Societal Change and Constitutional Interpretation

Conor O'Mahony*

The Irish courts have long operated on the basis that the Constitution is a living document to be interpreted in light of changing standards and conditions in society. As Irish society has changed dramatically in recent years, the courts have been presented with difficult questions regarding whether the degree of change justifies reinterpreting a constitutional provision. This has led some members of the judiciary to have reservations about the democratic legitimacy of such reinterpretations, and to doubt their own institutional competence to accurately reflect views in society. Accordingly, in two recent cases regarding same sex marriage and frozen embryos, the courts have chosen to defer to the legislative position as reflective of the will of society instead of exercising an independent judgment. This article critically assesses judicial deference as a method of reflecting societal change in constitutional interpretation, and argues that while it is superficially appealing, it is ultimately problematic. In this light, alternative methods of facilitating the evolution of constitutional principles will be considered.

I - Introduction

Since the Irish Constitution was drafted and enacted in 1937, Irish society has changed out of all recognition. Family structures, moral standards and patterns of religious participation have all radically shifted; economic development, immigration and technological advancement have contributed to shaping a modern Ireland that the people who drafted and ratified the Constitution could never have imagined. By way of contrast, the text of the Constitution itself has changed comparatively little, particularly with respect to issues concerning fundamental rights.[1] This gives rise to a particularly challenging problem of constitutional interpretation whenever a provision of the Constitution falls to be applied in a novel factual scenario which was not contemplated

* B.C.L., LL.M. (N.U.I.), Ph.D. (University of Wales, Aberystwyth); Lecturer in Constitutional Law, University College Cork. This article is based on a paper originally given at the Society of Legal Scholars (Ireland) Seminar, Trinity College Dublin School of Law, February 17, 2008. The author is grateful to Dr Maria Cahill for her comments on an earlier draft.

[1] The fundamental rights provisions of Articles 40-44 of the Constitution have been the subject of relatively little reform since 1937, with only five amendments being successfully passed at a referendum. Article 44 was amended in 1972 to remove the reference to the special position of the Catholic Church. Article 41 was amended in 1995 so as to remove the prohibition on divorce. Article 40.4 was amended in 1996 to allow for the refusal of bail where considered necessary to prevent the commission of a serious offence. The most significant amendments have been to Article 40.3, which was amended in 1983 so as to explicitly protect the right to life of the unborn, and again in 1992 so as to prevent this provision being used to restrict travel abroad or the distribution of information about services abroad.

at the time when the provision was drafted and enacted, or which was contemplated in a way which no longer reflects the views of society today.

In the United States, proponents of "originalism" argue that in the absence of an intervening amendment, the Constitution should only be applied in the manner intended by those who drafted and enacted the provisions, and that judges should not update its meaning by reading its provisions in the so called "present tense" and in light of changes in ideas, standards and conditions in society. This is a viewpoint which has met with much opposition in American constitutional discourse.[2] In Ireland, as will be seen, it is a viewpoint which has seldom been accepted by the courts, with the dominant view being that the Constitution was intended to be capable of evolution, and that judges should be free to mould it to changing conditions and ideas without the need for repeated referenda.

If judges are to interpret constitutional provisions not by reference to the original intent of those who drafted and enacted them, but by reference to how present-day society would wish to see them applied, the obvious next question is: how is the latter to be established in court? Two recent cases have put this challenge to the Irish courts. In *MR v. TR*,[3] the High Court was asked to decide whether surplus frozen embryos from IVF treatment fall within the meaning of the undefined term "unborn" in Article 40.3.3°, even though the provision was originally enacted for the purpose of prohibiting the abortion of the foetus in the womb, at a time before IVF treatment was available in Ireland. In *Zappone v. Revenue Commissioners*,[4] the High Court was asked to decide whether the undefined term "Marriage" in Article 41.3.1° could extend to same-sex couples, even though this possibility was never seriously considered when it was originally enacted.

In each case, the Court had a choice between interpreting the provision by reference to original intent, or attempting to give effect to the wishes of society today.

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[2] For a discussion of the flaws of originalism with respect to societal change, see C. Eisgruber, *Constitutional Self-Government* (Cambridge: Harvard University Press, 2001), Chapter 1 [hereinafter Eisgruber].
[3] [2006] I.E.H.C. 359.
[4] [2008] 2 I.R. 417 [hereinafter *Zappone*]. This case is currently under appeal to the Supreme Court.

As will be discussed in this article, the High Court in each case was open to the idea of updating the interpretation of the provision, [5] and the mechanism chosen in each case for establishing how society would wish to see the provision interpreted was that of judicial deference to the legislature. The purpose of this article is to examine whether deference is the appropriate mechanism to be utilised in such cases. Drawing on the work of a number of prominent American constitutional theorists, it will be argued that the application of judicial deference in cases of "present tense" [6] constitutional interpretation is superficially appealing, but ultimately problematic; and further, that the alternative option of originalism and repeated referenda is at least as bad. With this in mind, potential new ways for allowing the Irish Constitution to evolve in line with society will also be considered.

II - Societal Change and Constitutional Interpretation

The Irish Constitution could be accused of attempting to be two completely conflicting things at once: an immovable and yet fluid object. Like many constitutional documents, it is entrenched, in the sense that it is not amenable to amendment through the ordinary legislative process (although the chosen method of entrenchment, the direct simple majority referendum following a simple majority vote in parliament, is perhaps less common, with many countries employing various parliamentary supermajority procedures instead). Set against this entrenchment is an acceptance that it is impractical to hold a referendum to amend the Constitution every time that circumstances in society change; consequently, the Constitution is couched in language that is deliberately vague and which speaks in the present tense. [7] Seeing this, the Irish

[5] The Supreme Court has since ruled in the frozen embryo case under the title *Roche v. Roche* [2009] I.E.S.C. 82. The decision of the Supreme Court, while upholding the decision of the High Court, was reached on different grounds; for the purposes of the subject matter of this article, the discussion will focus on the High Court decision.

[6] This term has been adopted from Doyle, "The Duration of Primary Education: Judicial Constraint in Constitutional Interpretation" [2002] 10 I.S.L.R. 222.

[7] Eisgruber, *supra* note 2, argues at 17 and 35 that the idea of an inflexible constitution (in the sense of the amendment procedure) is inconsistent with the idea of an over-specific constitution, since it makes no sense to set down highly specific rules that are so hard to change. Consequently, if a constitution is very difficult to amend, the principles contained in it are likely to be more abstract, and thus to invite more interpretation and re-interpretation.

judiciary has generally taken the view (unlike some American judges[8]) that the original intention of the framers of the Constitution was not to bind the judiciary by the original intention – indeed, Richard Humphreys states that "every indication is to the contrary" – but to allow them to mould the constitutional directive in question to suit the times at hand.[9] Alexander Bickel has commented that in the U.S.,

> [t]he Framers knew … that nothing but disaster could result for government under a written constitution if it were generally accepted that the specific intent of a constitutional provision is ascertainable and is forever and specifically binding, subject only to the cumbersome process of amendment.[10]

In Ireland, the principle that the meaning of the Constitution is open to evolution through interpretation was eloquently expressed by Walsh J. in the classic case of *McGee v. Attorney General*:

> [t]he judges must, therefore, [in light of the Preamble] as best they can from their training and their experience interpret these rights in accordance with their ideas of prudence, justice and charity. It is but natural that from time to time the prevailing ideas of these virtues may be conditioned by the passage of time; no interpretation of the Constitution is intended to final for all time. It is given in the light of prevailing ideas and concepts.[11]

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[8] The classic proponent of originalism justified on the basis of original intention in American constitutional literature is R. Bork, *The Tempting of America: The Political Seduction of the Law* (New York: Touchstone, 1990). Note, however, that even Bork was open to some limited evolution of constitutional principle through judicial interpretation; see S. Levinson, ed., *Responding to Imperfection: The Theory and Practice of Constitutional Amendment* (Princeton: Princeton University Press, 1995) at 13 [hereinafter Levinson]. The most prominent originalist on the current U.S. Supreme Court is Justice Scalia; see A. Scalia, *A Matter of Interpretation: Federal Courts and the Law* (Princeton: Princeton University Press, 1997).

[9] R. Humphreys, "Constitutional Interpretation" (1993) 15 D.U.L.J. 57 at 64. Eisgruber, *supra* note 7 at 33:

> [i]f the framing generation had a right to construct whatever constitution it thought best, it might have instructed later generations to act on the basis of their best judgment about [e.g.] the "freedom of speech," even if that judgment was inconsistent with the framing generation's own. If "the people" chose to constitutionalize [sic] abstract ideals, then originalism would defeat, rather than respect, their intentions.

[10] A. Bickel, *The Least Dangerous Branch: The Supreme Court* at *the Bar of Politics*, 2nd Ed. (London: Yale University Press, 1986) at 106 [hereinafter Bickel, *The Least Dangerous Branch*]. At 105, Bickel cites C. Curtis, "A Modern Supreme Court in a Modern World" 4 Vand. L. Rev. 427, 428 (1951) who said that what the Framers wrote

> ... comes down to us more like chapter headings than anything else. They put it up to us, their successors, to write the text. And why not? We are better equipped and better able than they to deal with their future, which is our present. At that, we are older and more experienced than they. They died in a younger world.

[11] [1974] I.R. 284 at 319 [hereinafter *McGee*].

This passage has been repeatedly approved in subsequent case law of the Supreme Court.[12] A recent example is *Sinnott v. Minister for Education*,[13] where Denham J. echoed Walsh J. by stating: "[t]he Constitution is a living document. It must be construed as a document of its time."[14] More recently still, in *A v. Governor of Arbour Hill Prison*, Murray C.J., approving all of the above case law, stated that the Constitution has a "dynamic quality" and must be "interpreted in accordance with contemporary circumstances including prevailing ideas and mores, such that "[i]t is entirely conceivable therefore that an Act found to be unconstitutional in this, the 21st century might well have passed constitutional muster in the 1940s or 50s."[15] A classic example of such interpretation can be seen in relation to the term "primary education" in Article 42.4. In *O'Donoghue v. Minister for Health*,[16] the definition of "primary education" was extended to include education for the most severely handicapped, all year round if necessary, and in *Sinnott* this was extended up to the age of 18 if necessary.[17] This occurred in spite of clear acceptance that the "primary education" contemplated by the electorate when enacting the provision in 1937 was reading, writing and arithmetic provided in national schools during the school term from ages 4 to 12. It should be

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[12] See, e.g., O'Higgins C.J. in *State (Healy) v. Donoghue* [1976] I.R. 325 at 347 and Denham J. in *D.P.P. v. Best* [2000] 2 I.L.R.M. 1 at 17-18. In *Norris v. Attorney General* [1984] I.R. 36 at 96, McCarthy J. stated:

> I find it philosophically impossible to carry out the necessary exercise of applying what I might believe to be the thinking of 1937 to the demands of 1983…it would be plainly impossible to identify with the necessary degree of accuracy of description the standards or mores of the Irish people in 1937 – indeed, it is no easy task to do so today…Suffice to say that the Constitution is a living document; its life depends not merely upon itself but on the people from whom it came and to whom it gives varying rights and duties.

[13] [2001] 2 I.R. 545 [hereinafter *Sinnott*].

[14] *Ibid.* at 664. Note, however, that there have been some judges who have cautioned that this principle does not mean that the historical background to the enactment of a provision is irrelevant. In *Crowley v. Ireland* [1980] I.R. 102 at 126, Kenny J. stated that "[t]he Constitution must not be interpreted without reference to our history and to the conditions and intellectual climate of 1937". Similarly, in *Sinnott*, *ibid.*, Murray J. stated:

> [a]greeing as I do with the view that the constitution is a living document which falls to be interpreted in accordance with contemporary circumstances including prevailing ideas and mores, this does not mean, and I do not think it has ever been so suggested, that it can be divorced from its historical context. Indeed, by definition that which is contemporary is determined by reference to its historical context.

In the same case, Murphy J. at 675 did in fact offer an originalist interpretation of the term "primary education", but was the only of the seven judges to do so, and his reasoning has been the subject of strong criticism; see F. Ryan, "Disability and the Right to Education: Defining the Constitutional 'Child'" (2002) 24 D.U.L.J. 96 at 110 and S. Quinlivan & M. Keys, "Official Indifference and Persistent Procrastination: An Analysis of *Sinnott*" [2002] J.S.I.J. 163 at 168.

[15] [2006] 4 I.R. 88 at 129-130.

[16] [1996] 2 I.R. 20.

[17] *Sinnott*, *supra* note 13.

stressed, of course, that the principle is one of evolution, not revolution; Bickel points out that "[t]he Court is seen as a continuum. It is never, like other institutions, renewed at a single stroke … . To the extent that they are instruments of decisive change, Justices are time bombs, not warheads that explode on impact."[18]

Former Chief Justice of Ireland Thomas Finlay, writing extra-judicially, has described this principle of interpretation as the reason why the Irish Constitution continued to provide broadly satisfactory protection for fundamental rights in spite of fairly minimal amendments in the first 50 years of its existence, and expressed his view that:

> … the experience of the last fifty years would strongly support the contention that interpretation necessarily and properly confined to interpretation and not used as a mask for amendment or variation…probably provides the most ready manner by which the fundamental laws of this State can be made reasonably fit to provide for the changes of Irish society as it develops into the future.[19]

Superficially, this sounds rather attractive; however, there is clearly something of a tension in allowing a fluid re-interpretation of a document which is designed to be relatively difficult to change. This tension has been highlighted in the American context by Jeremy Waldron, and his comments would seem to be equally applicable in Ireland:

> [o]n any account of the activity of the US Supreme Court over the past century or so, the inescapable duty to interpret the law has been taken as the occasion for serious and radical revision. There may not be anything wrong with that, but there is something wrong in conjoining it with an insistence that the very rights which the judges are interpreting and revising are to be put beyond the reach of democratic revision and reinterpretation. In the end, either we believe in the need for a cumbersome amendment process or we do not. If we do, then we should be disturbed by the scale of the revisions in which the judges engage … . They find themselves routinely having to think afresh about the rights that people have, and having to choose between rival conceptions of those rights, in

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[18] Bickel, *The Least Dangerous Branch*, *supra* note 10 at 31. Bickel continues at 109:

> [c]hange should be a process of growth. The coloration of the new should not clash with that of the old. Change should not come about in violent spasms. Government under law is a continuum, not a series of fresh jerky departures. And so the past is relevant … . Moreover, the recorded past is, of course, experience; it is a laboratory in which ideas and principles are tested…history is a recurrent major theme in the Supreme Court, as it necessarily must be in an institution charged with the evolution and application of society's fundamental principles.

[19] T. Finlay, "The Constitution of Ireland in a Changing Society" in Curtin & O'Keefe (eds.), *Constitutional Adjudication in European Community and National Law* (Dublin: Butterworths, 1992) at 143. For a discussion of the difference between interpretation and amendment, see Levinson, *supra* note 8 at 13-36.

> just the way that traditional arguments for making amendment difficult are supposed to preclude.[20]

It is thus that the first concern regarding "present tense" interpretation of the Constitution is the perennial concern regarding the scope of the powers of the judiciary to interpret the Constitution: the democratic legitimacy concern, which often asks why, in constitutional law, unelected and barely accountable judges should be empowered to do what the democratically elected and accountable representatives of the people cannot. The second concern is one of institutional competence: if the views of society really have changed, then surely a predominantly male, white, middle-class judiciary who inhabit a relatively insulated world are worse placed to reflect this than elected representatives who speak to the people and for the people. As John Hart Ely puts it: "as between courts and legislatures, it is clear that the latter are better situated to reflect consensus … we may grant until we're blue in the face that legislatures aren't wholly democratic, but that isn't going to make courts more democratic than legislatures."[21] The danger is that judges engaged in such constitutional interpretation would consciously or unconsciously impute their own views to society at large,[22] which would be a clear abuse of judicial power, not to mention a failure to give effect to the views of the people.

Faced with these criticisms, what is a court to do? One option is to simply avoid re-interpreting constitutional provisions on the basis of a claimed change in conditions and ideas in society and stick to the original intention or established interpretation. However, such an approach does not adequately address the democratic legitimacy concern as it is clearly also undemocratic to constrain the elected representatives of today's generation by the outdated constitutional law of their forefathers. Moreover, the traditional justification for originalist constitutional interpretation – that that is how the Constitution was originally intended to be interpreted – does not hold true in Ireland.

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[20] J. Waldron, "A Right-Based Critique of Constitutional Rights" (1993) 13 O.J.L.S. 18 at 42-43.

[21] J. Ely, *Democracy and Distrust: A Theory of Judicial Review* (London: Harvard University Press, 1980) at 67 [hereinafter Ely].

[22] *Ibid.* at 67, states that "by viewing society's values through one's own spectacles…one can convince oneself that some invocable consensus supports almost any position a civilized person might want to see supported." As against this, see Eisgruber, *supra* note 2 at 130-135, who argues that as judges have a "democratic pedigree" deriving from their appointment by elected representatives, their own values will ordinarily correspond to those of the people at large, but concedes that this will not always be so. Eisgruber continues in Chapter 5 to argue that a critical assessment of tradition can aid judges in constructing the people's values and moral principles.

As already discussed, it is generally accepted that the Irish Constitution establishes a system which legitimises judicial re-interpretation of provisions in light of societal change; consequently, for the judiciary to refuse to do so on the grounds that such interpretation would be undemocratic would be to distort the intention of the document in a way that is itself undemocratic. Thus, in generally rejecting originalism, the Irish jurisprudence rejects Waldron's democratic legitimacy concern set out above – but the institutional competence concern expressed by Ely remains.

Judicial deference offers to courts a way to engage in present tense interpretation of the Constitution while acknowledging that the political organs are better placed to reflect the views of society on a particular issue. Thus, when invited to re-interpret a provision of the Constitution from its original or established interpretation, deference theory states that the courts should look to the legislative position for guidance. A court can defer to legislative judgment to a greater or lesser degree; but within the scope of whatever deference does occur, the court is precluded from reaching its own independent judgment as to what the Constitution demands. As deference is a model of judicial restraint, the decision to defer to any degree in itself greatly reduces the prospect of the applicant succeeding in establishing that the legislature or executive is in breach of the Constitution. The actual degree of deference that is ultimately afforded will determine whether the applicant's claim has any chance of success at all.

The variation in the level of deference is related to (but not synonymous with) the variation in the standard of review applied by courts to a piece of legislation.[23] One species of deference is what David Dyzenhaus calls "deference as respect",[24] which requires "a respectful attention to the reasons offered or which could be offered in support of a decision." This is similar to what is known as "rationality review", whereby a piece of legislation will not be struck down as long as the legislature had reasons for thinking that it was constitutional – the court ordinarily defers to those reasons and thus to the legislature's interpretation of the Constitution. As a consequence, in a similar way

[23] See generally S. Margulies, "Standards of Review and State Action under the Irish Constitution" (2002) 37 I.J. 23.
[24] D. Dyzenhaus, "The Politics of Deference: Judicial Review and Democracy" in M. Taggart (ed.), *The Province of Administrative Law* (Oxford: Hart Publishing, 1997) 279 [hereinafter Dyzenhaus] at 286.

to cases involving rationality review, cases in which the courts afford deference as respect to the legislature rarely succeed – but crucially, the court retains the discretion in extreme cases to hold that the interpretation offered by the legislature cannot reasonably be supported by the Constitution and surrounding case law. This may occur, for example, if the choice made by the legislature fails the proportionality test.[25]

A different type of deference is the altogether more extreme concept of what Dyzenhaus terms "deference as submission".[26] This type of deference, which Dyzenhaus rejects as being too extreme, leaves no room at all for the independent judgment of the court, which submits to the choice made by the legislature as to what the Constitution demands and does not question its validity. As a consequence, a constitutional claimant faced with a submissively deferential court has no prospect of success at all. This is rather similar to the "political questions" doctrine and the concept of "non-justiciability". Interestingly, the Irish Courts have traditionally been slow to embrace these concepts unreservedly, preferring instead to always leave open the possibility of constitutional review, albeit sometimes only in limited or extreme circumstances.[27] For this reason, it is highly questionable whether they should ever engage in deference as submission, particularly since such an approach is essentially incompatible with the concept of judicial review; this point will be explored further below.[28]

A clear cut and recent instance of judicial deference to the legislature in the context of present tense constitutional interpretation occurred in the Irish High Court decision in *Zappone* regarding the definition of marriage under Article 41.3.1° of the Constitution, [29] which provides that "[t]he State pledges itself to guard with special care the institution of Marriage, on which the Family is founded, and to protect it against attack."[30] The applicants in *Zappone* were two women who had participated in a

[25] It should be noted, however, that even within the scope of the proportionality test, there is room for a varying degree of deference when the court is addressing the question of whether a limitation on a right went no further than necessary to secure its objective – see Foley, "The Proportionality Test: Present Problems" (2008) 1 J.S.I.J. 67.
[26] Dyzenhaus, *ibid.* at 24.
[27] See P. Daly, "'Political Questions' and Judicial Review in Ireland" (2008) 2 J.S.I.J. 116.
[28] See text accompanying footnotes 98-105.
[29] *Zappone*, *supra* note 4.
[30] *Ibid.*

legally recognised wedding ceremony to each other in Canada. They were seeking to have their status as a married couple recognised in Ireland for tax and other purposes, but all efforts were rejected on the basis that Irish law did not recognise same-sex marriages. The applicants challenged the refusal of the Revenue Commissioners to recognise their marriage, arguing that attitudes and consensus in respect of Marriage as exclusively consisting of a union between a man and a woman have changed and that the interpretation of the (undefined) term "Marriage" in Article 41.3.1° should reflect such change. Dunne J. in the High Court accepted that the Constitution should be interpreted in the present tense and in light of consensus in society; but crucially, in deciding what exactly constituted current consensus on the issue, she looked to the position set down in recent legislation:

> [t]he definition of marriage to date has always been understood as being opposite sex marriage. How then can it be argued that in the light of prevailing ideas and concepts that definition be changed to encompass same sex marriage? ... as recently as 2004, s. 2(2)(e) of the Civil Registration Act was enacted. That Act sets out what was previously the common law exclusion of same sex couples from the institution of marriage. Is that not of itself an indication of the prevailing idea and concept in relation to what marriage is and how it should be defined? I think it is.[31]

In this way, the interpretation of the Constitution is kept up to date, but in a situation where the judge felt that the legislature was better placed than the courts to determine the views of society on a sensitive and potentially controversial issue, the court deferred to the legislative view of what the Constitution required.

Around the same time, another decision of the High Court demonstrated a slightly different type of judicial deference in determining the application of a constitutional provision to a novel situation – this time, a situation involving a change in technology and medical practice rather than a change in attitudes *per se*. In *MR v. TR*,[32] a separated woman was seeking to be implanted with surplus frozen embryos remaining from successful *in vitro* fertilisation (IVF) treatment which she underwent before her marriage broke down. Her husband refused to consent to this, and the High

[31] *Ibid.* at 505-506.
[32] *MR v. TR*, *supra* note 3.

Court held that the contract with the fertility clinic required his consent before the embryos could be released. The woman sought to trump the contractual issue by arguing that the protection provided by Article 40.3.3°[33] to the right to life of the "unborn" should encompass frozen embryos *in vitro* in addition to embryos being carried *in utero*. Since the State has a duty to protect the right to life of the unborn, it was argued that the court should order the fertility clinic to release the embryos for implantation. The complicating factor in this case was the fact that when Article 40.3.3° was originally inserted into the Constitution in 1983, IVF technology had only just been invented and was not available in Ireland. Consequently, it did not feature in the Oireachtas debates concerning the amendment, which centred around the issue of abortion,[34] and received scant attention in the media coverage of the referendum debate.[35]

In light of this background, McGovern J. adopted what at first glance appears to be an originalist approach in holding that the 1983 amendment was motivated by concerns relating to abortion and only contemplated the unborn within the womb. As frozen embryos were not within the contemplation of the people at the time of the 1983 amendment, they therefore could not fall within the meaning of the term "unborn" in

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[33] Article 40.3.3° states: "[t]he State acknowledges the right to life of the unborn and, with due respect for the equal right to life of the mother, guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate that right."

[34] In the Oireachtas debates on the *Eighth Amendment to the Constitution Bill 1983*, only two speakers made any reference to IVF technology, and neither expressed a clear view regarding whether frozen embryos were protected by the proposed amendment. See J. Doyle T.D., 340 Dáil Deb.col. 500-501 (February 17, 1983), who stated that "[h]uman life begins in the womb and must be protected and respected from there on until death. I speak on my own behalf and on behalf of the majority of the Irish people." This would suggest that he envisaged that embryos outside the womb would not be protected, but he went on to say:

> [i]t is my belief that the embryo foetus possesses a fundamental right to life from the moment of conception. From that moment the foetus is already provided with all the genetic elements which will shape its future development as an adult person … . One of those involved in the test tube baby experiments said that in crushing unwanted embryos he was conscious of destroying human life.

The only other mention of IVF treatment in the legislative debates was a rather opaque reference made by Mrs Bulbulia, 100 Seanad Deb.col. 891 (May 11, 1983).

[35] The limited coverage that can be found tends to suggest that at least some of the vocal campaigners for a "yes" vote were of the view that frozen embryos are alive and should be protected accordingly. See, e.g., "Protestant support for constitutional amendment", *The Irish Times* (October 28, 1982), and "Letters to the Editor", *The Irish Times* (March 3, 1983) and (May 6, 1983). In this light, it is perhaps unsurprising that when *MR v. TR* was appealed to the Supreme Court, a woman who voted "yes" in 1983 applied (unsuccessfully) to the Court to be joined as an *amicus curiae* party to the appeal on the ground that the Attorney General's argument that the 1983 amendment did not apply to frozen embryos "completely misrepresented" the intention of those who voted in favour of the amendment to "protect human life". See M. Carolan, "Court rules woman cannot join appeal on embryos", *The Irish Times* (February 27, 2009).

Article 40.3.3°, and thus could not enjoy the right to life. However, to characterise the decision as purely originalist would be over-simplistic. As in *Zappone*, legislation was an important element of the reasoning of the High Court in deciding whether to update the definition of a term contained in the Constitution – but on this occasion, it was the lack of legislation, rather than the presence of legislation containing a definition of the term at issue, that was a decisive factor. In deciding not to extend the definition of the term "unborn" to include frozen embryos, McGovern J. was clearly influenced by the fact that no legislation was in place which provided protection for frozen embryos.

In the earlier decision of *Attorney General (SPUC (Ireland) Ltd) v. Open Door Counselling Ltd*, it was held that Article 40.3.3° is self-executing and imposes an obligation not only on the Oireachtas but on the courts, who are not only entitled but obliged to act directly on foot of Article 40.3.3° to protect the right to life of the unborn if asked to do so, regardless of the absence of any relevant legislation.[36] In spite of this, in *MR v. TR* McGovern J. stated his opinion that the application of Article 40.3.3° to frozen embryos was not a matter for the courts – it was for the Oireachtas to legislate on, or for the people to vote on in a referendum. In this sense, the decision could be characterised as deference to legislative inaction, in that the decision to ultimately adopt an originalist approach followed from the initial deference. Conversely, the implication in *MR v. TR* – and indeed in *Zappone* also – is that the court would have been amenable to applying, in a constitutional setting, the updated definition being advocated by the applicants as long as the legislature had previously enacted measures to a similar effect.[37]

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[36] [1988] I.R. 593. The case concerned the distribution of information regarding abortion services available outside of the State; although no legislation prohibited this practice, the Court granted an injunction pursuant to Article 40.3.3° restraining the defendants from distributing the relevant information.

[37] Admittedly, this point is open to the counter-argument that if the legislature had previously enacted measures concerning the point at issue, the case would fall to be dealt with simply as an issue of statute law and not as a constitutional issue. In some cases, this would indeed be the case – if same sex marriage or the protection of the right to life of frozen embryos were legislated for, then the plaintiffs in *Zappone*, *supra* note 4, and *MR v. TR*, *supra* note 3, would have had no need to invoke the Constitution. Nonetheless, there remains the possibility that a plaintiff in a different case may wish to invoke the Constitution so as to override a piece of legislation (such as to argue that the legislature went too far, or not far enough, in re-defining a constitutional concept, of which Marriage would be one possible example). Equally, cases may arise similar to *MR v. TR* where no legislation yet exists, but may possibly be enacted in the future.

III - Problems with Deference in Present Tense Interpretation

To proponents of judicial deference, *Zappone* and *MR v. TR* might appear to provide shining examples of how a deferential approach keeps the Constitution open to evolution and adaptation while simultaneously ensuring that the democratic legitimacy and institutional competence deficiencies of the courts are kept from discrediting the process of constitutional judicial review. The judges remain, in principle, empowered to expand constitutional provisions, but – recognising that the legislature is better placed to determine whether such an extension should in fact be made – defer to the judgment of the legislature as represented by relevant legislation (or, alternatively, the lack thereof) when deciding whether the provision in question is ripe for re-interpretation. Brian Foley has argued that this form of judicial restraint is considerably more attractive than what he terms "interpretative restraint" – that is, where the democratic legitimacy and institutional competence concerns lead judges to avoid the issue by simply adopting a narrow reading of the constitutional provision in question. Interpretative restraint avoids the courts being seen as enjoying excessive discretion or as usurping the democratic process, but does so at the cost of excessively narrow readings of the Constitution which water down the scope of protection offered to fundamental rights and which set precedents which close off possible avenues of redress for future litigants. By way of contrast, Foley argues that deference allows judges to acknowledge the limitations of the courts while simultaneously keeping the issue alive as a question of constitutional law:

> … if one thinks that the court is the only institution which can "do" constitutional law, but, in a given case, it is unable to do so, then constitutional law does not get "done" at all. The logic here is simple. If one believes that the constitutional decision-making power belongs exclusively to the courts, one may find that there are constitutional questions which the courts cannot deal with … . Irish courts have, on occasion, dealt with this conflict by narrowing the text of the Constitution so as to exclude problematic claims from constitutional significance.
>
> On the other hand, if one does not believe in judicial exclusivity over constitutional-questions, then these problem-cases do not have to result in narrow readings of the Constitution. Assuming that, in fact, certain

> constitutional claims cannot rationally be the subject of adjudication, a court may choose not to "read-down" the Constitution, but to defer to legislative judgment as to how the constitutional claim should be resolved.[38]

Foley's ultimate argument is thus that "approaching the general question of judicial restraint by working out which constitutional issues should be decided by which institutions can have the advantage of permitting judicial restraint *without* restrained readings of the Constitution", although he takes great care to clarify that he does not seek to advocate *when* judicial deference should be utilised, but merely to explain *why* it is a potentially beneficial model of judicial restraint.[39] Moreover, in his later work, he is careful to caution that the courts should only defer in cases where deference is due;[40] this idea will be discussed below.[41]

On the face of it, there is no doubt that there is a certain appeal to the concept of judicial deference as an answer to the institutional competence concerns surrounding the practice of present tense constitutional interpretation. Closer examination, however, reveals that – in the Irish context at least – there are also significant difficulties which call into question whether we should want our courts to go down the route of deference to legislative judgment when interpreting provisions of the Constitution in light of societal change. These difficulties include doctrinal problems associated with the hierarchy of laws and the established principles of judicial review and constitutional interpretation, as well as more practical issues relating to political reality and the reasons for having constitutional principles which are set apart from ordinary politics. These difficulties will now be discussed in turn.

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[38] B. Foley, "Interpretative and Deference Based Models of Judicial Restraint in the Irish Constitution" (2006) 6(1) H.L.J. 65 [hereinafter Foley, "Interpretative and Deference Based Models"] at 68-69 [emphasis in original].

[39] *Ibid.* at 91. Indeed, as will be seen, much of his later work on the presumption of constitutionality goes towards showing how the broad concept of judicial deference is problematic as an aid to present tense constitutional interpretation.

[40] See generally B. Foley, *Deference and the Presumption of Constitutionality* (Dublin: Institute of Public Administration, 2008) [hereinafter Foley, *Deference and the Presumption of Constitutionality*], particularly Chapter 5.

[41] See text accompanying footnotes 58-63.

A. Presumption of Constitutionality

In highlighting the doctrinal difficulties which can arise from the application of judicial deference in cases of "present tense" constitutional interpretation, a good place to begin is the presumption of constitutionality and the so-called "double construction rule".[42] Our legal system operates on the basis of a presumption that legislation is compatible with the Constitution and should,[43] where both constitutional and unconstitutional interpretations are available, be given an interpretation which conforms with the Constitution.[44] These principles, it should be noted, are principles of statutory – and not constitutional – interpretation. Consequently, the presumption that legislation is constitutional does not require that the interpretation of the Constitution should, in cases of doubt, conform with the legislation so as to ensure its continuing validity. The interpretation of the Constitution should be established first, and only after this should legislation be looked at, at which point its validity or invalidity can be ascertained. The process embarked upon by Dunne J. in *Zappone* reverses the established order and approaches the issue entirely the wrong way around. In doing so, the Court

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[42] On the presumption of constitutionality and the double construction rule, see generally G. Hogan & G. Whyte, *JM Kelly: The Irish Constitution*, 4th ed. (Dublin: Lexis-Nexis Butterworths, 2003) at 832-870 [hereinafter Hogan & Whyte].

[43] See Hanna J. in *Pigs Marketing Board v. Donnelly* [1939] I.R. 413 at 424:

> When the court has to consider the constitutionality of a law it must, in the first place, be accepted as an axiom that a law passed by the Oireachtas, the elected representatives of the people, is presumed to be constitutional unless and until the contrary is clearly established.

The presumption has been applied in constitutional cases ever since. Foley, *Deference*, *supra* note 40, characterises the presumption of constitutionality as a species of deference which defers to a considered legislative judgment that the legislation being enacted is in fact compatible with the Constitution, and argues that as this is rarely the case, the presumption should be abandoned. He briefly states at 69 that the presumption is far more than an onus of proof, although Hogan & Whyte, *ibid.* at 846-847, state that "[o]ne would be hard put to identify a real distinction" between the presumption and a mere onus of proof. Foley certainly levies some valid criticisms towards the operation of the presumption in Irish constitutional law; however, given that the double construction rule aspect of the presumption acts as an important expedient designed to avoid unnecessary striking down of legislation and associated difficulties, perhaps the better approach would be not to abandon the presumption altogether, but to accept the presumption as a mere onus of proof, and the double construction rule as a rule of statutory (but not constitutional) interpretation.

[44] See Walsh J. in *McDonald v. Bord na gCon (No 2)* [1965] I.R. 217 at 239:

> [o]ne practical effect of this presumption [of constitutionality] is that if in respect of any provision or provisions of the Act two or more constructions are reasonably open, one of which is constitutional and the other or others are unconstitutional, it must be presumed that the Oireachtas intended only the constitutional construction and a court called upon to adjudicate upon the constitutionality of the statutory provision should uphold the constitutional construction.

went considerably further than refraining from stepping outside its appointed role – in effect, it transferred one of its most important functions to the legislature.

Of course, establishing what exactly the view of society is on a given issue is a rather difficult task, but it is not one which should be approached through the medium of legislation. As the applicants in *Zappone* were already married under Canadian law, they were not seeking to get married in Ireland, but rather to have their Canadian marriage recognised. Consequently, it was not necessary to their case to seek a declaration that section 2 of the Civil Registration Act 2004, on which Dunne J. relied, was unconstitutional. However, if the facts were changed very slightly so that the applicants were not yet married, and therefore *were* seeking such a declaration, then Dunne J. would still have had to decide whether the definition of Marriage should be updated in light of changed views in society – but, in making that decision, would surely not have been entitled to refer to the very provisions whose constitutionality was impugned in order to justify their own constitutionality. To say otherwise is to say that legislation can never be declared unconstitutional in such circumstances, which is clearly incompatible with the concept of the supremacy of the Constitution, as well as the express terms of Article 34.3.2°, which states that "the jurisdiction of the High Court shall extend to the question of the validity of any law having regard to the provisions of this Constitution."

B. Hierarchy of Laws

Indeed, judicial deference of this sort not only distorts the presumption of constitutionality – it distorts the hierarchy of laws. For example, in *Zappone*,[45] the court decided that the definition of marriage in Article 41.3.1° is open to evolution, and that (in the absence of a referendum) the position as set down in legislation is to be taken as representative of the views of society and thus as determinative of the scope of the definition of the constitutional term. In this instance, the present definition happened to coincide with the original one. However, under this model of judicial deference – which Dyzenhaus characterises as "deference as submission" – the legislature is free to change

[45] *Zappone, supra* note 4.

the definition set down in legislation, and the new definition would be transposed onto the Constitution.[46] This would appear to be constitutional amendment by ordinary legislation by any other name, in which case it is in clear contravention of Article 46.

To take a slightly different angle: in *MR v. TR*,[47] it was suggested that the fact that there was no legislation providing protection for frozen embryos meant that they did not qualify for protection as enjoying the right to life of the unborn under Article 40.3.3°. The converse of this is that if such legislation was put in place, the constitutional definition would thus be extended by the courts so as to include frozen embryos. But what would happen if a later legislature wanted to repeal that legislation and allow for mass disposal of surplus embryos? To allow such a change in the law would run against the definition of the constitutional term as operational at that time, and again would clearly be a case of the Constitution being amended by ordinary legislation. But to take the opposite approach, and to hold that such a change in the law is unconstitutional as a violation of the right to life of the unborn as defined by reference to the older legislation, is to cease to be deferential where deference was once thought appropriate. Why should the court defer to legislative judgment on a discrete issue on one occasion and subsequently decline to do so on another? If the matter is ripe for deference, then surely the court should always be deferential on that particular issue. However, as outlined, such a consistent level of deference makes a mockery of both supremacy and entrenchment.

The reaction of political figures to the *Zappone* case perhaps demonstrates how Irish legislators have not yet even begun to come to terms with what deference theory has to say about the hierarchy of laws and the relationship between the legislature and the courts in the determination of constitutional questions. The decision of the High Court clearly suggested that legislation could have taken a step forward in line with views in society and that this, if it had occurred, would have provided sufficient evidence of the relevant societal change to justify the Constitution being interpreted in a similarly updated fashion. As against this, the outcome of the High Court action – which

[46] Dyzenhaus, *supra* note 24 at 286. The varying levels of deference were discussed above – see text accompanying footnotes 23-28.
[47] *MR v. TR*, *supra* note 3.

was based on the fact that legislation had not taken this step – was immediately viewed by the legislature as a bar to making the very legislative change that the Court was suggesting could have been made.[48] The comments made by the Minister for Justice of the time, Brian Lenihan T.D., are particularly revealing; he informed the media that he could not legislate for same sex marriage as the legal advice he had received was that any such legislation would be unconstitutional as a violation of the requirement in Article 41.3 that the State guard with special care the institution of Marriage. The Minister stated: "[i]t is my strong belief, based on sound legal advice, that gay marriage would require constitutional change and in my view a referendum on this issue at this time would be divisive and unsuccessful and, furthermore, would jeopardise the progress we have made over the last 15 years."[49]

Either the legislature has the power to enact such legislation or it does not. Clearly, both propositions cannot be true simultaneously. But either answer is unsatisfactory, in that persistent deference undermines supremacy and entrenchment, while selective deference is logically inconsistent and unsatisfactory. Moreover, the type of selective deference that would make the statement of the Minister for Justice correct would present a clear vicious circle, particularly as the Minister also indicated his unwillingness to hold a referendum which would establish what society really thinks. The court has held that the definition cannot be extended because of what the legislation says. The legislature now says that it cannot legislate on the issue because of what the court says. The only answer lies in a referendum which – as identified by the Minister in the very same statement – the legislature, in this instance, refuses to hold. Therefore neither the Constitution nor legislation can evolve, and the law risks becoming out of touch with the needs of the society it is supposed to serve. This is the type of deadlock which a court charged with interpreting a constitutional bill of rights in a manner which reflects changes in society can break. Holding that the 2004 legislation disposes of the issue approaches matters the wrong way around – it is

[48] In this instance, this results from the fact that the State is obliged by Article 41.3.1° to guard with special care the institution of Marriage and protect it from attack, and the High Court had clearly re-affirmed the definition of Marriage as being inherently heterosexual; consequently, legislation providing for same-sex marriage could be construed as an attack on the constitutionally protected institution of heterosexual Marriage.

[49] C. O'Brien, "Lenihan rules out 'divisive' referendum on gay marriage", *The Irish Times* (December 5, 2007).

legislation which is required to be compatible with the Constitution, and not vice-versa. The question should be: is the 2004 Act constitutional in light of the concept of Marriage that is protected by Article 41 in the prevailing conditions?

C. "Due Deference"

The difficulty just raised would apply to any case in which members of the judiciary defer to legislative judgment, but there is a further difficulty particular to the legislative judgment involved in the two cases under discussion. The idea of deference, in the institutional competence sense, is that the legislature is better placed than the courts to consult widely and reflect the views of the people. However, it is clearly unsafe to assume that all legislation is reflective of the views of the majority of society – an Act of the Oireachtas, once passed by both Houses, would not necessarily be approved by the people if they were given the chance to vote on it. For an illustration of this point, it is not necessary to look any further than the referendum process: every time that a referendum is put to the people and rejected (which has occurred three times in the past decade alone), it involves the enactment of legislation which is voted on and passed in both the Dáil and the Seanad, but subsequently rejected by a majority of the people.

More specifically, in any society such as Ireland where religion has traditionally played a strong role, the issues of same sex marriage and the right to life of the unborn are perennially controversial issues on which legislative reform would generate a strong reaction from vocal elements on either side of the issue. In the Irish political system (with its idiosyncratic sameness as between the established centre-right political parties), the elected organs of the State, always thinking in 5-year cycles, party politics, constituencies, proportional representation and Dáil majorities, are afraid to act on issues such as these because they cannot afford to alienate even 20% of the electorate, not to mind 40% or 50%. To legislate in either direction on the unborn is to strongly risk losing the next election, and thus legislators deliberately choose not to act and to leave the difficult decisions to the judiciary,[50] who then face the wrath of the electorate

[50] When asked in 2005 whether the Government would legislate to clarify the law relating to abortion and the unborn, then Taoiseach Bertie Ahern stated that he had "no intention" of doing so. See D.

on the airwaves and in the letter columns, but not at the ballot boxes. This phenomenon is not uniquely Irish: Mark Graber has highlighted a similar sort of "legislative deference to the judiciary" in the U.S.,[51] often on very similar issues. Given that the legislature is quite obviously paralysed into inaction on all issues relating to the right to life of the unborn, the absence of legislation is neither a reliable guide to the views of society nor a particularly good basis for interpreting the Constitution.

Moreover, it does not seem acceptable to say that a particular decision should properly be made by the legislature when it is plain to see that the legislature has no intention of making that decision. Instead, seeing this failure, the courts should be willing to take up their mantle as residual guardians of fundamental rights under the Constitution. Graber suggests that, in cases such as this:

> [i]ndependent judicial policymaking seems both anomalous and countermajoritarian … only if scholars assume that legislators wish to bear the responsibility for resolving conflicts that divide the body politic. In fact, mainstream politicians are often more interested in keeping social controversies off the political agenda than in considering the merits of alternative settlements. When the disputes arise that most elected officials would rather not address publicly, Supreme Court justices may serve the interests of the political status quo by making policy… .[52]
>
> …although the resulting judicial decisions may be questioned on many substantive grounds, the justices cannot be criticized (or praised) for defeating the will of the legislature; the will of the legislature in each instance was that the justices take the responsibility for deciding what policy should be the law of the land.[53]

On the one hand, Graber cautions that judicial resolution of controversial issues tends to be less accommodating of compromise than political solutions, and thus more

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McDonald, "Abortion – it's back to court", *The Sunday Times* (August 14, 2005), and E. O'Kelly, "Cowardly politicians are to blame for sorry fertility mess", *The Irish Independent* (February 8, 2009).

[51] M. Graber, "The Nonmajoritarian Difficulty: Legislative Deference to the Judiciary" (1993) 7 Studies in American Political Development 35 [hereinafter Graber]. At 53-54, Graber cites literature which suggests that on the abortion issue, similar tactics have been adopted by politicians in virtually every Western democracy. At 58, he observes that only politicians at extreme ends of the debate on the abortion issue wish to politicise it; the vast majority in the middle wish to avoid it altogether rather than vote on it.

[52] *Ibid.* at 37-38.

[53] *Ibid.* at 46.

polarising of opinion on what are already deeply divisive questions.[54] As against this, he observes that when political solutions are clearly not forthcoming, it can be argued that "democratic values are better promoted by having some conflicts resolved by justices appointed and confirmed by elected officials when the practical alternative is not having those conflicts resolved at all."[55] Graber's point is well made, and supports the view that if legislation is not forthcoming because of a calculated decision to leave an issue to be resolved by the courts, rather than because of mere political inertia, the argument for the courts reaching an independent view of what the constitutional provision requires is strengthened even further.

On the definition of marriage, a similar (if slightly less pronounced) reluctance to legislate can be detected, with the legislature showing some willingness to legislate for civil partnership, but not to tackle full same-sex marriage. Certainly there is a similarly motivated and openly admitted reluctance to hold a referendum on re-defining the constitutionally protected family unit so as to include non-traditional families. The officially stated position of the legislature is that such a referendum will not be held – not because it is unlikely to pass, but because it might be divisive.[56] For similar reasons, proposals to amend the Constitution to provide enhanced protection for children have deliberately avoided seeking to make any alteration to the provisions of Article 41 which protect the marital family unit.[57]

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[54] *Ibid.* at 66. See also J. Goldsworthy, "Judicial Review, Legislative Override, and Democracy" (2003) 38 Wake Forest Law Review 451 at 459-465 [hereinafter Goldsworthy].

[55] Graber, *supra* note 51 at 73.

[56] See All Party Oireachtas Committee on the Constitution, *Tenth Progress Report: The Family* (Dublin: Stationery Office, 2006) at 121-122. In declining to follow the recommendation of the *Report of the Constitution Review Group* (Dublin: Stationery Office, 1996) at 348, that "Article 42.1 should be amended to apply to all non-marital parents, provided they have appropriate family ties and connections with the child in question", the All Party Oireachtas Committee stated its view that,

> [h]owever comprehensive, well-articulated and apt this proposal may be, it encounters the strong belief of many people that it is not practicable to provide constitutional recognition for all family types while at the same time maintaining the uniqueness of one … to extend the definition of the family would cause deep and long-lasting division in our society and would not necessarily be passed by a majority.

[57] Joint Oireachtas Committee on the Constitutional Amendment on Children Final Report, February 2010 <http://www.oireachtas.ie/viewdoc.asp?fn=/documents/Committees30thDail/J-ConAmendChildren/Reports_2008/20100218.pdf> (date accessed: 18 November 2010).

In addition, on this particular issue, there is another reason why deference is not appropriate. The reasoning in *Zappone* was that the provisions of the Civil Registration Act 2004 were drafted so as to reflect the views of society at large. However, the comments made by the Minister for Justice make it clear that the terms of the Civil Registration Act are reflective not of the legislature's understanding of the views of the people it represents but of its own (or more accurately, its legal advisors') (mis)understanding of the constitutional restrictions within which the legislature operates. Clearly, when drafting the 2004 Act, the possibility of defining marriage as anything other than one man and one woman was never even considered, as it was assumed to be unconstitutional. If this is an issue which is ripe for judicial deference, then the view of the government that legislating for same sex marriage would be unconstitutional is misinformed, given that the courts feel it appropriate to defer to legislative judgment on that issue. Since the legislative choice was thus not necessarily intended as an expression of the views of the people, and additionally was based on a misunderstanding of the scope of legislative power on the issue at hand, it can be argued that the legislation in question is doubly unsuitable for deference.

Moreover, it smacks of unreality to characterise a situation such as this one as a case of deferring to an interpretation of the Constitution which was reached, after careful thought and deliberation, by the elected representatives of the people. In this regard, it is important to consider the concept of "due deference" – that deference must be earned, and must be deference to a decision actually reached. Foley states this point as follows:

> … the very idea of deference involves the reasonable belief that the legislature may be a better decision-maker than the court in some, or indeed in all, constitutional issues. The essence of deference, however, is deference to *a decision actually made*. If the legislature *does not actually* decide on matters of rights, then it starts to make less sense to 'defer' to its decisions because they *do not exist*.[58]

In the specific context of *Zappone*, it is interesting to note that section 2(2)(e) of the Civil Registration Act 2004, to which Dunne J. deferred as evidence of the legislature's

[58] Foley, *Deference*, *supra* note 40 at 230 [emphasis in original]. Foley discusses the concept of due deference generally at 161-165.

expression of the views of society, was never once discussed in the Dáil or the Seanad,[59] and was inserted into the Bill at Committee Stage with no discussion whatsoever of either Article 41 or the issue of same sex marriage.[60] More generally, it should be pointed out that while the Oireachtas does consider the scope of constitutional restrictions when legislating, this tends not to take the form of debate and deliberation on the floor of the House, or even in Committee, but rather comes in the form of mere legal advice given to the relevant Minister by the Attorney General's office. Legal advice emanates not from elected representatives, but from a small group of elite lawyers, who are in fact rather similar to the courts, but suffer from the disadvantage of not having an actual set of facts on which to base a decision,[61] and are not (unlike the courts) assigned a role in constitutional interpretation by the Constitution itself.

Moreover, since the Oireachtas is, in reality, heavily dominated by the executive, frequently what actually occurs is simply a case of the Minister responsible for a Bill communicating his legal advice to the House as a *fait accompli*, with no independent view being formed by any of the elected representatives of the people.[62] This type of constitutional interpretation is not all that different to the constitutional interpretation that takes place in the courts – it is still a case of the Constitution being interpreted by a small group of elite lawyers, and not by the people's elected representatives. If the courts effectively choose to defer to the interpretation of the Constitution reached by the relevant Minister's legal advisers, then they are abdicating their own responsibilities in

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[59] J. Mullins, "Not Thinking Straight" (Centre for Criminal Justice and Human Rights Annual Postgraduate Conference, University College Cork, May 1, 2009). Notes with author.

[60] Dáil Select Committee on Social and Family Affairs, February 3, 2004, amendment No. 9. The Minister for Social and Family Affairs, Mary Coughlan T.D., stated:

> [t]his section, as I indicated earlier, deals with interpretations. The interdepartmental committee on the reform of marriage law is examining a number of issues including the capacity to marry. It intends publishing a discussion paper on this issue and seeking views and observations from all interested parties.

There was no reply on the issue of same sex marriage from the other members of the Committee, one of whom (Willie Penrose T.D.) commented that they had only received the Minister's amendments the previous day.

[61] Foley, *Deference*, *supra* note 40, states at 286 that "… law may seem reasonable when viewed generally, but when one considers how it applies in a *particular* case, it may look less than reasonable.", and later: "[m]oreover, it is quite clear that legislation can be upheld as constitutional on one set of facts, but struck down when viewed through the lens of another factual situation." [emphasis in original].

[62] *Ibid.* at 238-246.

the field of constitutional interpretation – a point which becomes particularly acute given that the legal advisers do not always reach the same view as the courts.[63]

D. Textual Attribution of Responsibility

From a literal textual perspective, another question which needs to be considered is why, when a (very large) number of provisions of the Irish Constitution expressly allow the legislature to fill in the detail on an issue, should this type of deference be exercised in relation to provisions which contain no such formulation? Issues such as citizenship rules,[64] the use of official languages,[65] the management of natural resources,[66] the organisation of elections,[67] the functions of the President,[68] the salaries of public officials,[69] the structure of government departments,[70] local government,[71] the incorporation of international law,[72] the prosecution of crime[73] and the jurisdiction of the courts[74] are all (quite sensibly) expressly delegated to the legislature to make detailed provision. In the field of fundamental rights, similar delegations are seen in relation to the circumstances in which personal liberty can be curtailed,[75] or bail refused,[76] the forcible entry into a private dwelling,[77] the control of certain public meetings and of associations and unions,[78] the conditions for divorce,[79]

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[63] A recent illustration of this point can be seen in relation to the *Health (Amendment) (No. 2) Bill 2004*. Foley, *ibid.* at 237, observes that when deputies objected to the manner in which the Bill was being rushed through the Dáil, the then Minister for Health, Mary Harney T.D. told them that she had received legal advice that the Bill was constitutional, but refused to share the details of this advice with them. Of course, the Bill was subsequently struck down by the Supreme Court in *Re Article 26 and the Health (Amendment) (No. 2) Bill 2004* [2005] 1 I.R. 205.
[64] Articles 2 and 9.
[65] Article 8.3.
[66] Articles 10.3 and 10.4.
[67] Articles 12.5, 16.1.2°, 16.2, 16.5, 16.6, 16.7, 18.4.2°, 18.6, 18.7, 18.10, 19 and 28A.
[68] Articles 12.1, 13.5.1° and 13.10.
[69] Articles 12.11.2°, 15.9.2°, 15.15 and 30.6.
[70] Article 28.12.
[71] Article 28A.
[72] Article 29.6.
[73] Article 30.3.
[74] Articles 34 and 38.3.
[75] Article 40.4.1°.
[76] Article 40.4.6°.
[77] Article 40.5.
[78] Article 40.6.
[79] Article 41.3.

the circumstances in which private property rights can be interfered with,[80] and the provision of information on abortion services available abroad.[81] Given that this is an extremely common device in the Irish Constitution (occurring on over forty occasions), it would seem at least arguable that where it is not employed, the legislature is not intended to have a role in determining the meaning or scope of that particular provision.[82]

E. Constitutionalised Principles and Ordinary Politics

This latter point relating to the attribution of responsibility under the Constitution is, in many ways, the nub of the issue: sometimes, it is appropriate that the elected organs should not have a say. At its most basic, the discussion boils down to a consideration of why, in the first place, we have an entrenched constitutional bill of rights that confers powers of judicial review of legislation. Michael Perry has observed:

> [w]hy … might at least *some* members of the community want to make it so difficult to disestablish a right or a liberty? A basic reason, presumably, is that they are skeptical about the capacity of the ordinary, majoritarian politics of the community adequately to protect the right, especially during politically stressful times when the right may be most severely challenged … the constitutional strategy for establishing a right, as distinct from the statutory strategy, presupposes a distrust, a lack of faith, in the (future) ordinary politics of the community.[83]

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[80] Article 43.2.2°.

[81] Article 40.3.3°.

[82] Foley, *Deference*, *supra* note 40, discusses this issue at 165-170, stating at 166:

> [t]he logic of this approach is that where the Constitution specifically provides for a general state role in a particular area, the court should respect its actions in that field because it operates, in a sense under constitutional licence. On the other hand, it may follow, that where the state is not specifically empowered to 'regulate', we may be more suspicious about legislation and thus less willing to tolerate deference.

As against this, Foley comments at 167 that since the provisions in question are indeterminate regarding the standard of review which a court should exercise when dealing with a case concerning them, "focusing on the specific provisions of the Constitution is, at best, secondary to one's general view on whether deference or judicial independence is of primary moral, ethical or political value." Foley does not discuss the point that the formulation of the relevant provisions is by no means uniform; they range from provisions such as Articles 28.3.3° and 29.4.10°, which expressly make certain laws immune from constitutional review, to others which delegate points of detail to the Oireachtas but which clearly leave any laws enacted pursuant to them subject to all other provisions of the Constitution. Consequently, the appropriateness of a deferential approach in interpreting such laws is at least partly linked to the wording of the provision in question.

[83] M. Perry, *The Constitution in the Courts: Law or Politics?* (Oxford: Oxford University Press, 1994) at 19 [hereinafter Perry, *The Constitution in the Courts*] [emphasis in original].

Indeed, Perry makes the point that the institutional competence concern may be misconceived, particularly when it comes to the protection of minorities or the challenge of legislating on controversial issues, and that sometimes the courts may in fact be better placed to shape the law than the legislature:

> [b]y virtue of its political insularity, the federal judiciary has the institutional capacity to engage in the pursuit of political-moral knowledge – a search for answers to the various questions as to how we, the political community, given our basic aspirations, should live our collective life, our life in common – in a relatively disinterested manner that has sometimes seemed to be beyond the reach of the electorally accountable branches of government, for many of whose members the cardinal value is "incumbency" … because of its political insularity, the federal judiciary is institutionally advantaged in dealing with controversial political-moral issues.[84]

In addition to this insularity, another point is that judges are not necessarily as unrepresentative of society as some would claim; Christopher Eisgruber argues that since they are politically appointed by elected representatives, judges have a "democratic pedigree" which, in tandem with their insularity, makes them well suited to the task of identifying the people's values as distinct from their short-term or partisan interests.[85]

Conversely, deference requires the courts to cede a large role in constitutional interpretation to the political organs – but this would seem to involve a different institutional competence concern. Constitutional interpretation is a highly specialised and technical task, and the judges charged with it are selected on the basis of years of training and experience and having demonstrated their knowledge and competence on many occasions. As against this, many politicians will have no formal training in law, much less constitutional law. In the same way that the courts are not as well placed to make decisions on questions of national policy as the political organs are, the political organs are not as well placed to decide what the Constitution requires as the courts

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[84] M. Perry, *Morality, Politics and Law* (Oxford: Oxford University Press, 1988) at 147 [hereinafter Perry, *Morality, Politics and Law*].

[85] See generally Eisgruber, *supra* note 2, particularly Chapters 1 and 2. Eisgruber states at 5:

> [p]eople have views about how they ought to behave, and views about what they want or desire. These views sometimes tug in different directions. Our interests are not always in harmony with our values: we sometimes desire things we ought not to have … . Congress and the president, because they must please voters to get re-elected, are likely to represent people's interests. But Supreme Court justices, because they have both a democratic pedigree and the freedom to behave disinterestedly, are better positioned to represent the people's convictions about what is right.

are.[86] A decision by a judge that touches on policy may have consequences that the judge could not have been aware of for other areas of policy – but equally a constitutional interpretation arrived at by legislators unaware of complicated principles set down in constitutional precedent and jurisprudence may have similarly unforeseen knock-on consequences. Admittedly, the point remains that the interpretation of the Constitution is not an area where the experts will agree that there is a single correct answer, and Foley observes that "[e]xpertise simply cannot find a right answer to a problem in cases where the best experts *disagree* over what the right answer is. Someone has to make a choice and that choice cannot be made on the basis that the decision-maker has some special ability to choose."[87] Nonetheless, it remains the fact that it is better to opt for one of the range of expert interpretations as opposed to an uninformed alternative; as Foley puts it, "[t]he power to make such choices could not be entrusted to a monkey with a dartboard."[88] In the present context, the range of expert interpretations emanate from the courts, not from the political organs.

Moreover, there are other reasons concerning the relative institutional competence of courts and legislatures which do not relate solely to expertise. It is also important not to lose sight of the fact that one of the reasons that the Constitution plays such an important role in human rights protection is that the political process does not adequately protect minority groups. Members of the majority are far less likely to have

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[86] One possible way around this concern would be to establish a specialised constitutional committee of the legislature to deal with questions of constitutional interpretation, as has occurred in Sweden: see K. Ewing, "Human Rights, Social Democracy and Constitutional Reform" in C. Gearty & A. Tomkins (eds), *Understanding Human Rights* (London: Mansell, 1996) at 54-56. The issue is also discussed by M. Tushnet, *Taking the Constitution Away from the Courts* (Princeton: Princeton University Press, 1999) at 61-62 [hereinafter Tushnett]. However, it would be naïve to assume that such a committee would make decisions free from political influence – one need only look to the work of the existing All-Party Oireachtas Committee on the Constitution, the Select Committee on the Constitution or the Joint Committee on the Constitutional Amendment on Children to see how politically charged and partisan any constitutional debate in the Irish legislature has always been. Moreover, given that the membership would be dependent on the vagaries of the electoral system, it seems rather unlikely that a sufficiently expert knowledge base would be provided. Tushnet attempts to counter this point by including legal advisers to such units in his discussion, in spite of the fact that such advisers are not so different from the courts, and are not the elected representatives of the people. On the shortcomings of the committee stage of the Irish legislative process and its unsuitability from the perspective of deference, see Foley, *Deference*, *supra* note 40 at 247-250 and at 376-377.

[87] Foley, *Deference*, *supra* note 40 at 266. Eisgruber, *supra* note 2 at 3 that "[w]hat distinguishes the justices from the people's other representatives is their life tenure and their consequent disinterestedness, not their legal acumen." [emphasis in original.

[88] Foley, *Deference*, *supra* note 40 at 270.

to resort to constitutional litigation, since the government that they elect to represent them is more likely to enact laws and formulate policies that protect the interests of their support base. It is members of the minority, and particularly members of specific minority groups, who are likely to have their interests disregarded by the political organs, either through neglect or oppression. If the Constitution is intended to provide rights for members of minority groups in order to protect them from the majority, then for courts interpreting those rights to be deferential to the decisions made by the political organs who represent the majority seems a peculiar way to go about this. Even Ely, who is generally sceptical about the democratic legitimacy of constitutional interpretation which is intended to reflect changing views in society, comments that "it makes no sense to employ the value judgments of the majority as the vehicle for protecting minorities from the value judgments of the majority."[89] Cass Sunstein highlights the particular position of permanent minority groups, such as homosexuals (whose rights were, of course, at issue in *Zappone*):

> [i]f a group faces obstacles to organization or pervasive prejudice or hostility – for example, homosexuals – it would be wrong to indulge the ordinary presumption in favour of democratic outcomes. Courts should give close scrutiny to governmental decisions that become possible only because certain groups face excessive barriers to exercising political influence. Such scrutiny is justified in the interest of democracy itself.[90]

Certainly, there are many good reasons why the elected organs of State are better suited to making decisions and taking steps to vindicate the rights of citizens. They are more representative of society than the judiciary; they are better placed to hear

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[89] Ely, *supra* note 21 at 69.

[90] C. Sunstein, *The Partial Constitution* (Cambridge: Harvard University Press, 1993) at 143. See also Perry, *The Constitution in the Courts*, *supra* note 83 at 194, who states:

> … Ely's argument lends support to the position that as a comparative matter, as an issue in the allocation of competences, the judiciary … is institutionally well suited to play the primary role in specifying any right- or liberty-regarding directive it is charged with enforcing *if our historical experience suggests that the directive is, like the antidiscrimination directive, "unusually vulnerable to majority sentiment"* [emphasis in original]

Having said this, Foley, *Deference and the Presumption of Constitutionality* , *supra* note 40, observes at 373 that,

> it is quite difficult to say, with any degree of accuracy, that the Oireachtas is 'bad' and that the courts are 'good' in how they respectively treat minorities. It is, of course, possible that legislatures will make bad and tyrannical decisions. It is equally possible that the *courts* may make bad decisions. Just as one may point to past legislative abuse of minorities, one can point to *Korematsu v United States* or *Norris v The Attorney General* for examples of where one could hardly hold the courts out as bastions of minority protection [emphasis in original].

and balance competing claims of the whole of society rather than merely the parties to a particular case; they have a broader range of experience and expertise; and they are elected and therefore accountable for their actions. However, this final point is also the precise reason why the elected organs are sometimes unsuited to making decisions concerning the protection of the position of minorities. The political organs will never make a decision which costs more money than votes, or which risks alienating a vocal element of the electorate. This is precisely why we have constitutional rights and an independent judiciary to enforce it. As Eisgruber argues, "[e]ven if politicians and judges are equally moral and equally insightful, it is easier for judges to act on their moral convictions",[91] and furthermore:

> [j]udges are, in a word, disinterested. Disinterestedness does not, of course, imply moral or political neutrality; on the contrary, once a controversial issue is in play, there is no way that judges can decide it "neutrally." They will have to deploy contested moral judgments. But at least judges will likely decide on the basis of a principled judgment – a judgment, in other words, about what is good from a moral perspective, rather than a judgment about what is good for their careers or their pocketbooks.[92]

While some argue that it is undemocratic to give the courts too much power to determine issues through a dynamic interpretation of the Constitution, it can equally be argued that the level of deference displayed in *Zappone* and *MR v. TR* gives too much power to the political organs and dilutes the protection for fundamental rights which the Constitution is supposed to provide by acting as a check on the activities (or inactivity) of the political organs where rights are not being vindicated. This is the purpose of a constitutional bill of rights. The judiciary is supposed to have power to intervene in issues which, ideally, would be adequately dealt with by the political organs, but which in a particular instance are not. It is not the function of the judiciary to make decisions which accord with public approval – the recent striking down of the statutory rape law in *CC v. Ireland* could hardly be characterised as a popular decision,[93] and yet it has never been suggested that this renders it in any way illegitimate. The courts decided that it was the correct decision under the text of the Constitution, as they were entitled to do, and the possibility was later seriously explored of the people

[91] Eisgruber, *supra* note 2 at 58.
[92] Ibid at 59.
[93] *CC v. Ireland*, [2006] 4 I.R. 66.

reversing the decision by way of a referendum, which they would have been equally be entitled to do.[94] None of this involves anything which is constitutionally inappropriate.

Having said this, Mark Tushnet cautions that "we have to remember that we buy judicial review wholesale: In getting the decisions we like, we run the risk of decisions we despise."[95] Of course this is true, and even in doing their very best to protect and vindicate fundamental rights, the courts will never please all of the people all of the time. From a democratic perspective, however, it should always be remembered that while the Irish Constitution grants individual rights which are entrenched against the ordinary choices of the political organs and empowers the courts to enforce these rights, it ultimately empowers the people to have the final say in a referendum. Gerry Whyte has pointed out on a number of occasions that the relative ease with which the Irish Constitution may be amended provides a safety valve in the event of a decision in a constitutional case genuinely offending against majority sentiment;[96] this point is a significant one, as Jeffrey Goldsworthy has argued that the existence of a mechanism which allows the majority to override a court decision interpreting the Constitution offers a way to overcome Waldron's democratic legitimacy objection which was set out earlier.[97] If the people reasonably (or even unreasonably) disagree with a judgment of the Court on a constitutional issue, they can have the final say, and thus ultimately the determination of the issue remains in the political rather than the judicial domain. With

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[94] See the *Twenty-eighth Amendment of the Constitution Bill 2007* and the Joint Committee on the *Constitutional Amendment on Children, Second Interim Report*, May 2009 <http://www.oireachtas.ie/documents/committees30thdail/j-conamendchildren/reports_2008/20090507.pdf> (date accessed: 18 November 2010).

[95] Tushnet, *supra* note 86 at 141. See also Perry, *The Constitution in the Courts*, *supra* note 83, who comments at 110 that "scepticism about the capacity of ordinary politics to specify constitutional indeterminacy does not necessarily translate into faith in the capacity of judges", and continues at 113:

> …if and to the extent our demand that the judges and justices who populate our courts be persons of good judgment is unfulfilled, the appeal of our judges and justices actually following the nonminimalist approach is doubtful. Indeed, to those who are skeptical that our courts are not or ever will be more than haphazardly populated with persons who have the requisite capacity for sound political-moral judgment, the appeal of even promoting, as a kind of ideal, the nonminimalist approach to the normative inquiry is doubtful.

[96] See G. Whyte, "Discerning the Philosophical Premises of the Report of the Constitution Review Group: An Analysis of the Recommendations on Fundamental Rights" in *Contemporary Issues in Irish Law and Politics (No. 2)* (Dublin: Round Hall, Sweet & Maxwell, 1998) at 232-233; "The Role of the Supreme Court in our Democracy: A Response to Mr. Justice Hardiman" (2006) 28 D.U.L.J. 1 at 12-13; and *Social Inclusion and the Legal System: Public Interest Law in Ireland* (Dublin: Institute of Public Administration, 2002) at 36-39. See also J. W. Parker, "Must Constitutional Rights be Specified? Reflections on the Proposal to Amend Article 40.3.1°" (1997) 32 I.J. 102 at 117.

[97] See generally Goldsworthy, *supra* note 54.

this in mind, it is strongly arguable that the Irish courts need not necessarily feel so obliged to exercise restraint as currently seems to be the case.

IV - Deference and Review: Mutually Exclusive?

As outlined above by Perry, and confirmed by the Irish courts,[98] the reason for constitutionalising something to begin with is to disempower the political organs from making certain (bad) choices, because they cannot be trusted to always make good ones. Perry explains that in this regard,

> [t]he judicial function is to determine which choices are ruled out [by the Constitution]. The legislative function is to select among the choices not ruled out (which sometimes requires that the legislature make a provisional determination as to which choices are ruled out).[99]

Of course, deference to the legislature within the range of permissible choices is entirely appropriate, and Perry comments that "[i]t would be a gross abuse of her function as a judge to invalidate a policy choice not because it was, in her view, ruled out by the relevant [constitutional] aspiration, but because it was a choice she would have opposed as a legislator."[100] However, complete deference to the legislature as regards the meaning of a constitutional provision – what Dyzenhaus calls "deference as submission",[101] and which was seen in *Zappone* in particular – is something rather more extreme than this. It is to fail to review the choice made by the legislature at all, on the basis that the issue in question is one where choices should fundamentally be made by the legislature and not the courts. The effect of this is to take an issue which was chosen for constitutionalisation – presumably to place it beyond the reach of ordinary

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[98] In *National Union of Railwaymen v. Sullivan* [1947] I.R. 77 at 100, Murnaghan J. stated that "the object of stating a principle in the Constitution is to limit the exercise by the Legislature of its otherwise unlimited power of legislation." Foley, *Deference*, *supra* note 40, states at 329:

> the very idea of constitutionalism, at least in Ireland, is that the Constitution displaces an unfettered freedom to act in favour of a commitment to a general belief that restraint of fetter is a morally beneficial idea … . We continue to accept the *idea* of constitutionalism because, at some basic level, we accept the notion that we should not be free to do as we wish on a day-to-day basis. Rather, we allow only a very specific vent for us to disregard constitutional fetter – namely through the formal removal of such fetter through referendum. [emphasis in original].

[99] Perry, *Morality, Politics and Law*, *supra* note 84 at 170.

[100] *Ibid.*

[101] Dyzenhaus, *supra* note 24 at 286.

legislation – and to de-constitutionalise it, placing it back in the realm of legislation once more.[102]

Foley argues that unlike interpretative restraint, where the court declares that the applicant's claim is not constitutional "ground" at all, deference has the advantage that the claim remains constitutional ground, but ground which is to be tilled by the political organs rather than the courts.[103] In this respect he claims that,

> insofar as one can accept the idea that the legislature *might* be constitutionally responsible, then there is a significant difference between being told to go to Leinster House with a purely political claim and being told to go there armed with a constitutional argument.[104]

As Foley concedes, however, this viewpoint is dependent on an acceptance of the legislature as being constitutionally responsible, and this acceptance flies somewhat in the face of the entire reason underlying constitutionalised rights and judicial review. From the perspective of review, complete deference to the political organs as to the meaning of a constitutional provision – deference as submission – is not, in effect, any different to reading down the provision so that it does not encompass the applicant's claim. In either case, the courts will not interfere with whatever choice the political organs make, and the applicant who goes to Leinster House armed with a constitutional claim is left to hope that the political organs have both the institutional competence, and

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[102] On this point, see Perry, *The Constitution in the Courts*, *supra* note 83 at 195-196, who links such an approach to the type of deference advocated by James Bradley Thayer, "The Origin and Scope of the American Doctrine of Constitutional Law" (1893) 7 Harv. L. Rev. 129, and states that,

> the Thayerian approach to the specification of any constitutional directive effectively marginalizes the directive – virtually to the point of eliminating it – insofar as constitutional adjudication is concerned. It is not obvious, therefore, why one would advocate the minimalist approach to the specification of a directive unless one thought that the directive *should be* marginalized. [emphasis in original]

See also Foley, *Deference and the Presumption of Constitutionality* , *supra* note 40 at 6-10, who states that complete deference on an issue "comes somewhat close to what is usually referred to as 'non-justiciability'". Of course, to marginalise a directive which is included as a justiciable provision of the Constitution is to substitute a judge's own views for the what the text requires, which is no less an abuse of judicial power (and arguably more) than to interpret that provision liberally. See O. Doyle, *Constitutional Equality Law* (Dublin: Thomson Round Hall, 2004) at 46.

[103] Foley, "Interpretative and Deference Based Models", *supra* note 38 at 73, and furthermore:

> [i]f a particular constitutional issue could fairly be regarded as being unsuited to adjudication, the deference-based model would still regard that issue as "constitutional ground" but *defer* to legislative discretion in respect of what the ground actually required in the case at bar. [emphasis in original]

[104] *Ibid.* at 85.

the "responsibility" spoken of by Foley, to determine – in good faith rather than for short-sighted political reasons – what is required by the Constitution. It would seem, perhaps, that this is hoping for rather a lot (as Foley himself concedes),[105] and this is why we have chosen to go down the constitutional route to begin with.

V - Reflecting the Views of Society without Deference

The fact remains that, as established at the outset, the Irish Constitution is intended to be open to evolution through present tense interpretation. This is particularly important in Ireland so as to cope with the startling pace of social change brought about by increased prosperity, diversity and secularisation since 1937 – in just 70 years, the country has changed beyond recognition, and the past decade has perhaps seen this pace increase more than ever. In deciding what the views of society are on a particular issue, partial deference – that is, respectful deference within the range of constitutionally permissible choices – is appropriate, but it has been shown above that the type of submissive deference seen in *Zappone* undermines both supremacy and entrenchment, is mutually exclusive with judicial review and reverses the presumption of constitutionality. Moreover, it has been demonstrated that deference is inappropriate on controversial issues where the legislature is paralysed into inaction, and on issues which relate to the protection of minorities. Finally, it should be recalled that our constitutional system provides a safety valve to deal with cases where the courts make decisions that interpret our Constitution in a manner which is genuinely out of line with the views of the majority of society. The existence of such a safety valve should reassure the judiciary that they are justified in tackling sensitive questions that the legislature is clearly anxious to avoid, and that if they get it wrong, the clocks can be reset.

In light of all of the above, it can be strongly argued that the Irish judiciary should take a more active role in interpreting the Constitution in a manner that reflects

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[105] Foley, *Deference and the Presumption of Constitutionality* , *supra* note 40 at 208:

> [t]oday, we do not have a socially conscious legislature being continuously thwarted by an overzealous court. Indeed, at least in the Irish context, it sometimes (though by no means *always*) appears to be the other way around. Was it not the *legislature* who passed the Health (Amendment) (No. 2) Bill, 2004? And was it not the *court* that defended the position of some of the most vulnerable people in society? [emphasis in original].

changes in conditions and ideas in society, and that deference to legislative judgment on the fundamental question of which choices are not constitutionally permissible should not form part of that process. In effect, this is an argument for judicial supremacy in the interpretation of the Constitution,[106] subject always to the final say of the people in a referendum. For a past example of such a non-deferential decision on an issue on which the views of society had changed, the classic case of *McGee* is apposite.[107] The decision in *McGee* could hardly be said to have been based upon a "consensus" that the importation of contraceptives should be legalised; this could not be illustrated more clearly than by the fact that the Taoiseach and the Minister for Education voted against their own Bill when the issue came before the legislature subsequent to the Supreme Court decision. Indeed, what this illustrates is that there are certain issues upon which consensus is virtually unattainable in Irish society, and that the elected organs of State are, by their very nature, inherently unsuited to grasping the nettle when difficult decisions need to be made. It is not suggested that the judiciary should be the primary decision maker on sensitive issues – but that the judiciary has an important and potentially cathartic role to play in instances where the political organs are paralysed into inaction by fear of alienating either side of a (roughly) evenly divided electorate.[108] Even staunch opponents of judicial activism such as David Gwynn Morgan have admitted that *McGee* offers an example of how a courageous court can "use open-textured areas of the Constitution to keep the laws up to date and in line with the changing needs and values of society, in a situation in which the principal guarantor – the legislature – appeared reluctant to act."[109] While the decision undoubtedly alienated large sections of the population (including senior members of the government of the day), the passage of time

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[106] Note that this refers specifically to the task of interpreting the Constitution and specifying indeterminate provisions of the Constitution; it does not connote a general supremacy of the judiciary over the executive and legislature.

[107] *McGee*, *supra* note 11.

[108] See, however, K. Roosevelt, *The Myth of Judicial Activism* (New Haven: Yale University Press, 2006) at 156 [hereinafter Roosevelt], who observes that,

> it is much easier to change laws than to reverse constitutional decisions. If the Court fails to recognize a consensus that exists, it can always do so later. If it finds consensus where none exists, it has taken the issue away from the democratic process in a manner unlikely to be remedied. Thus, justices highly concerned with the value of democratic self-governance might demand evidence of a very substantial consensus – more than the Constitution itself requires … .

[109] D. G. Morgan, *A Judgment Too Far? Judicial Activism and the Constitution* (Cork: Cork University Press, 2001) at 24.

has shown it to be a forward-thinking decision which provided the catalyst for positive social change.

Of course, the fact that the result in *McGee* worked out well in the long-run does not necessarily imply that the courts should force the agenda of social change. Ely makes a strong case when he argues:

> [c]ontrolling today's generation by the values of its grandchildren is no more acceptable than controlling it by the values of its grandparents: a "liberal accelerator" is neither less nor more consistent with democratic theory than a "conservative brake."[110]

This point, coupled with Ely's well articulated concerns regarding the institutional capacity of the courts to determine consensus, certainly militates in favour of a high level of restraint in this area. However, striking a perfect balance between activism and restraint on this issue is as good as impossible, and hard cases will always arise in which judges themselves may not feel competent to pronounce on the views of society. Therefore, while it is submitted that judicial supremacy in present tense constitutional interpretation is frequently defensible in Ireland, any argument against originalism and deference in this area must also consider whether, in the hard cases where it is not defensible, there might be alternative courses of action available – even ones which might necessitate constitutional amendment.

A referendum is, of course, the most accurate way of establishing what the views of society actually are on a given issue, and it has the added advantage of avoiding the problems associated with either deference or what may seem like guesswork on the part

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[110] Ely, *supra* note 21 at 70. This point has been echoed by Justice William Brennan, "Why Have a Bill of Rights?" (1989) 9 O.J.L.S. 425 at 435 [hereinafter Brennan], who argues that "High Court judges interpreting a bill of rights may at times lead public opinion; but in a democratic society they cannot do so often, or by very much." A. Bickel, *The Supreme Court and the Idea of Progress* (New Haven: Yale University Press, 1978) at 99-100 [hereinafter Bickel, *The Supreme Court*], has argued that the Warren Court in the U.S. found that some of its more liberal decisions were accepted because the Court correctly predicted the future in terms of trends in popular opinion, but of course this may not always be the case. Tushnet, *supra* note 86 at 150-152, points out that Justice Scalia's dissent in *Romer v. Evans* 517 U.S. 620 (1996) (in which the U.S. Supreme Court invalidated an attempt at denying legal protection against discrimination on grounds of sexual orientation in Colorado) was based in part on the grounds that judges are members of a cultural elite, and are likely to see the future moving in the direction the elite wants. Tushnet comments at 150-151: "[a]nd yet, one thing that gives a cultural elite its status is precisely the power to shape the future. The Court could do worse than follow the views of cultural elites if it wants to predict the future." See also Roosevelt, *supra* note 108 at 91-110.

of the court. For this reason, McGovern J. held that the extension of the protection of the right to life to frozen embryos would be a more appropriate matter for the people in a referendum than for the courts.[111] Similarly, it was argued by the State in the *Zappone* case that the question of whether the protection offered to the institution of Marriage should be extended to same-sex couples is an issue where the correct course of action would be the amendment of the Constitution and not the re-interpretation of the existing provisions. That is all very well and good, but the complete lack of political courage shown by the All-Party Oireachtas Committee on the Constitution in their 2006 *Tenth Progress Report on the Family* makes it clear that the prospect of such an amendment being put to the people in the near future is highly doubtful, in spite of at least some evidence of a shift in public opinion.[112] The judiciary could overcome this political inertia by extending the definition – if there were a backlash to this, then this may lead to the holding of the very referendum that the political organs lack the courage to bring about. The charge that would automatically be levelled against this argument is that it is undemocratic to allow an unelected judiciary to push forward a change which our elected representatives have declined to pursue. However, if indeed public opinion was such that a referendum on this very issue may be passed, then it

[111] What McGovern J. did not concede is that by ultimately deciding that frozen embryos do not enjoy the right to life, the court has still made a decision as to the scope of the protection offered by Article 40.3.3°. It is no less a "decision" to decide that the embryos are not protected as the court does not have the power to extend the protection of the provision to frozen embryos than it would have been to decide that the provision did protect them. See Brest, "Interpretation and Interest" (1982) 34 S.L.R. 765 at 770:

> [l]egal interpretation seeks to resolve ambiguity. A court faced with a constitutional challenge to an anti-abortion law may not stop after it has identified our moral, social, or psychoanalytical conflicts around the issue. It must decide the case … . Whatever judgment the court renders, however, is a definitive resolution of the issue. Even a finding of indeterminacy is, in effect, a final judgment delineating the bounds of what is and what is not (legally) known.

Given that the court has to make a decision one way or the other, and that choosing to be deferential on the issue is as much a choice on the part of the judge as any other decision would be, there would not seem to be a sufficiently overwhelming argument in favour of deference such as to justify the doctrinal difficulties raised by the application of the concept in these cases.

[112] *Supra* note 57. Although it is hardly the most objective and statistically reliable source to cite on this issue, it is nonetheless interesting to note that a poll commissioned by the campaign group Marriage Equality in 2008 revealed that 62% of respondents would vote yes in a referendum to extend civil marriage to same-sex couples, while 54% believed that the definition of the family unit in the Constitution should be changed to include same-sex families. The poll was conducted by Lansdowne Market Research between October 15th and 30th, 2008. A national sample of 1,000 people over 15 years of age were interviewed. See C. O'Brien, "Same-sex marriage gets poll support", *The Irish Times* (February 27, 2009).

follows that it is equally undemocratic for those same elected representatives to refuse to allow the electorate to have their say.[113]

Having said all of that, there may be a less confrontational way for such issues to be dealt with. At present, the Constitution provides for two ways in which a referendum may be triggered. One is the normal way provided for in Article 46, whereby a Bill is initiated in the Dáil and passed by both the Dáil and the Seanad before being put to the people in a referendum. On certain issues, the government may respond to political lobbying for a referendum – but conversely, in the type of controversial cases that give rise to the phenomenon of legislative deference to the judiciary,[114] such calls are frequently resisted as the government (and possibly even the opposition) do not wish to deal with the controversy associated with a referendum. The fallout from the rejection of the first referendum on the Lisbon Treaty is likely to exacerbate this tendency. The other mechanism for initiating a referendum, which has never been utilised,[115] stems from Article 27, and relates not to the amendment of the Constitution, but to the assent of the people to the passing of a law on a proposal of national importance. In such a case, a referendum on the Bill in question can be triggered by a petition signed by a majority of the Seanad and not less than one-third of the members of the Dáil, coupled with a decision by the President that the Bill contains a proposal of such national importance that the will of the people thereon ought to be ascertained.

The latter procedure raises the question as to whether it would be appropriate to provide a similar mechanism whereby the courts, in a hard case where they feel that they are not institutionally competent to determine the present tense interpretation of a provision of the Constitution on an issue of national importance, could trigger a

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[113] As against this point, K. Miller, *Direct Democracy and the Courts* (Cambridge: Cambridge University Press, 2009) [hereinafter Miller], argues at 219-223 that deciding controversial issues such as this through litigation and referenda marginalises and weakens the legislature and polarises opinion. Miller instead advocates judicial restraint in the recognition of controversial new rights and the working out of compromise positions such as civil partnership in the legislature. Significantly, this is what is presently happening in Ireland on the same-sex marriage issue; however, it is questionable whether Miller's argument could be successfully transferred to all other issues, most particularly the right to life of the unborn.

[114] See text accompanying footnotes 50-57.

[115] Hogan & Whyte, supra note 43 at 416, note that an attempt to invoke the provision in relation to the *Regulation of Information (Services Outside the State for the Termination of Pregnancies) Bill 1995* failed due to a lack of support from members of the Oireachtas.

referendum so as to establish the views of the majority of the people. Such a procedure could operate in a manner similar to a "case stated" to the High Court or Supreme Court, or a preliminary reference to the European Court of Justice, whereby the ultimate determination by the trial court of the case at bar would await clarification on a point of interpretation – but in this instance, the clarification would come from the people, and not from a different court. At a stroke, the democratic legitimacy and institutional competence concerns would be addressed. The disadvantage is that the fate of the individual litigant(s) in the case could be seen as being played out and decided in the court of public opinion. If this is thought to be undesirable, then the question is whether – if democratic legitimacy and institutional competence are thought to be lacking – it is any more undesirable than the judiciary deciding the case based on their unaided view of what conditions in society demand. There is also a danger that the debate surrounding the referendum may become unduly focused on the facts of the individual case rather than on the broader issues – but was this any different in, for example, the referendum which followed the *X* case?[116] For that matter, it is worth observing that leaving the matter to be decided entirely by the court is to decide a matter of principle primarily by reference to the facts of an individual case – as discussed earlier, making a decision on the basis of an actual set of facts rather than in the abstract is generally considered to be an advantage rather than a disadvantage.[117] As noted by Bickel, "the flesh and blood of an actual case … tends to modify, perhaps to lengthen, everyone's view … [and] also provides an extremely salutary proving ground for all abstractions."[118]

Another option falling short of a full referendum has recently been considered by Eric Ghosh, who has presented a case for considering the use of "constitutional juries" to determine, in the place of judges, controversial questions of constitutional interpretation.[119] Ghosh's proposal is that randomly selected juries of approximately 200 people, if provided with a sufficient quantity of accessible information and opportunity for deliberation, could resolve complicated moral constitutional issues in a

[116] *Attorney General v. X* [1992] I.E.S.C. 1
[117] See text accompanying footnote 54.
[118] Bickel, *The Least Dangerous Branch*, *supra* note 10 at 26.
[119] E. Ghosh, "Deliberative Democracy and the Countermajoritarian Difficulty: Considering Constitutional Juries" (2010) 30 O.J.L.S. 327 [hereinafter Ghosh].

manner reflective of the views of society, and that such a process would have greater democratic legitimacy than leaving such questions to be determined by the judiciary.[120] It would also enhance the quality of deliberative democracy by involving citizens in informed debate and decision making in a way not facilitated by elections;[121] moreover, the dangers associated with an overly deferential court would not exist, since the concerns motivating a deferential approach would not be present, and in contrast to judicial appointments, governments could not appoint constitutional jurors predisposed towards deference.[122] Ghosh's proposal is a fascinating one with much potential; it is, however (as he is careful to stress himself), no more than a *prima facie* case at this point, which is in need of further study and debate.

Finally, another possible avenue of reform which would alter the current balance between the legislature and the court in instigating constitutional change would be to allow for constitutional amendment through pure direct democracy. Such a reform would enhance the ability of the majority to override a court decision by removing the necessity for a constitutional amendment to be passed by the Oireachtas and thus avoid the party politics that can sometimes act as an obstacle to constitutional reform. This could be achieved by resurrecting a mechanism contained in Article 48 of the 1922 Free State Constitution which allowed for constitutional amendment by popular initiative.[123] This provision provided that "[t]he Oireachtas may provide for the initiation by the people of proposals for laws or constitutional amendments." Article 48 further provided that should the Oireachtas fail to make such provision within two years of the enactment of the Constitution, it would be required either to do so or to submit the question to a referendum upon the submission of a petition of not less than 75,000 registered voters, of whom not more than 15,000 were from any one constituency. Legislation providing for the popular initiative, if enacted, was required to provide that proposals may be initiated by a petition of 50,000 registered voters, and that if the Oireachtas rejected proposals put forward under the initiative, they should be put to a

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[120] *Ibid.* at 345-355.
[121] *Ibid.* at 340-342.
[122] *Ibid.* at 351-352.
[123] I am grateful to TP O'Mahony for sending me his article from the Evening Echo on this point – see T.P. O'Mahony, "TDs won't push for changes in the Dáil – but we voters can", *Evening Echo* (February 26, 2009).

referendum. This brand of direct democracy – which is similar to provisions in operation in Switzerland and in 16 U.S. States – would have the advantage of taking party politics out of the equation, but the disadvantage of perhaps leading to the marginalisation of representative politics and the polarisation of public opinion on controversial issues.[124] It also allows for the type of legislative deliberation seen on the proposed statutory rape amendment to be circumvented, which may not necessarily be a good thing. It is difficult to say how practicable such a provision would be in the Irish context, particularly since Article 48 of the 1922 Constitution was never utilised.[125] Moreover, it should be observed that in the absence of a relatively recent referendum on the point at issue, the presence of such a mechanism would still not allow a court faced with a question of present tense constitutional interpretation to ascertain the views of society (other than to speculate as to the implications of a failure on the part of the people to invoke the procedure).

Having said all of this, it should be questioned whether, in a case regarding the protection of a minority right, it is appropriate for the majority to have the final say through a direct vote.[126] To take *Zappone* as an example: if the right to marry is genuinely a fundamental *right* deriving from the inherent dignity of every human being, and not merely a statutory entitlement extended to opposite sex couples only, then surely the question of whether same-sex couples – a perpetual minority – should be entitled to exercise this right is not one which should be left to the whim of a majority vote? Would *Brown v. Board of Education*[127] ever have occurred if the decision had been referred to the people? To many, cases like *Brown* and *McGee* are seen as watershed moments where a courageous re-interpretation of the constitution brought an end to

[124] The use of popular initiative as a mechanism for constitutional amendment, and its relative merits compared to amendments initiated by the legislature, is discussed in detail in Cronin, *Direct Democracy: The Politics of Initiative, Referendum and Recall* (Cambridge: Harvard University Press, 1989) and Miller, *supra* note 113.

[125] The Oireachtas did not legislate to give effect to it, and when, in 1928, 96,000 signatures were gathered by the opposition in an attempt to trigger a referendum to introduce the process, the Oireachtas responded by amending the Constitution under Article 50 (which allowed for its amendment through ordinary legislation during an initial period of 8 years) so as to remove Article 48.

[126] Indeed, it is precisely for this reason that James Madison expressed his preference in *Federalist No. 10* for representative democracy over direct democracy. On the comparative advantages and disadvantages of representative and direct democracy in the context of the protection of constitutional rights, see generally Eisgruber, *supra* note 2, particularly Chapter 3.

[127] 347 U.S. 483 (1954).

legislation and policy which, although approved of by the majority, infringed upon fundamental human rights.[128] If we can see the value in these decisions, why should we want to neuter our courts so that they cannot make similar ones in the future? Why not simply trust the judiciary who we have appointed to undertake the vital task of interpreting the Constitution? And if we do want to retain the possibility of the people having the final say in a referendum, should the legislature act as a deliberative bulwark to filter out reactionary constitutional amendments? To fail to do so runs the risk of opinion-leading decisions such as *Brown* and *McGee* being overturned before they have had the time to gain acceptance, possibly foreclosing reform on the issue for a considerable period of time to come.

A related question, which cannot be fully considered in the present article but is nonetheless worthy of mention, is whether the simple majority referendum option is a satisfactory method of dealing with hard questions relating to the protection of fundamental rights, particularly when minorities are involved. The present mechanism employed by the Irish Constitution allows an amendment to be passed by a simple majority of one vote – there is no requirement for either a supermajority, a quorum of voters or successive votes confirming the amendment.[129] This raises questions as to the true extent to which the Irish Constitution really provides protection for the rights of minorities if those rights, once recognised by the courts, can potentially be voted away by such a narrow majority. Of course, this is generally not an undue difficulty – the existence of a legislative filter in the amendment process can prevent reactionary amendments, and it would be hoped that where an existing minority protection is already contained in the Constitution, the legislature would resist lobbying directed

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[128] Eisgruber, *supra* note 2, argues at 73 in respect of the U.S. Supreme Court:

> [d]uring the last half-century, the Supreme Court's greatest moments have come when it intervened most boldly: [e.g.] *Brown v. Board. Of Education* … . The Court's greatest embarrassments have come when it refused to act: [e.g.] *Korematsu v. United States* … .

Of course, opponents of decisions such as *Roe v. Wade* (1973) 410 U.S. 113 would surely disagree with Eisgruber's characterisation.

[129] However, there is such a requirement in Article 47.2.1° in relation to a referendum on a proposal other than a constitutional amendment, such as a referendum triggered under the Article 27 procedure. Article 47.2.1° provides that a proposal other than a constitutional amendment which is submitted by referendum to the decision of the people shall be held to have been vetoed by the people if a majority of the votes cast at such referendum shall have been cast against its enactment into law and if the votes so cast against its enactment into law shall have amounted to not less than thirty-three and one-third per cent of the voters on the register. The contingency of the result of such a referendum on voter turnout has been criticised by Hogan & Whyte, *supra* note 42 at 417.

towards removing it – particularly if international obligations under the ECHR and other instruments require that we continue to protect the right in domestic law.

However, the possibility remains that the political climate of the time may result in a Supreme Court decision which extended a fundamental right being sufficiently unpopular to lead directly to a referendum overturning it (as has already occurred in the context of bail).[130] If we are committed to the protection of minority rights, should we require that they can only be taken away by, for example, a two-thirds majority, possibly even with a quorum of, say, half of all registered voters? Should we require that the amendment be confirmed by another vote at the next election, as occurs in Nevada? Of course, it could be said that an amendment taking away a true minority *right* is no more legitimate because it has been passed by a supermajority or has been confirmed after further deliberation;[131] but as any Constitution is dependent upon popular support for its long-term survival, there comes a point at which rights theory must give way to political reality.[132] The difficult question would be how high to set the bar.[133] For the time being, the bar is not set very high in the referendum process itself, although the need to initiate an amendment through the legislature does provide a filtering process which can been seen as a positive or negative feature, depending on one's own views and the amendment at issue. In the final analysis, the referendum still provides the ultimate democratic check on present tense constitutional interpretation. It has been argued that

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[130] The *Sixteenth Amendment of the Constitution Act 1996*, which provided for the refusal of bail where considered reasonably necessary in order to prevent the commission of a serious offence, was a direct response to the decision of the Supreme Court in *Ryan v. D.P.P.* [1989] I.R. 399.

[131] See W. Murphy, "Consent and Constitutional Change" in O'Reilly (ed.), *Human Rights and Constitutional Law* (Dublin: Round Hall, 1992) 123 and "An Ordering of Constitutional Values" (1979-80) 53 S. Cal. L. Rev. 703.

[132] See, e.g., Eisgruber, *supra* note 2 at 120:

> [b]ecause constitutions must leave people free to govern themselves, any constitution – no matter how good – must leave people free to enact bad provisions. Of course, constitutions can incorporate safeguards to discourage bad amendments … . But no system is foolproof. A constitutional procedure that enables people to entrench good rules and institutions will also enable them to entrench bad rules and institutions. A people must have the freedom to make controversial political choices, and that freedom will necessarily entail the freedom to choose badly.

To similar effect, see Bickel, *The Least Dangerous Branch*, *supra* note 10 at 28.

[133] J. Vile, "The Case Against Implicit Limits on the Constitutional Amending Process" in Levinson, *supra* note 8 at 191-213, discusses the idea of how the people can always change a Constitution, but burdensome amendment procedures may force them to do so "outside" the Constitution, perhaps even by force of arms. Clearly, in a stable democracy, the more burdensome the amendment procedures, the less likely the people are to resort to methods "outside" the Constitution, and thus the less likely any change is to occur. See also Ackerman, "Higher Lawmaking" in Levinson, *supra* note 8 at 85.

neither originalism nor deference to legislative intent provides the answer to how constitutional provisions should be applied to novel situations. The remaining and most defensible option is to allow judges to interpret the Constitution in light of their best reading of conditions and views in society and the demands of fundamental rights, subject to the ultimate decision of the people. If we are dissatisfied with the current mechanism which allows the people to make this ultimate decision, then perhaps it is time to explore one of the other options which have been discussed.

VI - Conclusion

Bickel has observed that in the heyday of judicial activism in the U.S., the Warren Court consoled itself that history would judge its decisions to have been correct.[134] That is all very well and good if all one is concerned with is outcomes – but is of little use in the context of the current discussion, which is concerned with the process leading to those outcomes. Nonetheless, although judicial supremacy in the interpretation of the Constitution will not always lead to particularly palatable outcomes – even to those who advocate it – it is submitted that, when interpreting the Constitution in light of changes in society, it is more logically defensible than deference in a system which operates on the basis of an entrenched and supreme constitution and full-blown judicial review of legislation. Insofar as a provision leaves room for choice to the legislature, deference is appropriate. However, to defer submissively to legislative judgment is to say that no choice has been taken away by the constitutionalisation of the issue – which seems to miss the entire point of constitutionalising a principle or right to begin with.

It is therefore clear that for reasons relating to entrenchment and supremacy, the courts should not engage in deference as submission; at most, they should engage in deference as respect, which leaves open the possibility – albeit a slim one – of the court making an independent judgment as to what the Constitution requires. Crucially, the courts should only engage in the practice in cases where deference is due, and need to scrutinise whether or not this is so on a case-by-case basis. In light of this, we can

[134] Bickel, *The Supreme Court*, *supra* note 110 at 99-100.

conclude that in cases involving present tense constitutional interpretation, legislation cannot be determinative of what the Constitution requires, although it may be indicative, provided that the court is satisfied that deference is due. Having said all of this, it has also been shown that in certain types of cases, including (but not necessarily limited to) cases involving claims for minority rights protection, ordinary politics have deliberately been excluded through the constitutionalisation of a right or principle. In such cases, it can strongly be argued that deference is never due.[135]

As against this, it should of course be recognised that in hard cases, judicial supremacy in the interpretation of the Constitution suffers from profound limitations from the perspective of the institutional capacity of the courts to reflect consensus on controversial issues. This disadvantage is tempered in the Irish context by the safety valve of the referendum amendment procedure. If we are dissatisfied with the existing political correction mechanism (on the ground that we cannot entirely trust politicians to legislate effectively or at all on controversial issues, but politicians must legislate in order to trigger a referendum), the logical next step is to use the existing mechanism to correct itself, and to provide a new mechanism which circumvents the elected representatives so as to allow the people to have their say on the most controversial issues. Two such possible mechanisms have been suggested: judicially initiated referenda, and constitutional amendment by way of popular initiative. An alternative course of action would be to provide a mechanism for decisions to be made by constitutional juries who are representative of the views of society, as suggested by Ghosh.[136] In the meantime, however, courts will have to work with what they have, and make a choice between originalism, deference or judicial supremacy in constitutional interpretation. This article has suggested that the latter choice is the most effective and defensible way to ensure adequate protection of individual and minority rights in novel situations and changing conditions in society.

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[135] Roosevelt, *supra* note 108, Chapter 2, identifies five factors which judges should consider in deciding how deferential they should be. In the case of minority rights protection, two are relevant: defects in democracy, where a particular group, due to numerical disadvantage, cannot rely on adequate political representation to protect their interests, and the lessons of history, where history shows that – irrespective of the numerical factor – a particular group (e.g. women) have been particularly vulnerable to legislative decisions adversely affecting their interests.

[136] Ghosh, *supra* note 119.

In conclusion, to constitutionalise a principle is to set that principle apart from ordinary politics; to defer to legislative judgment as to what that principle requires is to thrust that principle back into the arena which was initially deemed unsuitable for its determination. In this light, if we accept the idea of constitutional evolution through interpretation, it makes sense that judges should occasionally point out when the political organs have failed to move with the times; but of course, the judges themselves will not always feel competent to do so. Justice William Brennan had it right when he stated that "High court judges interpreting a Bill of Rights may at times lead public opinion; but in a democratic society they cannot do so often, or by very much."[137] If, and to the extent that, we are sceptical of the capacity or suitability of ordinary politics to keep the Constitution in line with societal change, we should be content to allow the judiciary to lead. However, if, and to the extent that, we are sometimes also sceptical of the capacity or willingness of the judiciary to reflect that societal change, we should provide mechanisms that allow the judiciary to more accurately ascertain the extent of the change in question *other than through ordinary politics*. Judicial deference does not solve this problem; an alternative methodology of constitutional interpretation or methodology of constitutional amendment is required, with constitutional juries, judicially initiated referenda and popularly initiated referenda being among the potential options.

[137] Brennan, *supra* note 110 at 435; Bickel, *The Least Dangerous Branch*, *supra* note 10, states at 239 that "the Court should declare as law only such principles as will – in time, but in a rather immediate foreseeable future – gain assent… The Court is a leader of opinion, not a mere register of it, but it must lead opinion, not merely impose its own".