

Letting ‘the People(s)’ Decide: Peace Referendums and Power-Sharing Settlements

Abstract

Referendums are increasingly used to legitimate power-sharing settlements in deeply divided societies transitioning from violent conflict. This article assesses the use of the referendum to legitimate power sharing, focusing on the capacity of referendum rules to facilitate the ‘voice’ of multiple groups or ‘peoples’ engaged in a ‘constitutional moment.’ Drawing on the constitutional referendums in Northern Ireland in 1998 and Iraq in 2005, I demonstrate that referendum rules matter in highlighting the variable degrees of support for the elite-negotiated deal on the part of the contending groups. The institutional design process prior to the referendum is crucial for incentivising groups to support the settlement, particularly the previously dominant group. When faced with a choice between a simple majority threshold and countermajoritarian procedures, majoritarianism is appropriate only in so far as the main groups see their constitutional preferences satisfied and concurrent majorities can be secured. A qualified majority referendum threshold to protect a minority groups is appropriate for divided states where the groups are regionally concentrated and when the groups agree to such rules.

Key words

Power sharing; referendums; legitimation; deeply divided societies

‘This is the result we have worked for and wanted. It’s another giant stride along the path to peace, hope and the future.’

UK Prime Minister Tony Blair on the Northern Ireland 1998 referendum result¹

‘There’s still a lot of difficult work to do in Iraq. But thanks to the courage of the Iraqi people, the year 2005 will be recorded as a turning point in the history of Iraq, the history of the Middle East and the history of freedom.’

US President George W. Bush on the Iraq 2005 referendum and subsequent elections²

Introduction

As these optimistic pronouncements from Tony Blair and George W. Bush attest, political leaders are at pains to frame a positive referendum result on constitutional reform in states transitioning from conflict as a significant step toward peace. The referendums in Northern Ireland and Iraq paved the way for cross-community power sharing, widely recognized as a useful framework to enhance the prospects for peace and democracy in deeply divided societies.³ Institutional rules that provide for joint-decision making between groups, power sharing is favoured by both international mediators and political elites seeking guarantees of access to power. Power-sharing pacts have increasingly been put to a popular vote from Burundi to Cyprus, Iraq, Northern Ireland, Rwanda and South Africa. Referendums on power sharing form part of the 'new wave of "direct constitutional democracy"' in the founding of new states; the revision of constitutions or creation of new ones; the establishment of sub-state autonomy; and in the transfer of power from the state to international organizations.⁴ Referendums are held in the expectation that a positive vote will shore up support for constitutional change on the part of the population at large. Enjoying such a reservoir or platform of popular support,

it is assumed that peace settlements (including power-sharing agreements) have a good chance of achieving political stability.

A relatively under-explored political phenomenon, constitutional/ethnonational referendums have received increased attention from scholars in comparative politics, international relations, constitutional theory and conflict resolution. Some scholars argue that the referendum is inappropriate in divided societies where the zero-sum outcome risks inflaming inter-communal relations and can trigger violence.⁵ Others are more optimistic about the prospects of ethnonational referendums. In a study of all referendums on ethnic/nationalist issues since the French Revolution to 2012, Matt Qvortrup finds that referendums result in peaceful solutions when groups agree to hold a referendum and the international community accepts the result.⁶ The referendum has also been shown to enable elites to pre-empt ethnic outbidding and maximize their credibility in reaching a political settlement.⁷ These debates highlight the question of whether referendums ride roughshod over the wishes of minority groups. For Arend Lijphart, the father of power-sharing theory, the referendum is 'a blunt majoritarian instrument that may well be used against minorities.'⁸ Potential exclusion of minority groups in constitution-making has been described as 'a profound issue and potentially the greatest stumbling block for referendum democracy.'⁹ This unresolved puzzle is particularly pertinent for the use of the referendum to legitimate power-sharing premised on minority inclusion and group guarantees. In a process of institutional design predicated on inclusive decision-making along group lines, the application of the referendum appears to contradict the essence of power sharing. An accommodationist strategy for managing diversity, power sharing seeks to ensure that each group 'has the public space necessary for it to express its identity, to protect itself against tyranny by the majority, and to make its own decisions in domains of critical importance.'¹⁰ It is intriguing, then, that the referendum is increasingly used to legitimate power sharing given its overarching accommodationist commitment to the recognition and protection of group identity.

This article assesses the use of the referendum to legitimate power-sharing democracy in deeply divided societies. I explore whether and how referendum design can facilitate the voice of multiple groups in the ratification of power sharing. If we lack a full understanding of the dynamics of referendum design in transitions to power sharing, minority groups may find themselves in a polity they perceive to be both illegitimate and in favour of the majority. Further intra-communal antagonism and the risk of recurring conflict could threaten a fragile political bargain reached by elites. Exploring the value of referendums is therefore important for the stability and legitimacy of peacebuilding.¹¹ The article proceeds in four parts. First, I connect the literature on power sharing, legitimacy, and the demonstration of popular consent via the referendum. Second, I consider how the notion of 'we the people' has implications for referendum design, particularly in relation to simple majority approval or countermajoritarian rules. Third, I illustrate how different referendum rules played out in two contemporary cases, Northern Ireland (with respect to the referendums on the Good Friday Agreement) and Iraq (with respect to the referendum on the 2005 Constitution). Finally, I conclude that when the referendum is used in deeply divided societies, the outcome has significant implications for the legitimacy of the deal. Referendum rules matter because they throw into sharp relief 'the people' dilemma whereby multiple groups as 'peoples' are collectively engaged in a 'constitutional moment'. Viewed positively, the referendum has the potential to facilitate the 'voice' of groups in such a way that they share constitutional authorship of the deal to transition to power sharing, thereby enhancing legitimacy. Yet the referendum will likely show that groups have variable degrees of support for the deal; the agreement may be more legitimate for one group (the previously excluded group) than another (the previously dominant group). Much depends on whether the main groups are sufficiently satisfied that their constitutional preferences are addressed. Highlighting these dynamics, I offer some lessons of potential use to policymakers working on constitutional design and the ratification of peace agreements.

Power sharing, legitimacy and consent via the referendum

Groups' support for power-sharing democracy is arguably central to political stability. The decision to set up power-sharing institutions usually derives from a compromise between the contending groups and protracted peace talks. Moving to power sharing is about transforming a political system viewed by one or more groups as illegitimate to one in which the main groups see their interests protected and wish to maintain. Political legitimacy, then, is at the core of power-sharing theory. Going back to Lijphart's investigation of the paradox of Dutch politics (i.e. democratic stability despite mutually reinforcing social cleavages), central to stability is the groups' desire to maintain the system. For Lijphart, in the absence of a comprehensive political consensus among groups, there must nevertheless be 'a minimum of agreement on fundamentals...the crucial component of a widely shared attitude that the existing system ought to be maintained.'¹² In the wider comparative politics literature, David Easton proposed the concept of diffuse support understood as citizens' 'generalized attachment' to the regime as a whole.¹³ As Pippa Norris notes, diffuse support is 'important for stability in fragile states emerging from deep-rooted internal conflict, as well as for processes of regime transition, by strengthening popular acceptance of the legitimacy of new constitutional arrangements and the authority of officeholders.'¹⁴ Drawing on Lijphart's earlier work and the wider comparative politics literature, power-sharing stability is likely enhanced when citizens and groups wish the system to be maintained, that they regard the system as legitimate.

The legitimation of a power-sharing agreement or constitution might be left to communal elites engaged in negotiations. Elites are, after all, expected to act on behalf of their respective community, particularly when they secure a seat at negotiations by virtue of an electoral mandate. In many cases, peace settlements are the outcome of elite bargaining with politicians seeking to 'sell' the deal to their communities. In the case of Northern Ireland, the presence of brokers (communal elites who were able to build a winning coalition for a settlement and marginalize spoilers) helped legitimate the Good Friday Agreement of 1998.¹⁵ The role of political elites in encouraging their constituents' support is, of course, key for securing popular support. In the case of Cyprus, although the main Greek Cypriot

and Turkish Cypriot parties initially supported the UN's 2004 Annan Plan, the deal was rejected by 76 per cent of Greek Cypriots while 65 per cent of Turkish Cypriots approved it in simultaneous referendums, the rejection largely owing to the Greek Cypriot party AKEL's 'last minute volte-face'.¹⁶ There are also caveats to be made about treating elites as the legitimate representation of communities and 'legitimizers' of a settlement. In the complex political space of peace negotiations, elites may be more interested in securing their own self-interests including power and rent-seeking opportunities. Leaders' goals may even conflict with the groups they purport to represent, given the incentives to avoid punishment ranging from 'loss of power, exile, imprisonment, or death'.¹⁷

Despite, or in addition to, the expected role of elites to act as 'legitimizers' of a settlement, international actors increasingly recommend that constitutional reform should be put to the people via consultation or ultimately in the form of a referendum. In the wider literature on statebuilding, scholars call for high levels of public participation so that the constitution better reflects the public's views and that such a process 'may assist in building a sense of political community, so that people unite to exercise their constituent power'.¹⁸ Drawing from central tenets of democracy theory, we can posit that the legitimation of peace settlements is enhanced when citizens consent. Within the social contract tradition, a Lockean view holds that 'Political power is morally legitimate, and those subject to it are morally obligated to obey, only where that power continues to be exercised within the terms of the consent given'.¹⁹ Legitimacy is conferred on authority through actions that publicly express citizens' consent.²⁰ In modern liberal democracies, the electoral process performs this function.²¹ Moreover, the referendum is widely accepted by states as a mechanism to demonstrate popular consent on a significant political issue.²² The exercise of popular sovereignty through democratic means is regarded as a 'global normative entitlement'²³ and has informed peacebuilding for some time. Voting in a referendum therefore provides citizens in transitional societies with the opportunity to consent (or not) to the proposed constitutional reform. Yet in a society with deep ethnonational cleavages, the referendum is not so straightforward.

‘We the People’ in Deeply Divided Societies and Referendum Rules for Minority Inclusion

The use of the referendum invokes the voice of 'the people' in consenting to a peace agreement or constitutional reform that will establish core political institutions. Since the shift from the notion of divine right of kings to popular sovereignty in Anglo-American democratic transitions, popular sovereignty has worked to legitimate and sustain democratic government.²⁴ But in our pluralistic world, and particularly in situations of deep ethnonational cleavages, 'the notion of a sovereign people acting on one will and speaking in one voice is inevitably met with suspicion.'²⁵ Indeed, the notion of 'the people' raises the question 'who are the people?', a particularly thorny issue in deeply divided societies given ongoing tensions over identity, territory and groups' access to power. Surprisingly, relatively little research has been undertaken on the relationship between 'the people' and constitutional reform in divided societies.²⁶ To negotiate the problem of identifying 'the people', a tradition in political philosophy has lent on the notion of 'hypothetical consent' which rests on a generalization about what 'the people' would want if acting rationally.²⁷ Yet such generalizations in the name of 'the people' cannot speak for multiple ethnonational groups and risk speaking in the name of the dominant group and excluding others. Moving away from an abstract notion of 'the people', we can posit that political legitimacy is enhanced by securing people's actual consent. Granted, the notion of actual consent is flawed in so far as it is impossible that any political institution would be supported by all citizens. Nevertheless, in the pursuit of political legitimacy, it is important for institutional designers in post-conflict transitions to consider how people might have 'a say in their own voices about the form and principles of their own political organization.'²⁸ As Tierney writes, from a popular republican position, 'the people of a polity ought to be directly involved in constitutional decision-making, particularly at constitutive moments.'²⁹ The challenge appears to be how such processes in institutional design might be based on inclusion, what Simone Chambers calls 'the democratization of popular sovereignty.'³⁰

If we accept it is important to include groups in institutional design, and in the popular ratification of an elite-negotiated deal, how do we get round the problem of identifying ‘the people’? Identifying ‘the people’ is particularly problematic in divided societies where ethnonational groups have divergent self-determination claims; it can be more appropriate to talk of ‘peoples’ rather than ‘*the* people.’ For Brendan O’Leary, power-sharing theorists are necessarily ‘sensitive to the nature of the demos or *demosi*’ in a deeply divided place.³¹ As John McGarry notes, when divisions between groups in a divided polity runs along ethnonational lines reflecting divergent self-determination claims, groups may have ‘claims to partnerships between peoples within central governments’, sometimes accompanied by ‘intense claims to territorial self-government, the recognition of their national symbols and institutional links with co-nationals in other states.’³² When constitutional reform involves such partnerships in government, the referendum therefore constitutes a ‘constitutional moment’ for the affected groups.³³ Constitutional moments in divided societies are high-stakes transformative events given that constitutions in such places ‘constitute the very demos which governs itself under and through the constitutional regime.’³⁴ Characterizing a referendum on a new constitution or peace agreement as part of a ‘constitutional moment’, we need to better consider how the voice of the groups or ‘peoples’ can be facilitated in the decision to be governed together in a power-sharing polity.³⁵

The need to facilitate the voice of groups in the ratification of power sharing seemingly sits at odds with the referendum’s use of majoritarian rules. After all, referendum results are usually decided by a simple majority threshold of 50 per cent plus 1. When there are two options available to voters (vote ‘yes’ or ‘no’), a simple majority is seemingly straightforward. As Buchanan and Tullock write, ‘Whenever a choice has to be made only a decision made by a simple majority will ensure that more are satisfied by the result than are frustrated.’³⁶ But those left frustrated might have been excluded from power for some time and suffered discrimination or oppression. A simple majority threshold risks privileging the majority, thereby excluding the minority community and ultimately failing to

legitimate the deal reached by elites. Imposing the will of the majority on the minority flies in the face of power-sharing principles. As Lijphart argues, in plural societies, 'majority rule spells majority dictatorship and civil strife rather than democracy.'³⁷ If a majority group can override the wishes of the minority in a referendum, the minority's right to self-determination will be denied. Imposing a constitutional decision on a dissenting minority against its wishes is hardly a promising scenario for peace and stability.

To counter the potentially negative effects of a simple majority threshold, referendums can draw on countermajoritarian procedures to protect minorities and facilitate the voice of the main communities. Broadly speaking, countermajoritarian procedures aim to protect the rights and interests of minority groups against potential infringement by the majority.³⁸ Such procedures are arguably required when the referendum acts as a constitutional moment, thereby necessitating a high level of popular support.³⁹ To secure concurrent *majorities* of the groups rather than *the majority*, referendum rules could opt for a qualified majority requiring a high level of support across groups (difference-blind in keeping with liberal consociation) or explicit approval of each of the main communities (as 'pre-determined' groups and in keeping with corporate consociation).⁴⁰ This liberal/corporate distinction has been applied to rules for concurrent majority decision-making in power-sharing legislatures. Concurrent majorities can be realized via 'corporate naming (or "designation") of the peoples' or 'implicitly through a difference-blind qualified majority decision-making rule' such as a weighted majority threshold (e.g. two-thirds).⁴¹ Given the impossibility of acquiring unanimous support in a high-stakes peace referendum, concurrent majority rules would approximate 'the 'will of the peoples' in a divided society transitioning to power sharing.

To secure a liberal weighted majority, the challenge lies in deciding the appropriate threshold figure which will depend on the relative size of the groups, necessitating sufficient support from the minority and majority groups. In the Montenegro 2006 referendum, approval of independence required a relatively low 55 per cent of those eligible to vote.⁴² Liberal referendum rules are commonly used in

federations as per the Swiss case where approval requires a double majority of more than 50 per cent of votes in the country and a majority of votes in a majority of the cantons. It is also possible for concurrent majorities to be achieved in the referendum via corporate naming of the groups. Tierney refers to the possibility of implementing such rules whereby voters would register as a member of a particular community and the outcome would make explicit the relative support of each community.⁴³ Requiring explicit concurrent majorities may encourage elites to hold a referendum when confident that cross-communal support is forthcoming given the potential of one community to veto.⁴⁴ In the case of the 2004 referendum in Cyprus, two simultaneous referendums took place to ascertain the consent of both the Greek Cypriot and Turkish Cypriot communities to proposals for reunification of the island.⁴⁵ There are, however, potential drawbacks to rules for determining concurrent majorities between groups. As O'Leary points out, 'Ceding parity for decisions is the most difficult power-sharing principle to accept for the representatives and negotiators of a people with a large or significant majority.'⁴⁶ Agreement on concurrent majority rules would be difficult to achieve. Concurrent majority rules (particularly corporate rules that name the groups) may well entrench the identity of groups to approve constitutional change, thereby heightening division. Such rules may also infringe the rights of minorities and individuals outside the main communities.

The protection of minority groups via countermajoritarian procedures invites the counter argument concerning 'tyranny of the minority.' Supermajoritarian requirements are considered minority vetoes because they allow a minority to block the will of the majority. Such rules violate the fundamental democratic principle of political equality, one person, one vote. For Robert Dahl, an ideal democracy involves, among other things, equality in voting.⁴⁷ Majority rule is preferred as the best way to ensure that citizens are treated as equals at the ballot box.⁴⁸ Reservations about the use of supermajority rules have also been considered in relation to federalism. Al Stepan has questioned the legitimacy of such arrangements whereby supermajority rules and overrepresentation in the upper house could mean that 'legislators representing less than 10 per cent of the electorate are able to thwart the wishes of the vast majority.'⁴⁹ In the growing literature on ethnonational referendums, there appears to be a

preference for a simple majority threshold provided that a majority of eligible and registered voters cast their ballot.⁵⁰

Debates on individual political equality versus group rights have been addressed by power-sharing theorists. To criticism from liberal theorists, O'Leary replies that advocates of consociation 'invoke necessity and realism to challenge the confidence of liberals in majoritarian and adversarial democracy.' Consociationalists advocate democracy allowing for 'majorities – rather than *the* majority or *the* plurality – to control or influence government.'⁵¹ Christopher McCrudden and Brendan O'Leary suggest that consociation involves a clash between two different understandings of equality. Whereas the majoritarian conception of equality is constrained by consociation, 'consociationalists seek to further equality between the consociated *peoples* or *groups*. They do not presume that there is one demos, certainly not the type of demos in which majority rule would be legitimate.'⁵² Power sharing approved in a referendum with concurrent consent of the main groups is considered to enjoy enhanced legitimacy.⁵³ Notably, existing consociational rules provide for the overrepresentation of a group, thereby conflicting with the principle of individual political equality. Thibaud Bodson and Neophytos Loizides explore the 'protective dis-proportional representation' of the Dutch-speaking community in the Brussels Capital Region. A minority in Brussels (though a majority in the country as a whole), the Dutch-speaking community is protected by a concurrent majority rule in the legislature, veto powers, the organisation of parliament into two language groups and parity of government portfolios with the French-speaking community. This over-representation of a minority group is argued to be justified in the pursuit of stability and peaceful inter-communal relations.⁵⁴ Drawing on these debates, and to shed light on the practical implications of whether referendum rules can facilitate the voice of multiple groups or peoples in a constitutional moment, I turn to explore the use of the referendum to legitimate power sharing in two contemporary cases, Northern Ireland and Iraq.

Managing 'the peoples' in two power-sharing referendums: Northern Ireland and Iraq

Northern Ireland

A crucial case in the history of ethnonational referendums, Northern Ireland's Good Friday Agreement of 1998 (GFA) was 'the first consociational pact to have been immediately popularly endorsed in a referendum.'⁵⁵ Following years of failed political initiatives, the Agreement reached between political parties and the British and Irish governments is founded on popular support demonstrated in two simultaneous and mutually dependent referendums held in Northern Ireland and the Republic of Ireland on 22 May 1998. The GFA is said to represent 'a new constitutional beginning with its origins very clearly in ideas of consent and popular sovereignty.'⁵⁶ With a high turnout of 81.1% in Northern Ireland, 71.1% voted 'yes' to approval of the Agreement and 28.9% voted 'no.'⁵⁷ The referendum in the Republic of Ireland asked voters to approve revisions to Articles 2 and 3 of the Irish Constitution, thereby abandoning the state's claim to territorial integrity of the island.⁵⁸ On a turnout of 56%, 94.4% voted in favour of constitutional change as an essential part of the ratification of the Agreement.

The referendum result can arguably be explained by the extent to which the Agreement addresses the two groups' self-determination claims and creates a binational polity in which both nationalists/republicans and unionists/loyalists can govern the polity together. Notably, the largest parties of the two communities engaged in the talks were the more 'moderate' Ulster Unionist Party (UUP) and the Social Democratic and Labour party (SDLP). For nationalists led by the SDLP, power sharing in Northern Ireland was to be bolstered by the North-South Ministerial Council and cross-border bodies, the 'Irish dimension.' For unionists, the Agreement secured the 'consent principle' (Northern Ireland's constitutional status would not change without majority approval in the region), established east-west institutions across the UK and promised an end to IRA violence.⁵⁹ Standing somewhat apart from the negotiations, republicans led by Sinn Féin voted to support the deal as transitional to a future united Ireland.⁶⁰ The political representatives of the loyalist community, the

Progressive Unionist Party, supported the Agreement as a means to embed 'shared responsibility' and the expression of more class-based politics.⁶¹

The Northern Ireland referendum highlighted the variable support for the Agreement on the part of the two main groups. Though there was no official breakdown by constituency, a *Sunday Times* exit poll found that 96 per cent of Catholics had voted in favour with a much smaller majority of 55 per cent of Protestants doing so.⁶² The 28.9% of the population who voted 'no' thus appeared to reflect unionist concerns. The Catholic nationalist community was almost wholly in favour but the Protestant community was deeply divided with a narrow majority subsequently declining to a minority just two years later.⁶³ Some argue that UUP Leader David Trimble had fought a 'defensive' referendum campaign given party tensions over the Agreement⁶⁴ and others suggest that Trimble had underestimated the 'No' Campaign by the DUP and UKUP 'which tapped into unionist fears about prisoners, policing and decommissioning.'⁶⁵ The British government took some comfort from the indication that even though the result 'was scarcely a resounding triumph on the unionist side...at least we could claim that a majority of Protestants had voted yes.'⁶⁶

In terms of rules, the Northern Ireland referendum adopted a simple majority threshold and there was no requirement for concurrent majorities of the two main communities.⁶⁷ We can speculate that had a clear unionist majority voted 'no', the UUP would have been devastated in the June Assembly elections and the prospects for the GFA would have been in serious jeopardy.⁶⁸ It is not likely the parties and the two governments would have supported a countermajoritarian procedure to demonstrate a concurrent majority either in the form of a qualified majority or corporate rules requiring voters to register as a member of a particular community. Though the Agreement includes corporate rules whereby Members of the Legislative Assembly register as 'nationalist', 'unionist' or 'other', it arguably would have been inappropriate to apply such categories to the electorate and unlikely that the parties would have agreed to such a move. A simple majority threshold was

appropriate because the Agreement sufficiently addressed the groups' self-determination aspirations. The inclusive peace process and 'constructive ambiguity' of the deal allowed nationalists, republicans, unionists and loyalists to view the GFA as securing their constitutional preferences. Of additional note is that political parties and wider civil society employed robust public relations efforts to persuade the public to vote 'yes.'⁶⁹ Converse to considerations of potential majority hegemony in referendums, the Northern Ireland case shows the need to make sure the previously dominant majority community is incentivised to vote 'yes'. The two referendums were also notable as an instance of direct constitutional democracy requiring concurrent majorities in two jurisdictions, acknowledging various demoi on the island.

The variation in groups' support constrained the implementation of the deal, largely owing to unionist reservations about sharing power with republicans in advance of IRA decommissioning. But the GFA is also a story of increased support for power sharing by a previously dominant group who were cautious in their initial support.⁷⁰ Peace implementation and increased stabilization are linked to the moderation of the DUP who had campaigned for a 'no' vote in 1998 but took their seats in the power-sharing executive created a year later and became the largest unionist party in 2003. Having outbid the UUP, the DUP continued to moderate, simultaneously critiquing the Agreement and presenting itself as a governing party, moving from a party of protest to one of power.⁷¹ Following the party's acceptance of revisions to the Agreement proposed by the two governments in the St Andrews Agreement of 2006 and gains at the 2007 Assembly election, the DUP agreed to enter an executive with Sinn Féin as the largest parties of each bloc.⁷² Despite a series of political crises, the executive led by the DUP and Sinn Féin from 2007 until its collapse in 2017 ushered in a period of relative stability. Electoral competition evolved over time from contestation over whether to share power to parties positioning themselves as the most 'effective voice' for their respective community.⁷³

Iraq

The constitutional design process in post-invasion Iraq took place in a very different context to the peace process and negotiations that led to the GFA in Northern Ireland. Despite important political and security differences, the use of the referendum to ratify a new constitutional order in Iraq further illuminates the challenge of facilitating the ‘voice’ of various groups in a referendum. The referendum held on 15 October 2005 ratified a new constitution encompassing an asymmetrical federation (including recognition of Kurdistan) and power sharing at the federal level according to liberal consociational rules.⁷⁴ On a turnout of 61 per cent, the constitution was approved by 79 per cent of voters overall with Kurds and Shi’a Arabs overwhelmingly in favour and Sunni Arabs overwhelmingly opposed.⁷⁵ The referendum rules were notable for introducing a qualified majority procedure whereby ratification required approval by a majority of voters in Iraq and if two-thirds of the voters in three or more governorates did not reject it.⁷⁶ Despite the large overall majority, the vote came close to a Sunni Arab veto.⁷⁷

To what extent did the referendum sufficiently facilitate the voice of the Kurds, Shi’a Arabs and Sunni Arabs in determining their constitutional future? The requirement for the constitution to be popularly ratified can be traced to the efforts of the Kurdish elites who sought to shape the interim constitution imposed by the Coalition Provisional Authority (CPA) in March 2004, the Transitional Administrative Law (TAL). O’Leary writes that the proposals from the Kurdistan National Assembly included a requirement that a permanent constitution would require majority approval in the Kurdistan Region.⁷⁸ A very different proposal was proposed by a Sunni Arab member of the CPA-appointed Iraqi Governing Council and chair of the Drafting Committee, Adnan Pachachi, for ratification by a simple majority of Iraq’s citizens.⁷⁹ The final text was a compromise: rather than affording Kurdistan an explicit veto, the text provided Kurdistan with a de facto veto over the ratification of the permanent constitution under the two-thirds rule (given the location of three governorates within the borders of Kurdistan: Dohuk, Erbil and Sulaimania). The Kurds’ revised veto rule is described as ‘a brilliant move’ drafted into the TAL in the final days before the deadline for a

deal.⁸⁰ Debate ensued on Shi'a and Sunni positions on the TAL and the ratification rule of the permanent constitution. According to Ali Allawi, Sunni Arab negotiators accepted the rule as a means to limit Shi'a power and to block a constitution perceived as against their interests.⁸¹ It appears that it was only once the TAL had been accepted by the Iraqi Governing Council that the Shi'a elites objected to the rule.⁸² Critiquing the rule, Arato writes that it suited the constitutional preferences of one community, the Kurds, and finalized 'a definition of Iraq as a voluntary union of two ethnically defined peoples.'⁸³ But though the rule may have been inserted into the interim constitution at the behest of Kurdish elites, it also facilitated a Sunni Arab veto given their dominance in at least three governorates.⁸⁴ Yet even if the rule might be understood as 'difference-blind', its application was far from neutral. As Sunni Arabs failed to muster the required threshold in one governorate, the constitution was weak in legitimacy for the previously dominant group who had existential fears about their position in a federal Iraq. The referendum appeared to fuel violent conflict, further isolating Sunni Arabs from the political process.⁸⁵

The variable degree of support for the constitution, particularly the overwhelming opposition on the part of Sunni Arabs, can be explained by the groups' divergent constitutional preferences that were not fully accommodated in the rushed, imposed constitution-making process led by the CPA.⁸⁶ The Kurds were in the positive position of having secured the recognition of Kurdistan in a federal Iraq and a guarantee that constitutional reform would not take place without their consent. O'Leary lists the achievements secured by Kurdistan in the constitution including 'extraordinary regional status', control over security, natural resources and most policy areas and a potential referendum to bring Kirkuk and other disputed territories into the Kurdistan Region.⁸⁷ In contrast, the Shi'a community preferred the creation of a centralized Iraq, unsurprising given their status as the majority group. Their preference for a centralized Iraq according to Shi'a religious values was vehemently opposed by Sunni Arabs, Kurds, and secularists throughout Iraq. Sunni Arabs, largely excluded from the process, also supported a centralized Iraq, their preference understood to be 'mostly ethnocentric in nature and

based on nostalgia for the Iraq that Sunni Arabs controlled since its creation.’⁸⁸ A few years later, however, some Sunni Arabs were supportive of federalism, exploring the possibility of forming their own region to counter the consolidation of Shia power.⁸⁹

Exploring the potential for the groups in Iraq to act as ‘peoples’ engaged in a constitutional moment, we need to consider the nature and strength of divisions between Shi’a Arabs, Sunni Arabs and Kurds. As Liam Anderson and Gareth Stansfield write, viewing Iraq as ‘starkly divided into three internally coherent and mutually hostile groups’ might be ‘an oversimplification of a complex reality’ but has some ‘obvious truths’ given Sunni Arab dominance of the state.⁹⁰ Following decades of discrimination, oppression and genocidal acts perpetrated against them by the Iraqi state, the Kurdish population have a long-standing, deep-rooted identity and continue to strive for self-government. Regional autonomy was viewed by Kurdistan leaders as the minimal level of acceptable self-determination short of independence.⁹¹ As McGarry and O’Leary put it, it is ‘very unlikely that victims of state policies of ethnocentrism, discrimination, ethnic expulsion, and genocide’ would accept the alternative vision of an integrated, centralized Iraq.⁹² In addition to the ethnic divide between Kurds and Arabs, Shi’a-Sunni divisions constitute a crucial political divide along sectarian lines.⁹³ Marginalization in post-invasion Iraq has fostered the development of a specifically Sunni identity in the face of an ascendant Shi’a identity. The emergence of hostile myths and a security dilemma between Shi’a and Sunni Arabs quickly led to the mobilization of group identity and ultimately civil war.⁹⁴ Aside from this struggle for power, the Shi’a-Sunni divide does not concern an alternative to the Iraqi state. It is therefore appropriate to talk of two (Kurd and Arab) peoples with divergent constitutional preferences, acknowledging the regional and religious divisions between Shi’a and Sunni. Given the relative concentration of the groups in the governorates, it was arguably appropriate for a liberal qualified majority rule to protect groups’ interests in the referendum. Yet the inclusion of such a rule without consensus among the groups hampered the prospects for the referendum to fully legitimate the new constitution.

Conclusions

To what extent can the referendum facilitate the 'voice' of multiple groups in a deeply divided society transitioning to power sharing? If power sharing is based on the consent of the contending groups, can referendum rules provide for concurrent majorities? The article began with the optimistic projections of Blair and Bush: the former UK Prime Minister characteristically heralding the referendums on the GFA as a 'giant stride' toward peace and former US President bravely framing the ratification of the Iraq Constitution and subsequent elections as a 'turning point' for Iraq and the Middle East. The path to peace in Northern Ireland has turned out to be a bumpy affair as successive cross-community coalitions lurched from one crisis to the next, leading to the collapse of power sharing in 2017. Iraq has been wracked by civil war, violence and destruction waged by ISIS, and little evidence of elite cooperation. Though referendum design is not an explanation for these outcomes, the two cases highlight the challenging dynamics of employing direct democracy in divided places transitioning from conflict.

When included in a post-conflict or transitional institutional design process, the referendum performs a crucial legitimation role. Particular care must be taken on referendum rules as they bring to the fore 'the people' dilemma and the variable support between groups engaged in the constitutional moment. Normatively speaking, the referendum can help demonstrate consent, facilitating the agency of voters who collectively bring into being (or not) a polity they will govern together as shared constitutional authors. The Northern Ireland case shows that a simple majority threshold may be sufficient provided that the deal sufficiently addresses the groups' preferences and is likely to secure majority support from the main communities. What comes before the referendum in the context of institutional design is therefore crucial. Yet a simple majority threshold may not be acceptable to one or more groups and efforts should be made to facilitate concurrent majorities. In situations where a minority is geographically concentrated in an administrative unit, a qualified majority in the country plus a

majority in a region or regions may be required. As shown in Iraq, deciding on the rules for a qualified majority that will be supported by all main groups will be tricky but it is vital that they support the rules. Establishing legitimate rules is particularly important where external actors employ a heavy hand in the process. To enhance legitimacy, decisions on ratification must not be rushed and should form part of an inclusive and ideally consultative process. It is also important to consider the implications of variable support for the settlement. As both Northern Ireland and Iraq show, the deal may be weak in legitimacy for the previously dominant group. Peace implementation must therefore address groups' ongoing political preferences and seek to increase support from the group(s) who registered their weaker support. In highlighting these dynamics, the article points to two principal avenues for research. For power-sharing theory, it will be important to further investigate the role of ratification, and in particular the referendum, for the 'adoptability' of power-sharing arrangements.⁹⁵ There is also potential for further research on the capacity of institutional design processes in conflict-affected states to provide opportunities for meaningful public participation, thereby enhancing the overall legitimacy of the elite-negotiated deal and the new political system.

Notes

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1. BBC News, 23 May 1998
 2. CCN.com, 12 Dec 2005, Transcript of Bush speech, <http://edition.cnn.com/2005/POLITICS/12/12/bush.transcript.philly.speech/>
 3. Hartzell & Hoddie, *Crafting Peace*; McCulloch, *Power-Sharing and Political Stability*; Mattes & Savun, "Fostering Peace after Civil War"; McGarry & O'Leary, *The Northern Ireland Conflict*; McEvoy, *Power-Sharing Executives*
 4. Tierney, *Constitutional Referendums*, 1. Referendums are also employed by sub-state movements to legitimate secession in the absence of approval by state institutions. Independence referendums have recently taken place in Kurdistan and Catalonia and Bosnian Serb leaders have mooted the possibility of a referendum on the secession of Republika Srpska.
 5. Mac Ginty, "Constitutional referendums and ethnonational conflict,"; Reilly, "Democratic Validation," Lee and Mac Ginty, "Context and Postconflict referendums"
 6. Qvortrup, *Referendums and Ethnic Conflict*, 159.
 7. Loizides, *Designing Peace*; Loizides, "Negotiated Settlements and Peace Referendums."
 8. Lijphart, "Constitutional Design," 106.
 9. Tierney, *Constitutional Referendums*, 52.
 10. McGarry, O'Leary and Simeon, "Integration or Accommodation?" 42
 11. Loizides, "Negotiated Settlements and Peace Referendums," 234

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12. Lijphart, *The Politics of Accommodation*, 103.
 13. Easton, "A Re-assessment of the Concept of Political Support," 445.
 14. Norris, *Democratic Deficit*, 22.
 15. Goddard, "Brokering Peace."
 16. Loizides, *Designing Peace*, 31
 17. Prorok, "Leader Incentives and Civil War Outcomes," 70.
 18. Wallis, *Constitution Making*, 315.
 19. Simmons, "Justification and Legitimacy," 745.
 20. Beetham, *The Legitimation of Power*, 91.
 21. The idea that voting confers consent is a controversial proposition given that voters on the losing side will not have consented to the outcome. See Anderson, Christopher J. et al. *Losers' Consent*
 22. Fishkin, *When the People Speak*, 76.
 23. Franck, "The Emerging Right to Democratic Governance."
 24. Morgan, *Inventing the People*.
 25. Tekin, *Founding Acts*, 2.
 26. Lerner, "Constitution-writing," 81.
 27. Chambers, "Democracy, Popular Sovereignty, and Constitutional Legitimacy," 155.
 28. Tekin, *Founding Acts*, 3
 29. Tierney, *Constitutional Referendums*, 55.
 30. Chambers, "Democracy, Popular Sovereignty, and Constitutional Legitimacy," 153.
 31. O'Leary, "Power Sharing: An Advocate's Conclusion," 389.
 32. McGarry, "Conclusion," 273.
 33. As Turner writes, peace agreements are increasingly understood as 'constitutional moments' given the break from the past or 'rupture with the existing order' and are 'increasingly characterised as having constitutional form.' Turner, *Violence, Law and the Impossibility of Transitional Justice*, 107-108.
 34. Choudhry, "Bridging Comparative Politics and Comparative Constitutional Law," 5; Llich, *Visions of Sovereignty*, 34-35.
 35. Peace agreements straddle domestic and international legal categories and are often constitutional in nature, though the constitution may be transitional and only one element of the deal. Bell, "Peace Agreements."
 36. Buchanan and Tullock, *The Calculus of Consent*, 244.
 37. Lijphart, *Patterns of Democracy*, 33. See also O'Leary, "Debating Consociational Politics," 11.
 38. Alberts, Warshaw and Weingast, "Democratization and Countermajoritarian Institutions," 71.
 39. Tierney, *Constitutional Referendums*, 271.
 40. For exploration of corporate and liberal consociation see McCulloch, "Consociational Settlements."
 41. O'Leary, "Power Sharing: An Advocate's Conclusion," 390-91.
 42. EU envoy Miroslav Lajcak proposed a 50 per cent participation threshold and 55 per cent approval for the Montenegro independence referendum. Lajcak described the proposal as 'a generally accepted model that the qualified majority is needed for key state decisions.' EUObserver, 27 Feb 2006.
 43. Tierney, *Constitutional Referendums*, 281.
 44. Ibid, 282.
 45. In Cyprus, it is essential for the two groups in the partitioned country to consent to reunification and associated political structures. It would be more problematic to require concurrent majorities via corporate rules in a single polity.
 46. O'Leary, "Power Sharing: An Advocate's Conclusion," 391.
 47. Dahl, *On Political Equality*, 9.
 48. Ibid, 15.

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49. Stepan, "Federalism and Democracy," 23-24.
50. Qvortrup, *Referendums and Ethnic Conflict*, 132.
51. O'Leary, "Debating Consociational Politics," 10. Consociationalism is most often associated with the seminal work of Arend Lijphart and has been developed in recent years, principally by John McGarry and Brendan O'Leary. The four principles of consociationalism are: a cross-community executive; proportionality; mutual veto rights; and segmental autonomy.
52. McCrudden & O'Leary, *Courts and Consociations*, 483.
53. *Ibid*, 500.
54. Bodson and Loizides "Consociationalism in the Brussels Capital Region," 95.
55. O'Leary, "The Nature of the British-Irish Agreement," 68.
56. McEvoy and Morison, "Beyond the 'Constitutional Moment'," 966.
57. Voters were asked: 'Do you support the agreement reached at the multi-party talks on Northern Ireland and set out in the Command Paper 3883?'
58. Voters were asked: 'Do you approve of the proposal to amend the Constitution contained in the undermentioned Bill, the Nineteenth Amendment of the Constitution Bill, 1998?'
59. O'Leary, "The Nature of the British-Irish Agreement," ; McEvoy and Morison, "Beyond the 'Constitutional Moment'," ; McEvoy, *Power-Sharing Executives*, 62-8. The GFA included several contentious issues for unionists: prisoner releases, police reform and the timing of IRA decommissioning.
60. Adams, 2003, 367; Murray & Tonge, 2005, 200-203.
61. McAuley, "Just Fighting to Survive"
62. Elliott, "The Referendum and Assembly Elections," 143.
63. Hayes, McAllister and Dowds, "The Erosion of Consent," 152.
64. Powell, *Great Hatred, Little Room*, 117.
65. Godson, *Himself Alone*, 374.
66. Powell, *Great Hatred, Little Room*, 117.
67. The primary legislation for the referendum existed in the NI (Entry to Negotiations, etc) Act 1996. Elliott, "The Referendum and Assembly Elections," 138.
68. As it was, the UUP was the largest party in the Northern Ireland Assembly following the June 1998 elections with 28 seats.
69. Somerville & Kirby, "Public Relations,"; Hancock, "There is No Alternative"
70. Drawing on survey data, Mitchell et al. show that support for power sharing among unionists increased considerably. Despite the difficulties experienced by the political institutions in the first five years following the agreement, 'popular support for mandatory sharing of executive power was overwhelming, and on the increase.' Mitchell et al. "Extremist Outbidding," 410.
71. Tonge et al., *The Democratic Unionist Party*.
72. See Gormley-Heenan and Mac Ginty, "Ethnic Outbidding and Party Modernization."
73. Mitchell et al., "Extremist Outbidding." A residual issue relates to the lower levels of support for the Assembly and Executive among women. See Hayes & McAllister, "Gender and Consociational Power Sharing."
74. McGarry and O'Leary, "Iraq's Constitution of 2005."
75. BBC News, *Iraq Voters Back New Constitution*
76. TAL, Art.61 C
77. In Sunni-dominated Anbar province, 96 per cent voted against the constitution; 81 per cent rejected it in Salahuddin and 56 per cent rejected the constitution in Nineveh, about 10 per cent short of the veto threshold.
78. O'Leary, "Debating Consociational Politics," 59.
79. *Ibid*.
80. Arato, *Constitution Making Under Occupation*, 171.
81. Allawi, *The Occupation of Iraq*, 223.

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82. Arato, *Constitution Making Under Occupation*; Clover, “Clash over ‘Kurdish Veto’ Looms in Iraq”. Even though the Shi’a leaders on the Governing Council signed the document, they held a press conference later the same day to express their concerns about TAL overall and the ratification rule. See Allawi, *The Occupation of Iraq*, 223.
83. Arato, *Constitution Making Under Occupation*, 192.
84. Given the demographic make-up of Iraq’s governorates, the Kurds could have more comfortably mobilized the required two-thirds in three governorates to veto the constitution. Arato claims it was much more difficult for Sunni Arabs to mobilize two-thirds of voters in three governorates, particularly in Nineveh given the presence of a large Kurdish minority and control of the province by the Kurdish Regional Government. Arato, *Constitution Making Under Occupation*, 322, fn.129. 56 per cent of voters in Nineveh rejected the constitution, 10 per cent short of vetoing ratification of the constitution.
85. Stansfield, *Iraq: People, History, Politics*.
86. Arato, “Interim Imposition,”; *Constitution Making Under Occupation*; Al-Ali, *The Struggle for Iraq’s Future*; Benomar, “Constitution-Making After Conflict”; Eklund et al., “Negotiating a Federation in Iraq”; Diamond, *Squandered Victory*.
87. O’Leary, “The Federalization of Iraq,” 506.
88. McGarry and O’Leary, “Iraq’s Constitution of 2005,” 684.
89. Al-Qarawee, 2014.
90. Anderson and Stansfield, *The Future of Iraq*, 139.
91. In the post-2005 period, Kurdistan elites moved toward holding a referendum on independence, held on 25 September 2017 and strongly opposed by Baghdad and the international community. Election monitors announced that 92 per cent of voters voted for independence. See Chulov, “More than 92% of voters in Iraqi Kurdistan back independence.”
92. McGarry and O’Leary, “Iraq’s Constitution of 2005,” 697.
93. Anderson and Stansfield, *The Future of Iraq*, 135.
94. Haddad, “Sectarian Relations in Arab Iraq,” 124.
95. McGarry, “Centripetalism, consociationalism and Cyprus.”

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