships between representatives and the represented that follow from these general features of democracy, and suggests that these offer some broad guidelines for how referendums should be used too. The third and final aim of this chapter is to consider the future of referendums. The use of certain types of referendums has been on the rise since the 1970s, and their use only

continues to increase.³⁴⁷ I conclude the thesis by identifying the ways in referendums may be, and cannot be, remedies for what ails democracies today.

2. The Case Against the Case Against Referendums

The case against referendums comes from two directions. The challenges from these two directions reflect different approaches to democracy. The first approach to democracy argues that representatives are better placed than The People to make decisions. That referendums are blunt, majoritarian instruments. Representatives are elected to make decisions and they should get on with it. Referendums are nothing more than mob-rule.³⁴⁸ Another set of challenges comes from a different approach to democracy. Referendums are anti-democratic for a different reason; they are not democratic *enough*. Voting is a device that undermines rather than cultivates the deliberation that self-government requires.³⁴⁹ Those who take this view of democracy might argue that the premise of this thesis is elitist because it suggests that voters cannot, and should not, make decisions directly.

These two sets of concerns are less about referendums and are more about democracy, and there is much that is right about them. The first concern is right that representatives are a necessary part of all democratic processes and that a failure to recognize this leads to referendums undermining democratic institutions. The latter approach is right too that referendums are not really instances of direct democracy, although I disagree about whether

³⁴⁷ Tierney (n 22). 1

³⁴⁸ John Haskell, *Direct Democracy or Representative Government? Dispelling the Populist Myth* (Perseus 2000). 85

³⁴⁹ Barber (n 25). 145

that is a bad thing. Directed democracy is an alternative view of the relationship between representative institutions and those that are usually labelled directly democratic. These two strands of argument against referendums place direct and representative democracy in opposition to each other. This is a false choice. There is no reason direct and representative democracy should be framed as an either-or proposition, and this framing misrepresents the relationship between referendums and other democratic institutions. Consider now how the idea of directed democracy responds to some of these worries. Take the first strand of concerns, that referendums undermine representative democracy, first.

There are two arguments against the use of referendums that are meant to challenge their use in principle rather than in practice. The first is the necessity of representatives. The second is the nature of political questions. The first worry does not require conceding that referendums are undemocratic; it requires instead thinking about the relationship between direct and representative democracy differently. The second argument against the use of referendums in principle is that political questions cannot be whittled down to binary propositions. Take the first of these arguments first. The core claim of the first strand of arguments against referendums is that representatives are better placed than voters to make decisions. This concern is right provided it is referencing the capacities afforded to particular roles. It is not necessarily the case that legislators are more informed or able than voters to weigh the merits of responses to political questions. What legislators do have, however, is the time and support to consider issues and to debate them in a structured format. This opportunity is not like casting a ballot. The claim that representatives are better placed to make decisions is not the same as the claim that legislators are better placed than voters to make decisions. Representatives are better placed than voters not by virtue of ability or expertise, but by having the time and support to consider questions in depth. That is why processes such as

constitutional conventions, especially where people are drawn by lot, are the gold standard for referendums.³⁵⁰ This gives voters input at the decision-making stage of a referendum as well as the later voting stage where a choice is made.

It is correct to say that referendums can be blunt majoritarian processes, but they are not necessarily blunt majoritarian processes. The case for referendums as exercises in directed democracy mitigates against this approach. When the voting stage of a referendum is taken to be synonymous with the decision-making process, then majoritarianism is indeed a concern. When referendums are based on the principles of directed democracy, however, then the power of this counterargument fades because the counter-majoritarian institutions of representative democracy are connected to the process itself. For instance, and on the principles of directed democracy, it is not only possible it is preferable that actors such as judges consider the implications of democratic decisions for minority rights. On an account where The People make decisions directly to bypass representatives, a review of referendum outcomes by judges is less compelling. Democratic processes are tools that can be manipulated in any number of ways, and the principles of directed democracy cannot eliminate the dangers of majoritarianism altogether. What directed democracy can do, however, is import other democratic values such as accountability, minority rights, and the rule of law into guidelines for the use of referendums. Finally, it is right to say that political questions are not binary, but no democratic question debated in a legislature or elsewhere can ever reflect the full range of possibilities. Further, political questions are not straightforward questions of expertise; they are questions of judgment too. It is possible for referendums to determine voters' judgments about political questions in an intelligible and defensible way. This is the case provided that the sorts of trade-

³⁵⁰ On the strengths and limitations of different models of constitutional conventions as part of the overall referendum process please see Tierney (n 22). Chapter Seven

offs and compromises necessary in democracies have been made at the decision-making stages, as advocated by the principles of directed democracy.

The second type of argument against the use of referendums argues that they are a pale imitation of democracy. A stronger version of this claim is that the sorts of democracies that hold referendums cannot be justified in the first place,³⁵¹ democracies must be radically smaller and localized in order to be defensible. Even if this second strand of argument is right, though, that democracy should be dramatically localized, there is nevertheless a need to understand how and why referendums might be more or less defensible in the sort of democracies they are used in today. Furthermore, even in much smaller democracies, representatives are still required (and the decisions of the group still stand for the group). In all democratic decision-making there is a need for people to act independently on behalf of others in order for decisions to be made, implemented, adjudicated, and for there to be coherence between decisions. So radically shrinking democracy does not eliminate the need for representatives altogether.

Neither of these concerns with referendums succeeds in making the case against their use in principle. Referendums are tools like any other democratic device that can be used to better or worst effect. Not all concerns about referendums can be addressed; this is not possible for any democratic process. It is possible, however, to take these concerns on board in a general account of referendums. This does not mean certain arguments against the use of referendums fade away, but it does challenge the idea that their use can never be justified.

³⁵¹ Barber (n 25). 177

There are plenty of conditions that might be placed on the use of referendums in practice, but these two broad arguments against their use in principle are unpersuasive.

3. The Uses and Abuses of Referendums

Many questions about how referendums should be used are contingent matters. The proper use of referendums depends on the context, question, and jurisdiction. Nevertheless, because there are some core features of democracy that hold in general, there are features of referendums that hold in general too. Because there are features of referendums that hold in general, there are general guidelines about their use that hold in general too. This section outlines some general guidelines for the use of referendums that follow from the relationships between representatives and the represented. These guidelines suggest what the role for referendums is in the process of democratic lawmaking when the aim is not to bypass representatives but rather provide direction to them. These guidelines will be outlined in three (connected) parts: referendum questions, processes, and institutions.

A few caveats about the guidelines put forward in this chapter. No guideline is necessary or sufficient for the successful use of referendums apart from the first: referendums must seek to give direction to representatives rather than replace them. There is no hierarchy of guidelines, but some do follow from others and they overlap in various ways. The list is not meant to be exhaustive but rather illustrative. Again, context and jurisdiction make a great deal of difference, and some guidelines will be more relevant in certain jurisdictions than others. What these guidelines propose is an alternative way of using referendums based on a different rationale. These guidelines demonstrate why understanding referendums as devices of directed democracy, rather than direct democracy, makes a difference.

3.1 The Form of Referendum Questions

Referendums are processes of referring questions back to voters for specific direction, and both the form and content of referendum questions should reflect this. The first way in which referendum questions should reflect this is in the sorts of questions that are appropriately asked of voters. As outlined in Chapter Three, referendums are best understood as processes where voters make choices about decisions made by representatives. This distinction between choices and decisions can be reflected in the wording of the referendum question itself. ‘Do you agree with the Proposals for X?’³⁵² or ‘Do you think the X Act should be implemented.’³⁵³ These are instances where referendums are used as devices of approval. These suggestions oversimplify the matter slightly because there is a spectrum of types of proposals ranging from white papers to fully-fledged bills before Parliament.³⁵⁴ As a general rule, though, the more developed the proposal the better. The content of instructions to representatives will necessarily be indeterminate, and the direction offered by referendums as devices of approval is a matter of degree rather than kind. In the ‘Should there be X?’ case, some direction is still being given to representatives. The point is just that, given the limits of voting and that the voting stage of a referendum is best understood as a choice rather than a decision, that referendums are better

³⁵² ‘Are you in favour of the Government’s proposals for a Greater London Authority, made up of an elected mayor and a separately elected assembly?’ Committee (n 115).

³⁵³ Take for instance the devolution referendums in the United Kingdom in 1979. ‘Do you want the provisions of the Scotland Act 1978 to be put into effect?’ and ‘Do you want the provisions of the Wales Act 1978 to be put into effect?’ *ibid*.

³⁵⁴ One instance of this is the Northern Ireland referendum in 1973 in which there was a move to attach the UK government’s white paper on Northern Ireland to the referendum question to avoid turning it into a sectarian headcount. The white paper was not attached and 98.5% of Republican voters boycotted the referendum. *The Times*, 16 January 1973

able to perform their function of referring a question back to people when the form of a question is a device of approval. The view that referendums are appropriately used as devices of approval or veto of proposals has widespread support. It is the central case in which the use of referendums is justified according to Bogdanor.³⁵⁵ Dicey argued that referendums are ‘the people’s veto’³⁵⁶ and that referendums could only properly be used to limit the actions of representatives. Using referendums as exercises in approval or veto also addresses the concern with referendums expressed by the Fabians. The Fabians were opposed to the use of referendums on the basis that the purpose of democracy was to give assent to results rather than projects.³⁵⁷ The Fabians were right about this. It is very difficult to assess and hold representatives accountable for democratic decisions and outcomes when framed *ex-post* rather than *ex-ante*. Or, given that a referendum may include multiple votes if a vote is necessary to initiate a proposal of policy or constitutional reform, then there is good reason to hold another approval vote at the end of the process too.³⁵⁸

3.2 Referendums and Political Questions

The character of political questions is at the heart of arguments for and against the use of referendums. Those who are opposed to the use of referendums argue that questions

³⁵⁵ ‘The referendum is an instrument of protection and not of change.’ Bogdanor (n 2). 69

³⁵⁶ ‘The referendum is sometimes described as “the people’s veto.” This name is a good one; it reminds us that the main use of the referendum is to prevent the passing of any important Act which does not command the sanction of the electors.’ Albert V Dicey, *Introduction to the Study of the Law of the Constitution* (Roger E Michener ed, 8th Revised edition, Liberty Fund Inc 1982).

³⁵⁷ The Webbs thought that ‘What democracy requires is assent to results; what the referendum gives is assent to projects.’ Qvortrup (n 5). 6

³⁵⁸ This was also the conclusion of the Constitution Unit’s Independent Commission on Referendums who came out very strongly against the use of post-legislative referendums. ‘Independent Commission on Referendums’ (n 54). 6.4 - 6.20

cannot be carved out and separated from others. There is a kernel of truth in this claim but it misses the mark. Even if there were such a thing as a binary political question, which side of the road to drive on, say, it would not follow from the binary nature of that question that it should be put to a referendum. What the nature of political questions does demonstrate is the necessity of directed democracy, and directed democracy addresses the underlying concern with the character of political questions. It is right that no disagreement is binary, and that responses to this disagreement are not binary because there are always multiple ways to address them. Further, referendum questions are necessarily indeterminate with multiple questions within them. From this it does not follow, though, that there is no case for asking questions in a binary way. Democracy always requires aggregating preferences in limited ways. Referendums are a way for voters to exercise their judgment and provide direction to representatives. Referendums can be more or less successful in this endeavor, but there is nothing about the binary character of referendum questions that precludes the possibility of coming to good decisions.

What does it mean to say that political questions cannot be asked in a binary way? There are different possibilities. The thought might be that there are always more than two possibilities for how to address a problem or respond to disagreement. That is right in a way, but some questions are more binary than others. There was a referendum in Sweden, for instance, on which side of the road to drive on.³⁵⁹ This question is more severable than other political questions such as whether or not a country should secede, for instance. Referendum questions are not binary, though, in that there is always a cost to focusing on some questions instead of others. Focusing on one question necessarily means not considering another question. By considering a particular question, representatives have already made a significant

³⁵⁹ The referendum was held in Sweden in 1955.

political decision; and that decision about what to consider was not binary. Referendum questions are also not binary in the sense that they are always indeterminate; albeit some questions have greater indeterminacy than others. Say the Swedish people decide to drive on the right side of the road, when does this take effect? How will this decision be executed? It is not only that these questions are indeterminate that challenges their binary nature; it might be too that this indeterminacy is in the form of decisions that are constitutive of other decisions. Say I decide to apply to graduate school. In a broad sense this is a binary choice, will I apply or not, but to say it is binary is misleading too. There are decisions that are constitutive of this decision. What should my research be about? Which universities should I apply to? I suspect that when referendums are dismissed on the basis that questions are too complicated for voters, the concern is not with the ability of voters to understand the questions, but rather with this indeterminacy. The worry is that the questions at issue have too many parts to be asked in a binary form. Complexity is better understood to mean composed of many parts rather than difficult. If the concern is with voters' abilities to appreciate complex questions, though, then the worry misses the mark. This is because democratic decisions are not only about expertise. As Pitkin says, political choices require both expertise and judgment.³⁶⁰ It is totally right that voters make broad judgments about what sort of democracy they want to live in, and this can be true about both binary and non-binary choices.

It might be countered that the disagreement to which referendums are responding is not binary. People have a range of views both about what is at issue and what should be done about it. There is truth in this concern but only to a point. It is right that referendum questions and

³⁶⁰ 'Political issues, by and large, are...not likely to be as arbitrary as a choice between two foods; nor are they likely to be questions of knowledge to which an expert can supply the correct answer. They are questions about action, about what should be done; consequently, they involve both facts and value judgements both ends and means. And, characteristically, the factual judgements and the value commitments, are inexplicably intertwined in political life.' Pitkin (n 33). 212

outcomes cannot reflect the whole range of this disagreement nor should they, democratic decisions made in legislatures cannot entirely reflect the scope of this disagreement either. No democratic process can. What a good referendum process does is identify some disagreement and provide a choice for how to address that. In order to aggregate political will about potential responses to disagreement, that choice cannot be exhaustive.

A related concern about the binary nature of referendum questions is that binary questions are necessarily divisive. This concern does not challenge the use of referendums in principle. Referendums are divisive when the voting stage of the process is taken to be the decision-making stage. That is addressing a problem by majority vote that does not necessarily address the underlying disagreement. A majority vote on an intractable question is divisive. If you ask people an either/or question you will get one of two answers, or it will be too close to call, and all of the situations create different problems. The prior deliberation and decision-making phase of referendums forces representatives to put forward proposals, focus on the disagreement and propose ways to address it. That is why the voting stage of the referendum has to be understood in the context of the longer set of opportunities to be engaged and why diachronic examples like the referendum on the Belfast Agreement³ are so important.

Democracy always requires the aggregation of preferences in a limited range of ways. It is right that no disagreement is binary, and responses are not binary in that there are always multiple ways to address them. Referendum questions are necessarily indeterminate with multiple questions embedded within them. It does not follow from this indeterminacy, though, that there is a definitive reason against asking questions in a binary way. Referendums are a way for voters to exercise their judgment and provide direction to representatives. Referendums can be more or less successful in this endeavor, but there is nothing in the

character of referendum questions in particular, or political questions in general, that precludes the possibility of success.

This idea of political questions is at the heart of both the uses and abuses of referendums. Those who are opposed to the use of referendums agree that political questions are not binary. This claim has a variety of overlapping commitments and meanings, but the core idea is that questions cannot usefully be carved out and separated from others. There is a kernel of truth in this claim but it misses the mark. It is right to say that political questions are not binary, but referendum questions and political questions need not overlap. Referendum questions are narrower than political questions in that they give voters the chance to provide additional direction to representatives on a particular point. They are binary in that they give voters a few options for how to do that, but the purpose of these options is not to reflect the character of a political question in all its indeterminacy. It is to give voters an opportunity to make judgments, and the judgment of voters is a necessary part of answering political questions. All democratic choices require restricting possibilities to a range of options; this feature is not particular to referendums.

3.3 The Framing of Referendum Questions

The way that the referendum process is framed matters a great deal. Chambers rightly argues that it is crucial that referendums not be phrased as once-in-a-generation events. She argues that raising the stakes of referendums this high undermines the quality of deliberation. Chambers draws a comparison with work on juries and shows that when groups know they will come to conclusive and irreversible decisions this inhibits rather than cultivates reasonable reflection on questions. Consequently, she says:

It would be better if discrete democratic decisions were not presented as the last word on the matter. If referendums are used, we should consider making them part of an on-going process of consultation rather than a once-and-for-all ratification.³⁶¹

Chambers' argument also supports the case for directed democracy. The more exceptional referendums are taken to be, the further they are from the other representative institutions upon which they rely. Further, recall that the act of voting itself is only one small part of the referendum process. Chambers' argument demonstrates the need to look holistically at referendum processes in the round in order for them to achieve their aim of responding to disagreement. Again, this is connected to the principle of directed democracy. If referendums are part of the process of representative democracy then they are not exceptional events outside of ordinary processes they are sometimes reverted to in particular cases. While it is true, as Chambers says, that referendums are verdictive, they are meant to make conclusive determinations about how to proceed on particular questions. There is no reason in principle that multiple referendums cannot be held in quick succession; particularly if the underlying material conditions of the political community have changed. What multiple referendums do suggest, however, is that referendums are not being used particularly well or successfully. That the direction given to representatives is unclear.

3.4 Voting for Issues and Representatives

Since referendums are the process of giving direction to representatives, it is impossible to completely disambiguate the direction given to representatives from the representatives themselves. There are certain instances of conflation, however, that should be avoided.

³⁶¹ Chambers (n 208). 251

Politicians are prone to conflating referendum outcomes with their personal mandates. It is very likely that a sovereigntist government making the case to secede will interpret a decision to separate as a personal mandate for them to take the secession process forward.³⁶² As Walker says, De Gaulle tactically used referendums throughout his career to support his personal popularity. ‘De Gaulle used referendums to legitimate his policy choices by making each vote a vote of confidence in him.’³⁶³ This use of referendums to shore up personal legitimacy is a familiar populist move in the use of referendums.³⁶⁴ By clarifying that referendums are devices of giving direction to representatives, the potential for this conflation can be identified in advance. It is inevitable that those leading particular arguments such as umbrella groups will achieve some personal legitimacy by being directed to execute their preferred referendum outcome, but given that the purpose of referendums is not to elect representatives, it is essential to separate so far as is possible support for particular politicians and particular propositions. Again, voting for proposals such as white papers and bills before parliament is a way of turning the focus of debates to the content of different decisions rather than to focus on the people executing them.

The principles of directed democracy offer an opportunity, however, for an additional use of referendums. On the account of referendums offered here, a critical use of referendums is to provide accountability and limitations on the actions of legislatures and legislators. Referendums can also be accountability mechanisms for legislatures themselves by offering voters opportunities to direct representatives, particularly when there is disagreement between

³⁶² Mark Walker, *The Strategic Use of Referendums: Power, Legitimacy, and Democracy* (Springer 2003). 22

³⁶³ *ibid.*

³⁶⁴ Even though Werner-Müller argues that referendums are not themselves necessarily populist processes, a point with which I entirely agree. Müller (n 98). 102

legislators and the public on an issue. An advantage of directed democracy, and understanding processes such as referendums as reliant on representative institutions rather than substitutes for them, is that it brings some of the advantages of representative democracy to directed democracy. By clarifying that those acting in organizations like umbrella groups, for instance, are representatives, directed democracy identifies the need for accountability mechanisms that are distinct but related to those in elections. This is connected to the need for voters to know what proposals they are voting on before they make their decisions.

3.5 The Referendum Process and Voters' Involvement at the Decision-Making Stage

Given that the voting stage of a referendum is an instance of making a choice rather than a decision, approving or vetoing actions by representatives, it is essential that voters have an opportunity to provide input at the decision-making stage. This is required in order for a referendum to meaningfully refer a question back to the public. These opportunities to give input can take all kinds of forms and there are many different successful models of constitutional conventions and other consultative processes. Recognizing the need for voters' involvement in the content-setting stage of a referendum takes the arguments of deliberative democrats seriously but comes to a different conclusion. The worry among supporters of democratic theorists who advocate these constitutional conventions is that they do not scale up. This gets it backwards. The decision-making process is not scalable, and that is part of its value. Voters in general cannot make decisions so there is a need for smaller groups to make decisions on their behalf. This requirement of involvement of voters in the decision-making stage through processes such as constitutional conventions demonstrates that the account of referendums advocated here is not elitist. It advocates for more participation for voters than often takes places. Defining referendums as instances of referring questions back to voters for specific

direction, as instances of direct democracy, sets the democratic standard for what counts as a referendum much higher, not lower.

4. Referendums as a 'Remedy'

The argument that referendums may be, in certain circumstances, a remedy for the failings of representative democracy is a familiar one. Bogdanor argues that referendums provide a remedy for the rigidity of the party system.³⁶⁵ Bogdanor also argues, and this is a more familiar approach, that referendums may perform an educative function by engaging voters with issues.³⁶⁶ Similarly, some argue that referendums may address democratic deficits by bringing voters closer to the decision-making process.³⁶⁷ The extent to which the claim that referendums are a remedy succeeds depends on the meaning of remedy. There are at least two possibilities. Does remedy mean a cure that is external to a democratic system, a solution that is brought in to solve a problem? Or does it mean something more like a countervailing force within the system? On the latter meaning of remedy, a countervailing force within a system, referendums are certainly a remedy. On the former view, that referendums are a process of a different type

³⁶⁵ 'The referendum, because it gives an equal value to every vote, yields due weight in deciding political issues to that important segment of political opinion which is not merely party opinion.' Bogdanor (n 2). 82

³⁶⁶ 'The referendum brings the voter directly into contact with these interests; it requires him to pay attention to public issues if he is to cast his vote intelligently... The voter may ask himself... what is for the good of the country. It may, therefore, have a profoundly educative effect upon the electorate.' *ibid.*

³⁶⁷ Tierney is clear that it is not necessarily the case that referendums can address democratic deficits, but he thinks they might. He says 'It might well be that... the referendum can help fill the gap between the growing interest of people in politics – "cognitive mobilization" and their aspirations for a greater role in, and heightened control over, decision-making on the one hand, and on the other hand the tapering away of traditional patterns of political participation such as party membership and voting, and weakening chains of responsibility binding political actors.'" Tierney (n 22).

that may be brought in to address the failings of representative democracy, the account does not succeed. Bogdanor uses the idea of referendums as a remedy in both of these ways. On the one hand, he argues that referendums are a structural remedy, built into a democratic system by virtue of the limits they provide on the actions of representatives. He also, however, thinks that referendums are an instrument to fix the failings of representative democracy from outside. Bogdanor himself acknowledges that these rationales rely on different arguments,³⁶⁸ but more than that they reflect a tension within his argument. Bogdanor thinks that referendums are both internal and external remedies to representative democracy. On the external view, remedies are a cure that comes from outside the system: referendums are *sui generis* democratic devices. On the internal view, they are a countervailing force within the system, a part of the same order of democracy. Indeed, on this internal view, referendums are not really a remedy at all. An example of one part of representative democracy as a countervailing force to another is the relationship between the bodies of a legislature. Is an upper house a cure for the failings of the other one? Not exactly. Each body complements the purposes of the other and each plays a different role. That different institutions have different responsibilities does not make one a remedy to another, at least not in a pejorative way. Another example is the appellate court system. Sometimes, for very good reasons, another layer of review is necessary. It would be unhelpful and misleading, however, to suggest that the existence of an appellate court system is a remedy to the failings of trial courts. That might be contingently the case in particular cases, but these bodies serve different purposes and are better placed to perform different roles. They are positioned differently with different virtues. Further, in both the legislative chamber and appellate court examples, is it essential that these relationships are understood as parts of a single system. It does not make sense to think of these bodies part of different two-tracks of

³⁶⁸ 'The case for the referendum based on its educative nature and the need to encourage participation relies upon arguments of an entirely different type. For they reflect not a conservative scepticism towards representative institutions, nor a belief that the source of authority lies with government, but a view that authority derives from the electorate itself.' Bogdanor (n 2). 85

democracy that are distinct from each other. The same is true for referendums; they are part of the same system rather than distinct processes. When referendums are understood as devices of directed democracy, it becomes clear how closely they are tied to other representative institutions. It becomes clear that they are countervailing forces rather than cures. Representative democracy is a remedy for the failings of referendums, referendums are not a remedy for the failings of representative democracy. Referendums are part of representative democracies themselves.

5. The Future of Referendums, the Future of Democracy

Since the 1970s there has been a noticeable increase in the use of certain kinds of referendums.³⁶⁹ This rise is often tied either by correlation or causation to declining membership in political parties.³⁷⁰ As Altman says, ‘Referendums are used twice as frequently today compared with fifty years ago and almost four times more than at the turn of the twentieth century.’³⁷¹ In 2000, the Royal Society for the Protection of Birds had a larger membership than all political parties put together.³⁷² There are a variety of ailments with political parties that might be the source of this declining membership. It might be the rigidity of party

³⁶⁹ ‘The use of referendums around the world has proliferated remarkably in the past 30 years. It has been estimated that of the 58 functioning electoral democracies of more than three million, 39 had conducted at least one national referendum between 1975 and 2000.’ Tierney (n 22). 1

³⁷⁰ Qvortrup (n 1). 5

³⁷¹ David Altman, *Direct Democracy Worldwide* (Cambridge University Press 2011). 10-11

³⁷² Colin Turpin and Adam Tomkins, *British Government and the Constitution* (7th Edition, CUP 2011). 547 Although the trend is a mixed one and in 2017 party membership was the highest it has been since 1987, after hitting an all-time low in 2013, so the trend may be changing. Richard Keen, Vyara Apostolova and Lukas Audickas, ‘Membership of UK Political Parties’ <<http://researchbriefings.parliament.uk/ResearchBriefing/Summary/SN05125>> accessed 31 August 2017.

structures;³⁷³ or dissatisfaction with major political parties generally.³⁷⁴ For some of these ailments, referendums are thought to be the cure. This is particularly the case given new technologies. Democracy, it is sometimes suggested, can be a function of millions of mouse clicks.³⁷⁵ Referendums are a democratic tool like any other, and whether they are helpful decision-making processes is up to all members of democracies. Indeed, one aim of challenging the exceptionality of referendums is to demystify referendums as devices of higher-order lawmaking, reserved for exceptional circumstances and jurisdictions. Referendums are one of many tools in the democratic toolbox, and there are problems that can help to address. They are not, however, a different and *sui generis* type of democratic process. Further, they are not a way around the dissatisfaction with representatives common to democracies today. The act of trusting others to act on our behalf and in our interests is an essential feature of democracies. Acting for others in their interests is not a bug of democracy, it is a feature. Representatives can never be eliminated; some trust is always required. I worry that characterizing referendums as instances of direct democracy where voters make decisions instead of representatives. The word direct should be nowhere near democracy because there are no shortcuts; there is no way around the necessity of representatives. There is no way to escape messy compromises and disappointment, nor should there be. Some distance from decisions is a desirable and necessary feature of group decision-making. If referendums are part of the solution to what ails democracy, it is not because they connect voters to outcomes directly. It is not because they

³⁷³ Bogdanor (n 2). 66

³⁷⁴ Smith (n 11). 20

³⁷⁵ This is the vision put forward by Budge who argues that ‘The new challenge of direct democracy lies in the startling fact that it is now technically possible. Public policy can be discussed and voted upon by everyone linked in an interactive communications net. Such nets are spreading through the world, so they can easily carry debates among citizens of any one State. This destroys the killer argument habitually used to knock direct democracy on the head, that it is just not practical in modern mass societies to bring citizens together to discuss public policy.’ Budge (n 72). 1

are a ‘purer’³⁷⁶ or higher form of democracy that demonstrates the will of The People undiluted by representatives. They do not occur in a rarified atmosphere above the considerations of party politics.³⁷⁷ One aim of this thesis was to put forward a liberal democratic account of referendums whereby referendums are a limit on the actions of representatives rather than a way of getting representatives out of the way. Even well-meaning supporters of direct democracy often suggest that it is necessary to bring The People closer to the decision-making process. It is good for the public to be engaged in the decision-making process, but not at the expense of representatives as being indispensable parts of that process too. The solution to democratic deficits and malaise cannot be to get representatives out of the way, it is for people to see themselves in their institutions and to see the potential to be representatives themselves.

The uptick in the use of referendums is not necessarily a bad development, but it is if the ideas that inform the standard view persist. It is essential that referendums themselves, and the ideas about democracy that they reflect, are continuously challenged. There was a debate after the advent of universal suffrage in the United Kingdom about whether referendums would play a role and if so what that role would be. Bogdanor says that the question at stake was:

How were the ‘people’ – the newly enfranchised electorate – to exercise their power: solely through representative institutions, or through the machinery of direct democracy? This was a central issue in the constitutional debates of the years between 1890 and 1912.³⁷⁸

³⁷⁶ ‘These days, referendums are more likely to be seen as pure democratic devices.’ Qvortrup (n 1). 3

³⁷⁷ Ackerman argues that in constitutional moments of higher-order law-making, ‘Apathy will give way to concern, ignorance to information, selfishness to serious reflection on the country’s future.’ Ackerman (n 1). 287

³⁷⁸ Bogdanor (n 2). 11

As this passage from Bogdanor suggests, the idea of democracy is an evolving one. The meaning of ‘rule by the many’ means different things at different times. Institutions treated as democratic now were specifically designed so as not to be democratic.³⁷⁹ Just as legislatures and elections have evolved, so too can referendums. It has been assumed for too long that referendums are synonymous with votes. The bar for what counts as a referendum can and should be set higher than a bare vote. Referendums should be defined by their function, referring a question back to voters in order to provide specific direction to representatives, and they ought to be evaluated by the quality of the opportunity they offer voters to provide direction to representatives.

Why hold referendums at all? Here, I have suggested there are general reasons to hold referendums, both instrumental and procedural, but that how these reasons play out will vary depending on the issue and context. Procedurally referendums might be valuable because it is useful to receive input from voters on significant, irreversible issues to lend legitimacy to the finality to the outcome. It may also be important to seek additional guidance from voters when a question arises that was not at issue when representatives were elected. Or it may be important to hold referendums because there are conflicts of interests, such as in the case of electoral changes, or that a particular policy demands extreme sacrifices from the public. The aim here was to put forward an account of referendums in general while still taking seriously the contingencies at stake in particular cases. The main reason referendums are instrumentally and procedurally valuable, however, is that democracies are not political theory seminars. At

³⁷⁹ ‘However, what today we call representative democracy has its origins in a system of institutions (established in the wake of the English, American, and French revolutions) that was in no way initially perceived as a form of democracy or government by the people.’ Manin (n 23). 1

some point, deliberation must stop, and decisions must be made.³⁸⁰ There is a need for groups to come to conclusions that people have reason to accept whether or not they agree with them. This is what democracies are for, and sometimes –when used properly–referendums are well placed to be a part of that process. Referendums are no more the devices of ‘dictators and demagogues’³⁸¹ than democracies are. This is because both democracies and referendums are tools, the way these tools are used is up to everyone, and how they are used can change.

³⁸⁰ Bringing an end to deliberation is a key requirement of what it means to make a decision. As Raz puts it: ‘A decision is always for the agent a reason for performing the act he decided to perform and for disregarding further reasons and arguments. It is always both a first order and an exclusionary reason...to make a decision is to put an end to deliberation. It is also to refuse to go on looking for more information and argument and to decline to listen to them when they crop up in one’s mind or are suggested by other people.’ Raz (n 213). 490;

³⁸¹ This is an infamous formulation of referendums by Margaret Thatcher, then Leader of the Opposition, speaking against the 1975 referendum remaining in the EEC. ‘History shows, as Clem Attlee pointed out with terse force in 1945, [a referendum] is a splendid weapon for demagogues and dictators.’ EEC MEMBERSHIP (REFERENDUM) (Hansard, 11 March 1975) <<http://hansard.millbanksystems.com/commons/1975/mar/11/eec-membership-referendum>> accessed 6 September 2017. 307

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