REVISITING *RYAN V LENNON* TO MAKE THE CASE AGAINST JUDICIAL SUPREMACY (AND FOR A NEW MODEL OF CONSTITUTIONALISM IN IRELAND)

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It is difficult to conceive of a case that might more starkly bring to the fore the arguments concerning judicial review than *State (Ryan) v Lennon*.[1] Small wonder that it has attracted so much scholarly attention, although the fact that almost all of it has been in an Irish setting is perhaps surprising, given the illustrative value of the case in respect of a philosophical quandary that continues to command attention in all developed constitutional democracies.[2] Should judges have power to invalidate legislation?

This article revisits *Ryan v Lennon* with an eye on the importance of the idea of democracy in the case. It assesses the meaning of democracy: what its purpose might be and what practical implications might follow, specifically in respect of judicial review. Based on this assessment, it argues for a particular institutional model for the vindication of constitutional rights. In the context of calls for the drafting of a new constitution for Ireland, however forlorn these calls might be for the moment, it makes a broad and general case for the abandonment of judicial supremacy and for the taking up of a model in which judges have a constrained rights-reviewing role that informs a more robust role that legislators would play, thereby enhancing the quality of the control that citizens have over their own laws.[3]

The article is in three parts. Part I assesses the exercise of judicial power over legislation in Ireland, with the primary emphasis on *Ryan v Lennon*. It considers the role played by the idea of democracy that finds expression in that case and relates it to certain apparently intractable dilemmas that emerged in later Irish constitutional jurisprudence. Part II considers the concept of democracy more generally, and argues for a republican account based on the idea of equally shared popular control over government. Part III applies this

1. *State (Ryan) v Lennon* [1935] I.R. 170, hereafter *Ryan v Lennon*.
2. Examples of that scholarly attention include: G. Hogan, "A Desert Island Case set in the Silver Sea: The State (Ryan) v. Lennon" in E. O'Dell (ed.), *Leading Cases of the Twentieth Century* (Dublin: Sweet & Maxwell, 2000); G. Quinn, "Dangerous Constitutional Moments: The 'Tactic of Legality' in Nazi Germany and the Irish Free State Compared", in J. Morison, K. McEvoy and G. Anthony (eds), *Judges, Transition and Human Rights* (Oxford: Oxford University Press, 2007); D. Coffey, "The Judiciary of the Irish Free State" (2011) *Dublin University Law Journal* 61; A. Kavanagh, "The Irish Constitution at 75 Years: Natural Law, Christian Values, and the Ideal of Justice" (2012) *Irish Jurist* 70.
3. The Labour Party, for instance, proposed a new text prior in its manifesto prior to the 2011 general election. See: *www.labour.ie/download/pdf/newgovernmentbettergovernmen.pdf* [Last accessed March 18, 2015].

account of democracy to the dilemmas around judicial power and presents the case—based on complementary theoretical and practical arguments—for a model of political constitutionalism in Ireland.

I. JUDICIAL POWER IN THE IRISH CONSTITUTIONAL ORDER THROUGH THE LENS OF *RYAN V LENNON*

In Art.34.3.2°, the Irish Constitution establishes a judicial power to review and invalidate parliamentary legislation on constitutional grounds.[4] Despite the relative clarity of the text with regard to this power, judicial approaches to its exercise have evolved considerably since independence. The prevailing commentary suggests that judges adopted a reticent stance in the early decades (illustrated by the decision in *Ryan v Lennon*), later pursuing a more activist approach from the 1960s to the 1990s, and then retreating again in the following decades.[5] The activist era was heralded by the 1965 High Court decision in *Ryan v Attorney General*, which activated the unenumerated rights doctrine.[6] In identifying a right to bodily integrity as one among those rights in that case, Kenny J. drew on theological considerations set out in a then recently published papal encyclical. Following the approval of the decision by the Supreme Court, it seemed that Irish judges had arrogated to themselves a considerable political power. They could invalidate parliamentary legislation based on interpretations of somewhat vague, open-ended principles, and could rely on sources not merely beyond the text, but beyond the general political system, to inform those interpretations.

The 1974 decision in *McGee v Attorney General* confirmed this power, a case in which the Supreme Court, basing its judgment on an unenumerated right to marital privacy, invalidated legislation that proscribed the sale of contraceptives within the jurisdiction.[7] Although the outcome was widely approved, the judgment of Walsh J. in particular is worth noting for the elevated role it gives to judges in a democratic society. He insisted that there were rights "over which the State has no authority" and which "it could not control".[8] The difficult task of identifying these rights was a matter for judges. He observed that "in this country, it falls finally upon the judges to interpret the Constitution and in doing so to determine, where necessary, the rights which are superior or antecedent to positive law or which are imprescriptible or inalienable".[9] The task was to be carried out by judges "as best they can from their training and their experience".[10]

4. The relevant part of the provision reads: "… the jurisdiction of the High Court shall extend to the question of the validity of a law having regard to the provisions of this Constitution …".
5. For a scholarly account that gives an overall picture, see for example Kavanagh, fn.2.
6. *Ryan v Attorney General* [1965] I.R. 294.
7. *McGee v Attorney General* [1974] I.R. 284.
8. *McGee v Attorney General* [1974] I.R. 284 at 310.
9. *McGee v Attorney General* [1974] I.R. 284 at 310.
10. *McGee v Attorney General* [1974] I.R. 284 at 310.

This era of activist judicial power arguably ended—or at least was attenuated—from the 1990s onwards. The 1995 *Abortion Information Case* considered (effectively) the validity of a constitutional amendment, approved by popular vote, allowing for the provision of information relating to abortion services abroad.[11] Counsel opposing the amendment drew on the natural law ideas elaborated in *McGee* in arguing that the amendment itself, despite its popular approval in a process ordained by the constitutional text, was unconstitutional. This was so because, in allowing for information concerning the termination of unborn life, it clashed with the imprescriptible rights that the Irish courts had held to be beyond the authority of the State, and which it was the task of judges to identify and protect. The Supreme Court rejected the argument, however, apparently disavowing the far-reaching concept of judicial power that had been repeatedly claimed since *Ryan v Attorney General*. It emphasised, instead, the constitutional principle of popular sovereignty.[12]

This apparent conflict between natural law and popular sovereignty, and the dilemmas it presented for judges enjoying supremacy, can be related back to the competing majority and dissenting judgments in the much earlier *Ryan v Lennon* decision. The case involved a challenge by four detained men, due to appear before a military tribunal on terrorist charges, to the constitutionality of their detention and of the tribunal. The case was decided during the period of the Free State Constitution, which had come into force in 1922 following the signing of the Anglo-Irish Treaty. That Constitution recognised many of the "marks of subordination" that had been set out in the Treaty and so its eventual demise, which was certainly facilitated by the decision in the case, had surely been inevitable in any event.[13] It contained other important features, however, such as the embrace of popular sovereignty;[14] the express protection of various human rights;[15] and the provision for judicial protection of those rights in the form of a power of invalidation of legislation.[16] It also made provision in Art.50, which was central to the outcome in *Ryan v Lennon*, that allowed for the amendment of the Constitution by ordinary legislation (that is, without

11. *Re Article 26 and the Regulation of Information (Services Outside the State for the Termination of Pregnancies) Bill 1995* [1995] 1 I.R. 1. (Strictly speaking, the court was considering the validity of the bill which had been brought through on foot of the approval of the right to information in a popular referendum.)
12. Judicial activism has in the meantime waned with cases like *Roche v Roche* [2010] 2 I.R. 321 and *Fleming v Ireland* [2013] IESC 19 confirming a trend of deference to the legislature. However, this may not be said of cases addressing the democratic process itself. Although they do not involve challenges to legislation per se, cases like *McKenna v An Taoiseach (No.2)* [1995] 2 I.R. 10; *Coughlan v Broadcasting Complaints Commission* [2000] 3 I.R. 1; *Doherty v Government of Ireland* [2011] 2 I.R. 222; and *McCrystal v Minister for Children* [2012] 2 I.R. 726 all involved substantial interference by the courts. *McKenna* and *Coughlan* are considered in Part III.
13. Such as the oath of allegiance to the British Crown in Art.17. For a comprehensive account, see Quinn, fn.2.
14. Article 2.
15. For example, to liberty and habeas corpus in Art.6, the inviolability of the dwelling in Art.7, and freedom of conscience in Art.8.
16. Article 65.

recourse to popular referendum) for a period of eight years after the coming into effect of the Constitution itself.[17] This Article had been inserted apparently with the intention of enabling the passage of minor or technical amendments during the early life of the new State.[18]

Given the wording of Art.50, the Free State Constitution seemed to cast "constitutionalism" and "democracy", at least on the basis of particular understandings of those ideas, in opposition to one another. On the one hand, there was a clear entrenchment of fundamental values such as popular sovereignty, the separation of powers and human rights. Not only that, judges of the superior courts were assigned as guardians of the Constitution, with express powers to strike down legislation that was in conflict with these values. On the other hand, however, democratically elected parliamentarians were apparently conferred with power to amend the Constitution at will.[19] This situation made inevitable a clash between legislators and judges, which duly came to pass in the wake of three such constitutional amendments, introduced by ordinary legislation in the late 1920s and early 1930s, two of which involved the use of Art.50 to amend itself. The first removed a safety valve from the Article, whereby it would no longer be subject to a power of either a majority of the Seanad or a popular initiative to insist that an amendment be put to the people in a referendum.[20] Then, with the eight-year period close to expiring, the second Act again amended Art.50, this time to extend the power to amend the Constitution by way of ordinary legislation by a further eight years.[21] Finally,

17. Article 50 read: "Amendments of this Constitution … may be made by the Oireachtas, but no such amendment … after the expiration of a period of eight years from the date of the coming into operation of this Constitution, shall become law, unless the same shall, after it has been passed … have been submitted to a Referendum of the people, and unless a majority of voters on the register, or two-thirds of the vote recorded, shall have been cast in favour of such an amendment. Any such amendment may be made within the said period of eight years by way of ordinary legislation and as such shall be subject to the provisions of Article 47 hereof." The relevant part of Art.47 read: "Any Bill passed … may be suspended for a period of ninety days on the written demand of two-fifths of the members of Dáil Eireann or of a majority of the members of Seanad Eireann … . Such a Bill shall … be submitted by Referendum to the decision of the people if demanded … either by a resolution of Seanad Eireann assented to by three-fifths of the members of Seanad Eireann, or by a petition signed by not less than one-twentieth of the voters then on the register of voters, and the decision of the people by a majority of the votes recorded on such Referendum shall be conclusive."
18. Hugh Kennedy (later Kennedy C.J., who presided in *Ryan v Lennon*) had been a member of the drafting committee of the Free State Constitution. He wrote in his foreword to Leo Kohn's book on the Free State Constitution that "at the last moment … it was agreed that a provision be added to Article 50 allowing amendment by way of ordinary legislation during a limited period, so that drafting or verbal amendments, not unlikely to appear necessary … might be made without the more elaborate process proper for the purpose of more important amendments …". See H. Kennedy, "Foreword", in L. Kohn, *The Constitution of the Irish Free State* (London: George Allen & Unwin, 1932). See also G. Hogan, *The Origins of the Irish Constitution 1928–1941* (Dublin: Royal Irish Academy, 2013), p.7.
19. Subject only to the proviso that any reforms be consistent with the terms of the Treaty.
20. Constitution (Amendment No. 10) Act 1928. See the text of Arts 50 and 47 in fn.17.
21. Constitution (Amendment No. 16) Act 1929.

the third, prompted by concerns on the part of the Government relating to increasing post-Civil War IRA violence, provided for the insertion into the Constitution of a new Art.2A.[22]

This very lengthy Art.2A provided for the establishment and operation of the military tribunal challenged in *Ryan v Lennon*.[23] Section 2 stated that "Article 3 and every subsequent Article of [the] Constitution shall be read and construed subject to" Art.2A. The tribunal was to comprise five members of the defence forces, removable at the will of Government. It had competence to try any terrorist-related offence of the many listed in an annex, but could also try an "offence" that was not an offence at the time of its commission, or that had been committed before the Article had been introduced, so long as the relevant minister "certified in writing … that to the best of his belief the act constituting such offence was done with the object of impairing or impeding the machinery of government or the administration of justice".[24] Section 7 authorised the Tribunal, in cases where it found a person guilty of an offence, to impose any penalty (including the death penalty) greater than the ordinary legal punishment for such an offence "if in the opinion of the tribunal such greater punishment is necessary or expedient".[25]

The arrangements were at odds not only with many of the human rights protected by the Constitution (including the express right against retroactive punishment in Art.43) but also with the doctrine of the separation of powers enshrined in Art.2. So much judicial and legislative power—in respect of the trial of certain offences, specified and unspecified, and in respect of the designation and sentencing of offences—was concentrated in the Government.[26] The Oireachtas had, it seemed, cast the essential principles of the Constitution aside and had arrogated to itself the power to amend it indefinitely. Not only was the Constitution no longer an obstacle in respect of post-Civil War violence, it was no longer an obstacle in any context: parliamentarians would have free rein in a constitutional order that lacked the conventions of the British Constitution which would have softened an otherwise unbridled parliamentary sovereignty.

In *Ryan v Lennon*, it fell to the judiciary to consider whether they could intervene. The application—which concerned the validity of the third of those amendments along with that of the previous two, upon which the third

22. Constitution (Amendment No. 17) Act 1931.
23. Under Pt I of Art.2A, the Government was authorised to initiate the operative parts of the Article whenever it was "of the opinion that circumstances exist which render it *expedient*" (emphasis added). There was no stipulation requiring the existence, for example, of a state of terror or armed rebellion. As it turned out, it was brought into operation, retracted, and then brought into operation again, through the early 1930s. See Quinn, fn.2.
24. *Ryan v Lennon* [1935] I.R. 170 at 197. Kennedy C.J. suggests in his judgment that "the more one dwells on this … the more one is staggered by the contemplation of the range of its operation and the scope of the matters authorised by it".
25. *Ryan v Lennon* [1935] I.R. 170 at 197.
26. The Government (or "Executive Council") controlled the trial of offence through its control of the Tribunal. As Kennedy C.J. put it in his judgment, "every act from the arrest of the individual and the charging him with an 'offence' to the sentence and its execution is, therefore, in naked reality, the act of the Executive Council": *Ryan v Lennon* [1935] I.R. 170 at 202.

relied—was rejected by a 2:1 majority of the Supreme Court. Fitzgibbon J.'s majority opinion, presaging the case against judicial review made by contemporary sceptics in the academy, emphasised the fact of disagreement concerning the meaning and implications of natural rights.[27] There was also an apparent endorsement of parliamentary sovereignty (or, perhaps, of political constitutionalism), expressed in the context of the absence of any formal text-based prohibition on the Oireachtas using Art.50 to amend itself in the manner challenged.[28] Finally, there was a general disavowal of judicial intervention in the "spheres assigned to the legislative and executive organs", expressed with reference to the notion of "judicial despotism" and of "making the courts sovereign over both the Constitution and the people".[29]

Kennedy C.J.'s celebrated dissent was almost the inverse, with an emphasis on divinely ordained natural law, *popular* over parliamentary sovereignty, and a robust judicial role. He found it impossible to reconcile certain aspects of Art.2A—such as vesting in the tribunal the power to impose the death penalty whenever its members thought it expedient—with natural law.[30] Also, the initial designation by the Constituent Assembly of principles such as liberty and the separation of powers as "fundamental and absolute … and so, necessarily, immutable" meant that it could not have intended Art.50 to vest power in the Oireachtas to violate these principles in the manner challenged.[31] The principle of popular sovereignty not only derived from its express invocation in Art.2 but also through the Art.47-reliant safety valves built into Art.50, which had been removed.[32] Their removal, in Kennedy's analysis, was an attempt by the Oireachtas to arrogate ultimate power over the Constitution and, thus, was a "usurpation that was done without lawful authority".[33] Finally, where Fitzgibbon J. had referred to "judicial despotism", Kennedy C.J. characterised the role of the judiciary in terms of acting as "watchdogs to protect [the Constitution] against unlawful encroachment and to maintain intact … the principles and provisions embodied in the Constitution …".

27. *Ryan v Lennon* [1935] I.R. 170 at 230–231.
28. Fitzgibbon J. agreed with the proposition put to the Court that—subject to the proviso that the provisions of the Treaty and of the Constituent Act itself were unimpeachable—the Dáil, when sitting as a Constituent Assembly in 1922, had transmitted "*full* power of legislation and [of] amendment [of the Constitution]" to the Oireachtas: *Ryan v Lennon* [1935] I.R. 170 at 226.
29. *Ryan v Lennon* [1935] I.R. 170 at 236.
30. *Ryan v Lennon* [1935] I.R. 170 at 205.
31. *Ryan v Lennon* [1935] I.R. 170 at 209. It is worth noting that Kennedy C.J. insisted that these natural law principles could not be amended "irrespective of the time when … or the process by which, the amendment is attempted".
32. *Ryan v Lennon* [1935] I.R. 170 at 213. These safety valves, in Kennedy C.J.'s analysis, meant that the Constituent Assembly "even during the preliminary period would not relax the ultimate authority of the people and expressly reserved to the people the right to intervene when they considered it necessary to restrain the action of the Oireachtas affecting the Constitution".
33. *Ryan v Lennon* [1935] I.R. 170 at 217. He also insisted that, if the series of amendments were lawful, they could "be continued indefinitely in time and scope … ultimately even to the exclusion of the people from all voice in legislation … and in open mockery of Article 2": *Ryan v Lennon* [1935] I.R. 170 at 212.

Standing back from both judgments, two contrasting understandings of democracy emerge. Fitzgibbon J.'s is reminiscent of the procedural account associated with Max Weber and Joseph Schumpeter, whereby democracy does not comprise particular substantive values as such, but is concerned only with the means by which particular political ends are reached.[34] This in turn corresponds with the one-person/one-vote majoritarian account preferred by contemporary sceptics of judicial review such as Jeremy Waldron and Richard Bellamy.[35] Yet the commitment to formal processes in Fitzgibbon J.'s judgment is rigid to an extent that, paradoxically, the elected Government could "democratically" subvert those very processes.

For Kennedy C.J., in contrast, this meant that judicial intervention was positively necessary to uphold democracy, or to save democracy from itself. Democracy was thus comprised of certain values that could not be "democratically" undone through formal processes. Yet Kennedy C.J.'s reliance on natural law seemed to have the potential to subjugate democratic politics to judicial ideology. There was also an uncomfortable elevation of popular sovereignty along with these nebulous values. As Hogan has reflected, how might his judgment have read had the people approved such objectionable measures in a popular referendum?[36] Thus the tension between natural law and popular sovereignty that surfaced some six decades later in the *Abortion Information* case—with judges seemingly enjoying the power to override a popularly endorsed amendment—might well be related back to Kennedy C.J.'s judgment.

In the result, the elected legislators were set free to amend the Constitution at will. It was duly dismantled by ordinary legislation in the years that followed, although the agenda was one of casting off of the marks of subordination to the British Crown, and to introduce a more "republican" constitution in 1937, rather than anything more sinister. Gerard Quinn has compared this apparently lawful dismantling of the Free State Constitution with the "tactic of legality" employed by the Nazi party in roughly the same period to set aside the constraints imposed by the Weimar Constitution (most dramatically through the Enabling Act 1933, which concentrated virtually absolute power in the German Chancellor).[37] Although the outcome for Irish citizens was incomparable, Quinn's point is that judicial reticence left the Constitution, and the democratic system, vulnerable to being dismantled in a similar, highly procedural, way. He argues that this experience shows that "space should be created for courts to prudentially intervene to save systems from self-destructing and to place limits on the 'tactic of legality' toward that end".[38] But Quinn's warning, while

34. See D. Held, *Models of Democracy*, 3rd edn (Cambridge: Polity Press, 2006), Ch.5, especially pp.141–152.
35. See J. Waldron, "The Core of the Case against Judicial Review" (2006) 115 T.Y.L.J. 1346; R. Bellamy, *Political Constitutionalism: A Republican Defence of the Constitutionality of Democracy* (Cambridge: Cambridge University Press, 2007).
36. See Hogan, fn.2, p.96.
37. See Quinn, fn.2.
38. Interventions of that kind, Quinn insists, would "not … be motivated by an illegitimate wish to substitute one substantive viewpoint (that of the judge) for that of the people"

instructive, is general and vague. Is it that judges, enjoying supremacy, are to simply draw on their own moral intuitions in such instances, thereby standing beyond the political structure (along the lines implied by the dicta from Walsh J. in *McGee*), intervening only where they themselves deem it necessary to save that structure? Or are they to faithfully commit themselves to a rule of law ideal along the lines of Lon Fuller's account, intervening only to uphold law's internal character?[39] Quinn seems to leave the two conclusions reached by Fitzgibbon and Kennedy JJ. as less than ideal alternatives, with the latter the least worst of them. Yet it seems that neither the values-oriented account of democracy, in which judges may be said to play the role of philosopher kings, nor the purely procedural account, in which legislators are left to determine the rules by which they rule, is satisfactory. Both leave citizens open to an alien will, either in the form of thoughtful or "democracy-supporting" judges, whose conception of rights or inclinations on how they might be balanced is at least in part a matter of personal conviction, or in the form of elected legislators who, while probably subject to electoral checks, are left to control the terms by which they exercise their own power.

II. DEMOCRACY AS EQUALLY SHARED POPULAR CONTROL

To make the case for a particular account of democracy, and for a particular model of constitutionalism based upon it, it will be instructive to consider, first, the argument for one-person/one-vote majoritarian democracy drawn upon so influentially by Waldron and others in their contemporary case against strong judicial power (the essence of which may seem to have informed Fitzgibbon J.'s assessment in *Ryan v Lennon*). It stems from a prior commitment to the value of legitimacy understood in terms of the *acceptability* of legislative outcomes to those who disagree with those outcomes. What is involved here is that, whenever government exercises its power, or whenever legislation is enacted, there will be some citizens whose interests or moral commitments are furthered, and others for whom they are undermined. Over time, every citizen is likely to experience "defeats" and so it must be that those who see themselves as having been defeated by particular enactments can nevertheless come to accept them. On Waldron's analysis, this requires that such citizens can trace those outcomes to a process in which they themselves have had as much say consistent with an equal say for every other citizen, which in turn requires ultimate parliamentary supremacy.[40] Where judges have the last word

but rather "would be motivated to preserve the democratic system according to which the people can democratically decide". See Quinn, fn.2, p.248.

39. L. Fuller, *The Morality of Law* (New Haven: Yale University Press, 1964).

40. In a widely cited passage, Waldron presents the image of a citizen who disagrees with a particular legislative outcome. Such a citizen, Waldron suggests, may question why a particular group of legislators had the authority to enact the legislation and may further ask why, in the procedure adhered to by the group of legislators, more weight was not given to the views of the legislators who happened to agree with her position. For Waldron, the response to the first question is that that particular group of legislators was

on legislation, those frustrated by outcomes not only substantively disagree; they also, by Waldron's reckoning, cannot be expected to accept the process by which they came about.

In making this argument, Waldron places much emphasis on the fact of reasonable disagreement concerning rights. He rejects the notion, associated with Rawls and Dworkin, that a rational consensus can be reached in contemporary political communities, insisting that reasonable citizens, including judges, can and do reasonably disagree on rights and on how they might be balanced against one another or might apply in particular concrete circumstances.[41] The fact that constitutional cases are often determined by majority decision—in a context where the ultimate fairness arguments behind majoritarian decision-making are not applicable—lends more credence to Waldron's fairness-based case against judicial supremacy.[42] To a "defeated" citizen, a particular outcome may appear to have come about by virtue of the happenstance of a certain number of judges on a court finding in a certain way.

Many of Waldron's critics base their arguments on a prioritisation of outcomes over processes.[43] In other words, they insist that what Raz refers to as the "instrumental condition of good government" overrides the concern for fair processes in the resolution of rights-based disagreements. On this basis, strong judicial review is justified because of its contribution to substantive justice.[44]

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ultimately selected by the citizens in a free and fair election in which everyone who was to be affected by the legislation had as much say in the election compatible with an equal say for every other citizen. The response to the second is essentially the same: it is a basic invocation of the fairness arguments underlying the principle of majority decision. In Waldron's words, "when we disagree about the desired outcome … and when each of the relevant participants has a moral claim to be treated as an equal in the process, then MD [majority decision]—or something like it—is the principle to use". He insists that citizens cannot see judicial resolution of such disagreements as legitimate, in the same way as the responses to the same two questions cannot be answered in anything like as satisfactory a manner. See Waldron, fn.35, at 1386–1389.

41. For Rawls's ideas on an "overlapping consensus", see for example J. Rawls, *The Law of Peoples* (Cambridge: Harvard University Press, 1999), pp.172–174. Dworkin insists that "in most hard cases there are right answers to be hunted by reason and imagination". R. Dworkin, *Law's Empire* (Cambridge: Harvard University Press, 1986), pp.viii–ix.
42. Waldron emphasises that the fairness arguments underlying the principle of majority decision cannot be invoked as judges, in that context, "do not represent anybody [and] their claim to participate is purely functional, not a matter of entitlement". See Waldron, fn.35, at 1389.
43. See A. Kavanagh, "Participation and Judicial Review: A Reply to Jeremy Waldron" (2003) *Law and Philosophy* 451.
44. J. Raz, *Ethics in the Public Domain: Essays in the Morality of Law and Politics* (Oxford: Clarendon Press, 1994), p.117. Kavanagh, for example, argues: "… [I]t is plausible to suggest that many of the movements that have historically pressed for participatory rights (in particular the right to vote) have done so (at least partly) on the basis that it would help to redress some of the inequities in society generally and help to ensure that their interests would be protected. It seems implausible that they could have wanted the right to participate regardless of how it would contribute to protecting their interests. In fact, it is questionable whether one could actually attain the intrinsic benefits of participation, if the instrumental condition of good government is not satisfied, at least to some degree." See Kavanagh, fn.43, at 464.

But very often, as in the case of Aileen Kavanagh's work, judicial review is presented as a non-democratic (or perhaps even an anti-democratic) corrective to majoritarian processes where such processes, while understood as fully satisfying the demands of democracy, nonetheless fall short on the overall and more urgent demands of political morality.[45] Indeed, this kind of thinking may seem to have informed Kennedy C.J.'s stance in *Ryan v Lennon*: an *un-democratic* intervention was required to save democracy from itself.

Dworkin, perhaps Waldron's most influential critic, made his case for American-style judicial review based on his idea of the "constitutional conception of democracy", where democracy was presented as distinct from, and often as potentially undermined by, the one-person/one-vote majoritarian processes so stridently defended by Waldron.[46] Thus Dworkin, unlike some whose work he influenced, understood judicial review as a democratic institution in itself, and theorised it with the idea of democracy very much in mind. But he was not exercised concerning the fact of disagreement about how rights might be applied in concrete cases. His thesis centred on the role of judges in uncovering the "right answer" in such cases: he presented courts as "forums of principle" where judges were liberated to engage in this necessarily interpretive task. The corollary was that elected legislators could not operate based on principle due to their concern for re-election. Politics was thus an unsavoury world where pragmatism trumped principle and rights were relegated in importance.

The overall argument made by this writer for an alternative model of constitutionalism is based on a republican account of democracy drawn from Philip Pettit's recent work.[47] This account has much in common with Dworkin's constitutional conception of democracy. Dworkin's idea that a democratic system, by definition, treats each citizen as an equal moral member—with all that that implies in terms of substantive as well as procedural justice—broadly corresponds with Pettit's idea of the undominated citizen, capable of looking fellow citizens "in the eye".[48] Indeed, Pettit himself would endorse Dworkin's conclusions for judicial power based on his own republican understanding of democracy. But the argument proffered here is that there are good reasons for scepticism regarding strong judicial power, both practical and theoretical,

45. Kavanagh suggests that "in order to see why democratic government is subject to the instrumentalist condition, we should note that what is just or right or fair does not always correspond to what is voted for through democratic procedures". See Kavanagh, fn.43, at 460. She later argues, at 482: "[I]f it can be shown that the interests underlying participation (namely autonomy, dignity, inclusion, etc.) are better protected by having democratic government combined with judicial review, then this combination of institutional procedures should be chosen." See p.481. Later again she insists that "while acknowledging the value of democratic government, I aimed to show that democratic values are not, and should not be, the whole of our political morality".
46. See R. Dworkin, *Freedom's Law: The Moral Reading of the American Constitution* (Cambridge: Harvard University Press, 1996), pp.1–43.
47. See P. Pettit, *On the People's Terms: A Republican Theory and Model of Democracy* (Cambridge: Cambridge University Press, 2012).
48. To draw on Pettit's favoured phrase. See P. Pettit, *Republicanism: A Theory of Freedom and Government* (Oxford: Clarendon Press, 1997).

based on this understanding of democracy, and that these reasons are pressing both generally and specifically within the Irish constitutional setting.

Pettit's theory is rooted in the republican tradition that, unlike the libertarian/liberal thought associated with Hobbes and Locke, conceives of rights and freedom as politically constituted rather than as pre-political. Hobbes, Locke and others—whose ideas significantly influenced not only the text of both of the twentieth-century Irish constitutions but also their interpretation[49]—imagined individuals living in a pre-political state of nature consenting to political society on condition that they would continue to enjoy their immutable and antecedent natural rights.[50] The legitimacy of the state in that classical liberal tradition was tied to the idea of consent that emanated from a state of nature. On the other hand, for republicans—who point to the slave contract to emphasise the compatibility of consent with unfreedom—legitimacy has been theorised in terms of the notion of ultimate and ongoing *control* over the State.[51] For political coercion to be legitimate or acceptable to citizens in plural communities in which disagreement is inevitable it must, then, be that citizens, in Pettit's phrase, "share equally in a system of joint control" over Government.[52]

This idea of equally shared popular control has several implications that go beyond the present scope of this article, but some do have a particular resonance for the overall argument that it advances. In order for the system of control to be equally shared, it must be that each individual not only has equal access to the system but, in addition, that the direction that government takes (in this context the legislation that is enacted) is one that each citizen is willing to accept.[53] Similarly, it must be that the influence that the people enjoy over government is such that those who are "defeated" in particular instances—that is, where a legislative enactment goes against their interests or commitments—can see their defeats as akin to bad luck rather than as alien impositions (i.e. as

49. The influence of this approach is evident not only in the language of the Irish Constitution—with its elevation of particular rights as "inviolable" or as "inalienable and imprescriptible … antecedent and superior to all positive law"—but also in much of the dicta of constitutional adjudication, with the judgments of Kennedy C.J. in *Ryan v Lennon* and Walsh J. in *McGee* particularly illustrative.
50. T. Hobbes, *Leviathan* (Indianapolis: Hackett, 1994); J. Locke, *Two Treatises on Government* (Cambridge: Cambridge University Press, 1960).
51. See Pettit, fn.47, pp.157–160. This emphasis on control rather than consent may help address some of the dilemmas arising from the so-called "paradox of constitutionalism". Loughlin and Walker give the following analysis to the paradox: "Modern constitutionalism is underpinned by two fundamental though antagonistic imperatives: that governmental power ultimately is generated from the 'consent of the people' and that, to be sustained and effective, such power is divided, constrained, and exercised through distinctive institutional forms. The people, in Maistre's words, 'are a sovereign that cannot exercise sovereignty': the power they possess, it would appear, can only be exercised through constitutional forms already established or in the process of being established." See M. Loughlin and N. Walker, "Introduction", in M. Loughlin and N. Walker (eds), *The Paradox of Constitutionalism* (Oxford: Oxford University Press, 2007), pp.1–8.
52. See generally, Pettit, fn.47, pp.160–167.
53. Pettit refers to this as "individualised" control. See Pettit, fn.47, pp.168–170.

an eighteenth-century Irish Catholic would have seen the penal laws).[54] And, finally, the people's control must be independent. It cannot be contingent on the indulgence of the "controlled" Government.[55]

These simple ideas may initially seem to point back to Waldron's one-person/one-vote model. How else, or how better, to promote equal access and equal acceptability, for instance? But in fact they point to the shortcomings of that model and, correspondingly, to the need, *in the name of democracy*, for non-electoral contestatory supplements to vote-based electoral processes. Taking the criterion of acceptability, let it be supposed that periodic votes were to be held to determine whether more and more privileges were to extend to a cultural majority. Those from outside of the majority could not be expected to accept the outcomes of those votes (were they to extend such privileges, as presumably they at least sometimes would) despite their having come about through a process in which, in that formal sense, they could be said to have had as much a say consistent with an equal say for everyone else.[56] Or, taking the related criterion of citizens being inclined to attribute "defeats" to bad luck rather than to an alien imposition, suppose the main governing party were to use its control over the legislature to impose electoral constituency reforms that advantaged themselves. This, indeed, occurred in Ireland in events that prompted the High Court to invalidate the Electoral (Amendment) Act 1959.[57] Those from outside the governing party will not be inclined to see the outcome as having been determined by a different set of reasonable arguments having defeated their preferred set. Rather, they will see the interference as dominating and arbitrary (albeit of a milder kind than the penal laws) despite having come about through an electoral process in which they shared in a formally equal way.

This elaboration on popular control does not make the case for judicial review of legislation and, still less, for any particular form of judicial review.[58] The

54. Pettit, fn.47, pp.229–231.
55. Pettit uses the phrase "unconditioned". See Pettit, fn.47, pp.170–174, 218–229.
56. This is reminiscent of Dworkin's assertion that "rights to participate in the political process are equally valuable to people only if these rights make it likely that each will receive equal respect, and the interests of each will receive equal concern not only in the choice of political officials, but in the decisions these officials make". See R. Dworkin, *A Matter of Principle* (Cambridge: Harvard University Press, 1985), p.64. Although Kavanagh at times appears to present judicial review as non-democratic, this idea is similarly reminiscent of her assertion that "it is doubtful that people who possess a right to vote, but whose interests are nonetheless ignored or thwarted by an unconcerned government or majority, would actually feel like full, valued members of society, whose dignity and autonomy is (equally) respected". See Kavanagh, fn.43, at 464.
57. The Act had permitted greater political representation for constituencies along the western seaboard (where Fianna Fáil, the governing party, was electorally strong) compared to in Dublin (where they were comparatively weak). In *O'Donovan v Attorney General* [1961] I.R. 114, Budd J., drawing on the characterisation of Ireland as a "democratic State" in Art.5, and on the equality provision in Art.40.1, held that the Act breached the requirement in Art.16.2.3° that the ratio of TDs to population in each constituency be "as far as practicable … the same throughout the country".
58. The argument developed below is that this republican account of democracy is best concretised through a model for the vindication of constitutional rights that empowers, and places responsibility on, both judges and legislators.

fact of disagreement concerning the implications of competing fundamental rights in practical settings, for instance, remains. But it nevertheless prompts reassessment of the legitimacy-based objection that forms the core of the case made by Waldron against judicial supremacy, and that informed Fitzgibbon J.'s scepticism about judicial power, as well as his general approach, in *Ryan v Lennon*. It suggests, as may seem implicit in Kennedy C.J.'s judgment, that the free and equal citizen is at the centre of the idea of democracy and comes prior to the practices of voting and elections (although Waldron and most contemporary political constitutionalists would go along with that idea). It further implies, however, that in the name of democratic popular control, some political questions—questions about which there will be reasonable disagreement—ought to be resolved through mechanisms that are not vote-based and majoritarian, and that others may best be resolved through mechanisms that combine vote-based electoral processes with non-vote-based processes. When the acceptability of political coercion is considered more generally and over time then—contra the Waldron position in respect of individual instances of legislation—the strict vote-based and majoritarian model upon which many sceptics of judicial review rely is arguably simplistic.[59] These ideas are elaborated upon in the final section.

III. JUDICIAL REVIEW, BUT NOT SUPREMACY

In this final section—which places an emphasis on the Irish constitutional system—a case is made that those ideas on equally shared popular control point away from the extreme models of either judicial or parliamentary supremacy and towards an alternative model that has been developing in recent decades in Canada, the UK and elsewhere. Under this model, referred to by Stephen Gardbaum as the "new commonwealth model of constitutionalism", a codified bill of rights is enforced by way of pre-enactment, *political* review with a particular kind of post-enactment *judicial* review available to citizens.[60] However, it stops short of giving judges powers to invalidate legislation, and thus of conceding the "final say" to judges in respect of rights issues. It establishes, thereby, public forums for contestation as to the meaning and balancing of fundamental rights, neither excusing the legislature from the obligation to account for its rights-based appraisals, nor positing courts as unassailable authorities on constitutional-rights issues.

59. This broadly corresponds with Eoin Carolan's argument. He claims that "the popular view of elected bodies as the representatives of the people is, it is contended, based on an unduly narrow conception of democratic representation" and that "a broader understanding of representation would allow for a revised mixed theory of government which would more effectively promote republican values". This approach, he suggests, "would avoid the false choice between the inadequacy of a formally egalitarian model and the domination of a unified popular will". See E. Carolan, "Recovering the Republic? Democratic Representation and the Theory of Mixed Government" (2012) *Irish Jurist* 172 at 195.
60. See S. Gardbaum, *The New Commonwealth Model of Constitutionalism: Theory and Practice* (Cambridge: Cambridge University Press, 2013).

A brief overview of the model as it operates in the UK is instructive. It developed following the enactment of the Human Rights Act 1998 which gave the European Convention on Human Rights "further effect" in domestic law. The pre-enactment political review element involves a mandatory ministerial statement on the compatibility (or incompatibility) of any proposed legislation with the Convention.[61] This has led to the establishment of dedicated rights-reviewing forums at both executive and parliamentary levels.[62] The power enjoyed by judges under the new settlement is greater than under the traditional British doctrine of parliamentary sovereignty and has been such as to lead many to decry (or celebrate) its (alleged[63]) diminution.[64] Section 3 requires that, in "so far as it is possible to do so", legislation—regardless of when enacted—must be "read and given effect in a way which is compatible with the Convention rights".[65] Where judges deem that it is impossible to interpret the legislation in such a manner—as when the wording and thrust of the legislation is straightforwardly at odds with the Convention—s.4 empowers them to make a "declaration of incompatibility".[66] There is, as a consequence, provision made

61. Section 19 of the Human Rights Act 1998 requires that the Minister sponsoring the Bill must make a statement before the second reading to the effect that either the Bill is compatible with Convention rights or that "although he is unable to make a statement of compatibility the Government nevertheless wishes the House to proceed with the bill". This latter provision—notably in the light of the general argument—was used on one occasion where the Government argued that its interpretation of freedom of expression, in the circumstances, was superior to the Strasbourg court's interpretation. That analysis was later upheld by the Judicial Committee of the House of Lords in *R (Animal Defenders International) v Secretary of State for Culture, Media and Sport* [2008] UKHL 15.
62. The parliamentary forum is the Joint Committee on Human Rights (JCHR). It scrutinises section 19 statements and prepares reports on the compatibility of the legislation with the Convention. Its reports also inform parliamentary debates at subsequent stages of legislation.
63. Bellamy, for example, gives a persuasive defence of the compatibility of the UK Human Rights Act with political constitutionalism, arguing that ss.4 and 19 enhance Parliament's rights-based scrutiny of legislation as well as its supremacy over courts in respect of rights generally. He claims that the section 3 provision represents a weak form of judicial review, whereby courts defer to (or at least, could or should defer to) the legislative "scope" as determined by Parliament, and only have discretion in respect of those matters, such as due process and overall fairness, that fall into their own "sphere". See R. Bellamy, "Political Constitutionalism and the Human Rights Act" (2011) 9(1) I-CON 86. Many others see the new constitutional order ordained by the Human Rights Act 1998 as a shift towards a legal constitution. See, for example, A. Kavanagh, *Constitutional Review under the Human Rights Act* (Cambridge: Cambridge University Press, 2009); T. Hickman, *Public Law after the Human Rights Act* (Oxford: Hart Publishing, 2010).
64. For general analysis, see for example D. Feldman, "Extending the Role of the Courts: The Human Rights Act 1998" (2011) 30 *Parliamentary History* 65; Kavanagh, fn.63; Hickman, fn.63.
65. For a good account, see T. Endicott, *Administrative Law*, 2nd edn (Oxford: Oxford University Press, 2011), pp.75–84.
66. Kavanagh has argued that the section 3 provision, as it has been interpreted, gives judges strong power—power effectively to amend legislation—such that Tushnet's label of "weak-form review" (which is taken up by Gardbaum and the mainstream of scholars in the field) may not be appropriate. See A. Kavanagh, "What's so Weak about 'Weak-Form

in s.10 for the relevant Minister to respond to such a declaration by amending the legislation through a remedial "fast-track" order as a speedier alternative to the ordinary legislative process. Critically, though, Parliament retains the final word: it can ignore such declarations, although in practice in tends not to.

The case made here in favour of the model is based on complementary theoretical and practical arguments. The former apply to the model of constitutionalism generally (it might therefore be seen as an essentially republican model) and pertain mainly to questions around democracy and legitimacy. Although the latter apply specifically to the Irish constitutional system, the insights may well bolster the overall theoretical argument. They pertain mainly to the real-world effectiveness of institutional mechanisms for the vindication of rights.

Theoretical arguments

The first of the theoretical arguments relates to the notion, mentioned earlier, that the popular control over government must be independent or, in Pettit's phrase, "unconditioned". It must be that government is truly subservient to the people and that, at some level, there is a common awareness that the people are in the saddle at all times (not just at election time) and are ready to pull the rein. It cannot be, in other words, that the control enjoyed by the people is illusory: their sovereign power must be independent and authentic.[67] For Pettit, this emphasises the need for a "resistance-prone people" along with a "resistance-averse government".[68] The people must be inclined to rail against government abuse of power, while the government must be both keen to stave off that likelihood (by not acting in a manner that will prompt such public ire) and inclined to back down in response, should such resistance occur. Although these conditions cannot be fulfilled without a public-spirited and contestatory citizenry, they also point to the need for certain institutional arrangements. They require that political power—particularly power over democratic rights such as, for example, freedom of assembly and freedom of speech—be dispersed across different, and differently constituted, institutions, rather than concentrated in one body, even an elected body. Where power is dispersed in this way, government is weakened vis-à-vis the citizenry in a way that promotes the citizens' reserve power. The capacity of government to "close ranks and assert its authority" (in the face of popular resistance) is lessened.[69]

Review'? The Case of the UK Human Rights Act 1998" (2015) I-CON (forthcoming), available online at: *papers.ssrn.com/sol3/papers.cfm?abstract_id=2548530* [Last Accessed March 18, 2015].

67. This again brings to mind broader questions around the "paradox of constitutionalism". On this idea, see fn.51. O'Cinneide asserts that although claims of a sharp disconnect in Ireland between the people and the system of governance by which they are ruled "can be exaggerated", there can be "little doubt that many Irish people do not consider themselves to be masters of their own political destinies, irrespective of what the Bunreacht has to say about popular sovereignty". See C. O'Cinneide, "'The People are the Masters'—The Paradox of Constitutionalism and the Uncertain Status of Popular Sovereignty with the Irish Constitutional Order" (2012) *Irish Jurist* 249 at 252.
68. Fn.47, pp.225–229.
69. Fn.47, p.223.

The idea is well illuminated by the circumstances surrounding *Ryan v Lennon*. The judicial reticence in the case—or perhaps more accurately the fact that the Free State Constitution had established institutional arrangements so clumsily, with judges holding a kind of "all-or-nothing" power—meant that, in the end, only the goodwill of political power-wielders stood in the way of government dispensing with democratic procedures altogether. The amending provision could have been used to suspend elections for an indefinite period, for example, or to suspend freedom of assembly, rather than merely to remove the oath of allegiance to the British Crown. The judges could have arrogated to themselves a power to intervene to prevent government from enjoying the kind of total control over the Constitution that it went on to exercise over the following decade to unwind the Constitution. But, given the crude "all-or-nothing" institutional arrangement, and the apparent need to draw on dubious sources such as divinely ordained natural law, the majority of the judges (three at High Court, and two of three at Supreme Court level) were not so inclined, despite the clearly expressed outrage of some among them.[70] The upshot was that government enjoyed that ultimate control: its powers over the Constitution—even if it did not exercise those powers to suspend key democratic rights—meant that it, rather than the citizens, held sway.

Under the new commonwealth model, citizen control is not contingent on either "democracy-supporting judges", as in the case of judicial supremacy generally, or on the virtuous self-restraint of political power-wielders, as under pure political constitutionalism. The model supports this republican goal in a particularly concrete way. With its pre-enactment political/post-enactment judicial/post-litigation political rights-reviews, it disperses rights-related powers among the three arms of government, whereas both of the other models tend towards the concentration of such powers in either the judiciary or the executive/legislature. Indeed, it actively consigns power over rights, and thus responsibility for them, to each of the three arms of Government—thereby enhancing overall rights-consciousness and opening rights-debates to wider deliberative inputs—while at the same time constraining those powers as required by republican theory. The key point in respect of this particular republican criterion is that the distribution of power supports Pettit's notion of a "resistance-averse" Government: power over legislation is dispersed and so the capacity of government to face down or lord it over citizens is countered.

But there is a second theory-based argument for the new commonwealth model. If the popular control is to be equally shared, it must be that the politics of the community (and, in this context, the legislative process) operates on the basis of "commonly avowable norms" and, by extension, that the democratic

70. In a Divisional High Court, Sullivan P., along with Meredith and O'Byrne JJ., rejected the application, while in the Supreme Court, Fitzgibbon and Murnaghan JJ. did likewise. While Kennedy C.J.'s judgment most openly expresses outrage, there are signs of despair in most of the judgments. Murnaghan J., for instance, asserted that "the extreme rigour of the Act is such that its provisions pass far beyond anything having the semblance of legal procedure and the judicial mind is staggered at the very complete departure from legal methods in use in these Courts". See *Ryan v Lennon* [1935] I.R. 170 at 237.

institutions be designed to encourage that kind of politics and law-making.[71] The idea here is that there are two alternative ways of engaging with others in the public (or legislative) domain (a domain where disagreement is inevitable, permanent and often deep). One is that deliberators would simply announce their preferred legislative outcome on any question that falls to be decided, without any inclination to offer reasons in support of that preference or any regard for how others might relate to them. Here, legislative outcomes would be determined by sheer force of numbers. The other is that deliberators would offer arguments for their preferences that might make those preferences more congenial to others, including to those who disagree with them. Those others may not be fully persuaded by a particular preference or a legislative outcome prompted by it but, so long as they can recognise that there are deeper considerations with which they can identify that the preference or legislation supports, they will be more inclined towards acceptance, despite their substantive disapproval.

The arguments that may be adduced in support of particular policy preferences—the arguments that count as "commonly avowable"—must be of a kind that citizens can reasonably expect their fellow citizens, many of whom will not share their own particular deeper worldview, to recognise as at least relevant. They cannot, therefore, be from within a particular religious or non-religious comprehensive worldview: they must be "political, not metaphysical", to draw on Rawls's phrase. The key point is that once an expectation emerges in a political culture that all political (and legislative) preferences be relatable to such norms, then not only will certain policy options be more or less removed—in the way that formal apartheid is off the table in contemporary western political culture, for example, or that laws like the penal laws would be—but, more significantly, a process emerges where more sophisticated understandings of these considerations develop over time.[72] These understandings render certain legislative options less likely and others more likely. Insofar as this process operates, perhaps silently and in the background political culture, the citizens, considered severally rather than in unison, can with some credibility be said to share equally in a meaningful kind of control over the laws that govern them. The deep disagreement between them will continue and is recognised but their individual voices, or at least their particular concerns which they may share with some but not all of their fellow citizens, inform the law and policy-making processes. In this way, individual citizens frustrated by particular outcomes can nevertheless accept them, as they might see them as having come about through a process in which they have counted equally.

One defence of judicial review, based on these ideas, might be that it represents a site of contestation which encourages the development and refining of such norms. That is, it engages with particular disagreements with fundamental rights as the primary concern—as the essential departure point in the resolution of the disagreement—and so operates on the basis of

71. Fn.47, pp.252–269.
72. Fn.47, pp.269–275.

broader norms that all citizens can at least recognise as relevant. It is also executed by agents who do not have re-election in mind, and so is immune from *certain kinds* of alien sources to which legislators may be vulnerable: the inclination to appeal to an electorally pivotal group or to indulge a powerful media organisation. It may thus make particular contributions to the overall development of commonly avowable norms, however modest in the overall scheme, releasing some of the blockages that build up in legislative settings.

But these ideas that inform popular control and common norms provide competing arguments that make for scepticism about outright judicial supremacy. As legal realists and critical scholars have argued, less principled or less carefully considered political predilections can inform judicial processes too, and so alien sources—different from those that operate in the political sphere—can have a distorting influence in this setting as well.[73] Judges can work from poorly thought out accounts of equality or liberty, for instance, or their deliberations can be unduly influenced by technical issues around standing, precedent or judicial procedure. Indeed, in some instances, judicial rulings in systems of judicial supremacy can stifle ongoing deliberation on a contested moral or political question and thereby undermine the development of shared norms that might otherwise emerge from that ongoing deliberation. What emerges from this is that an outcome is fixed that would otherwise be fluid and open to new interpretations. In similar vein, the fact that judges reach different, often diametrically opposed, conclusions in the same cases cannot be ignored: whatever about its credentials as a contestatory forum, it is difficult to escape the conclusion that where judges have the final word on legislation, the resolution of important policy disagreements can be determined in significant part by the happenstance of how many judges on the court favour or disfavour a particular outcome.

A further competing argument—this time falling outside of the judicial sphere—is that electoral politics, despite its shortcomings, does itself encourage the use of commonly avowable norms. Those engaged in political debate must deploy arguments that make their proposals more widely congenial, if for nothing else, in order to win wider support. Indeed, the Westminster model, with its tendency to promote the development of big political parties and, especially in the Irish version, to compel parties to make themselves attractive as coalition partners, obliges those within parties to make their policy preferences relatable across the political spectrum. This in some way facilitates a politics based on commonly avowable norms.[74]

All of this seems again to point to the new commonwealth model as being superior to either of the more well-known alternatives. Just as is the case under judicial supremacy, judicial review under this model operates as a forum for

73. On legal realism and critical legal studies, see M.D.A. Freeman, *Lloyd's Introduction to Jurisprudence*, 8th edn (London: Sweet & Maxwell, 2010), Chs 10, 11 and 14.
74. Bellamy argues along these lines that the competitive party system obliges citizens to "relate their concerns to those of others as part of a comprehensive set of policies for the people as a whole", thus promoting an overall "regulation by a set of public rules, reasons and conventions". See Bellamy, fn.35, p.232. See also, R. Bellamy, fn.63, p.92.

individual contestation and consequently of political participation for cultural or political "outsiders". By doing so, it satisfies the main arguments for the strong form of judicial review proffered by Kavanagh.[75] But, unlike strong form of judicial review, it accommodates the reality of reasonable disagreement on rights as unaccountable judges are not left with the last word. Should legislators have a principled objection to a judicial appraisal, they can ignore it, even if it is more likely that, in doing so, they will respond in a more nuanced fashion by accounting for the judicial appraisal but also for their own principled position. Indeed, judicial review under this model may well contribute more effectively to the overall process of norm development, as judges under the model are not stymied (as they tend to be under judicial supremacy) in respect of concerns over the democratic legitimacy of their own power. They can engage more freely in the collaborative rights-vindicating process and, further, can more forthrightly contribute to the development of better understandings of such norms. The nature of the parliamentary forum under the model is important too: under the UK version the Joint Committee on Human Rights is seen as independent from government and as having a meaningful scrutinising role.[76] A parliamentary committee chaired by a member of the Opposition benches, and perhaps comprising a majority from those benches, is likely to bring to bear the perspectives of those citizens who may see themselves as having lost out in the electoral contest. If its deliberations are to be informed by the (largely) principled deliberations of a constitutional court, it is likely on the whole to make a real rights-vindicating impact on the legislative process overall. And the contestation will occur more routinely than in judicial settings; they will not rely on there being a perceived egregious rights-breach or on there being an individual or group with the financial resources, standing and motivation to bring a claim.

Practical arguments

These theoretical arguments are complemented by practical arguments that can be made with reference to Irish constitutional law and practice. Under judicial supremacy, judges are faced with what may seem a crude choice: the drastic option of invalidation of legislation (or other findings of unconstitutionality), with all of the democratic baggage that that carries, or the alternative, which is often taken as bolstering the disputed legislation and undermining the wider political case for the rights agenda in question. The *Zappone & Gilligan v Revenue Commissioners* decision is instructive on this point.[77] It involved the challenge by two women (who were a married couple) to the refusal by the Revenue Commissioners to recognise their Canadian marriage for the purposes of a tax exemption. The couple claimed that the failure constituted a breach of the pledge in Art.41 that the State would "guard with special care"

75. Kavanagh, fn.43.
76. For a case outlining the value of the Joint Committee on Human Rights, again in the context of the Westminster Parliament, see A. Tomkins, "The Role of the Courts in the Political Constitution" (2011) 60 *University of Toronto Law Journal* 1.
77. *Zappone & Gilligan v Revenue Commissioners* [1998] 2 I.R. 417.

the institution of marriage and "protect it against attack". They argued that the court should interpret the provision in light of contemporary social mores.[78] Ms Justice Dunne in the High Court rejected their claim on the basis that marriage under Art.41 meant opposite sex marriage. She suggested at one point, based on fairly dubious reasoning, that an originalist approach to interpretation was appropriate which, inevitably, meant defeat for the applicants.[79] But, later in her judgment, she switched to a "living constitution" approach, holding that s.2 of the Civil Registration Act 2004—which placed the exclusion of homosexual couples from marriage on a statutory footing—demonstrated that the contemporary consensus was that marriage meant opposite sex marriage.[80]

The case did present the judge with a fairly daunting dilemma. While there were some substantive arguments in favour of her conclusion (that is, as a matter of constitutional interpretation and leaving aside the moral arguments), the better substantive arguments probably favoured the married couple. Relying purely on the text, there was nothing in the Constitution that prohibited same-sex marriage. The equality provisions meant that the discrimination would have to be justified by reference to differences in physical or moral capacity or social function.[81] And although there were arguments for an originalist approach, they did not seem particularly compelling. What is manifestly clear is that, if the statutory exclusion of same-sex couples from a right to marry in the State was deemed unconstitutional, it would have been perceived in many quarters as an illegitimate invasion by an unelected judge into the law-making process. From the point of view of the equality agenda, it might have set things back considerably. As O'Mahony has argued, it may well have prompted demands for a referendum to insert a clause into the Constitution excluding homosexuals from the institution of marriage with general support for such a clause being generated by anger based on the perception of an "undemocratic" institution having foisted politically correct social policy on its citizens.[82] It was unsurprising in the end that Dunne J. decided the case as she did. In the event, despite the implication from the "living constitution" part of her judgment that it was open to the Oireachtas to legislate as it saw fit, the decision prompted a political consensus to the effect that a constitutional referendum was required

78. Article 41.3.1° provides: "The State pledges itself to guard with special care the institution of Marriage, on which the Family is founded, and to prevent it against attack."
79. For a good account of the dubious reasoning, see C. O'Mahony, "Principled Expediency: How the Irish Courts can Compromise on Same-Sex Marriage" (2012) 35 *Dublin University Law Journal* 198 at 200–204.
80. *Zappone & Gilligan v Revenue Commissioners* [1998] 2 I.R. 417 at 505–506.
81. Article 40.1.1° provides: "All citizens shall, as human persons, be held equal before the law. This shall not be held to mean that the State shall not in its enactments have due regard to differences of capacity, physical and moral, and of social function." As O'Mahony argues, although homosexuals do not have the capacity to procreate, neither do infertile heterosexuals, yet they are not precluded from marriage. As for social function, the law already allowed for homosexuals to adopt (albeit not for homosexual couples). In addition, no judge would openly question the equal moral capacity of homosexuals with heterosexuals. See O'Mahony, fn.79, at 210–211.
82. See O'Mahony, fn.79, at 219–220.

to allow same-sex marriage. The then Minister for Justice insisted that such a referendum was not prudent at that time.[83]

The case illuminates particular shortcomings in the judicial supremacy model and suggests the superiority of the alternative. If Dunne J. found in favour of the couple, she was inviting the accusation of illegitimate incursions into the political domain and might well have prompted a sequence of events that would have resulted in the direct insertion of the exclusion of same-sex marriage into the Constitution in text form. If she found against them, it was likely to be interpreted as implying that such exclusion already existed under the Constitution as it stood at that point. She could perhaps have placed, more emphatically, the onus on the Oireachtas to legislate for marriage equality, as the Supreme Court did in respect of surrogacy in *Roche v Roche*.[84] However, the lack of any formal institutional mechanism would mean that such an approach would have been viewed more or less seriously depending on overall political expediency. Just as in *Ryan v Lennon*, the crudeness of the options available to judges in the Irish model undermines their capacity to impact on the overall rights-vindicating process. While the apparent reduction in their powers under the intermediate model may be seen as leaving the fundamental rights of citizens in the hands of populist politicians, it might mean that judges would be more inclined to actually use their (more modest) powers—in this instance, in the form of a declaration of incompatibility—thereby better facilitating the vindication of rights overall. This exercise of power would then trigger a formal response from the political branches enabling them to bring their own principled considerations into play. The upshot would be that the outcome would not be vulnerable to the charge of democratic illegitimacy and would thus be less likely to provoke populist backlashes.

An additional practical argument is that the political branches—given the formal nature of the mechanism—would be compelled to respond to an adverse judicial finding more promptly than is the case that prevails under judicial supremacy. Much as *McGee v AG* is widely heralded as the great liberalising achievement of the Irish Supreme Court,[85] it took more than half a decade for any legislation providing for the sale of contraception to be enacted and a

83. The Minister for Justice at the time, Mr Brian Lenihan T.D. declared: "It 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." See D. O'Brien, "Lenihan Rules Out 'Divisive' Referendum on Gay Marriage", *Irish Times*, December 5, 2007, as cited by O'Mahony, fn.79, at 204.

84. *Roche v Roche* [2009] IESC 2. Mr Justice Geoghegan asserted: "I want however to make it clear at this stage that I am in agreement with the often expressed view that spare embryos, being lives or at least potential lives, ought to be treated with respect. The absence of a statute or statutory regulations indicating how that respect should be given is undesirable and *arguably contrary to the spirit of the Constitution*. It is, however, up to the Oireachtas to provide such regulation." (Emphasis added).

85. The constitutional law scholar and judge of the Court of Appeal, Mr Justice Gerard Hogan, for example, referred to *McGee* in these terms at the "Judges, Politics and the Irish Constitution" conference at Dublin City University on September 4, 2014.

further half decade before contraception became available without a medical prescription.[86] Similarly, in *X v AG*, McCarthy J. chastised the Oireachtas for having failed to introduce legislation clarifying the rights of women under the Eighth Amendment over the eight years that had passed since the approval of that amendment.[87] A further 21 years passed before the Protection of Life during Pregnancy Act was finally passed in 2013. This only came about following an adverse finding by the European Court of Human Rights in *A, B & C v Ireland*.[88] Again, the limits of the capacity of a court enjoying supremacy to trigger real-world rights vindication are apparent: it may be characterised as a brute "top-down" mechanism that, in practice, works much less efficiently than the more "bottom-up" oriented approach that the new commonwealth model appears to facilitate. Had there been a more sophisticated rights-vindicating mechanism in place, where an independent and rights-dedicated parliamentary committee were charged with, among other tasks, responding to court rulings, perhaps the failure to legislate would have been challenged and addressed in the domestic setting at an earlier stage, saving many of the thousands of women the additional trauma of having to travel to the UK to access abortion services through much of the last twenty or so years.[89]

On a related matter, the controversy in the Dáil in January 2014 involving a Private Members' Bill allowing for abortion in cases of fatal foetal abnormality demonstrates the problems pertaining to the culture of legal constitutionalism which, in turn, is encouraged by a system of judicial supremacy.[90] It is arguable, as a matter of constitutional interpretation, that the Eighth Amendment allows for abortion in such circumstances, as the foetus has no prospect of *being born* and so, as the European Court of Human Rights held in *D v Ireland*, may be deemed not to count as *unborn* for the purposes of the provision.[91] The Taoiseach justified the Government's voting down the Bill on the basis that the Attorney General had advised that the Bill was unconstitutional. This implied that, according to the advice given, Art.15 precluded the enactment of a bill in those circumstances. However, as a matter of constitutional law, nothing prevents the Oireachtas from legislating in such circumstances, and nothing would prevent legislation from being subsequently tested before the courts.[92]

86. Health (Family Planning) Act 1979; Health (Family Planning) (Amendment) Act 1985.
87. McCarthy J. asserted: "In the context of the eight years that have passed since the Amendment was adopted … the failure by the legislature to enact the appropriate legislation is no longer just unfortunate; it is inexcusable." *X v Attorney General* [1992] I.R. 1 at 82.
88. *A, B & C v Ireland* [2010] ECHR 2032.
89. The same argument may be made from *Roche v Roche*, where five years passed from the exhortation of the Supreme Court to regulate surrogacy through legislation to the announcement in February 2015 by the Minister for Health that Heads of Bill were to be brought before the Oireachtas.
90. On the episode, see C. O'Mahony, "It's Vital that Politicians Engage with the Constitution", *Irish Times*, February 16, 2015, available online at: *www.irishtimes.com/news/crime-and-law/it-s-vital-that-politicians-engage-with-the-constitution-1.2103024* [Last accessed March 20, 2015].
91. *D v Ireland*, App. No. 26499/02, paras 90–92.
92. Fn.90.

What the episode demonstrates is the meekness of the Oireachtas which may, it is submitted, be attributed in part to the culture of legal constitutionalism. (Perhaps it might be described as a "learned meekness": it can be convenient for a government to conclude that an issue is out of constitutional bounds when political expediency might be the real explanation for avoiding the question.) Once one unelected lawyer had given an opinion on the matter, a majority of the elected legislators folded.[93] Under a constitutional system with responsibility for constitutional rights distributed among the judicial and political branches, legislators could not as easily hide behind supposed constitutional diktat. With additional power would come additional responsibility—more pressure would be brought to bear on legislators to engage in principled constitutional interpretation.

The penultimate practical argument is made with reference to the Supreme Court decisions in *McKenna (No.2) v AG* and *Coughlan v Broadcasting Complaints Commission*, decisions that have had a considerable influence on how referendum campaigns have been conducted over the past few decades.[94] In *McKenna (No.2)*, the court ruled that the expenditure of public funds by government to advocate a "yes" vote (in this instance in the referendum on the removal of the constitutional prohibition on divorce) breached the equality provisions in Art.40.1 as well as the right of the citizen to a democratic process, taken as implied by Art.40.3 along with Arts 5, 6 and 16.[95] In *Coughlan*, which arose from the same referendum, the court ruled that the national broadcaster had acted in an unconstitutional fashion in failing to allocate equal airtime to proponents and opponents of the proposed amendment.

Notwithstanding that the outcome in *McKenna (No.2)* was justified by the majority of judges with reference to, arguably, quite contestable interpretations of equality and democracy,[96] it is intuitively attractive in certain ways, as there is a concern that government might otherwise use its privileged access to public funds to dominate a campaign (although the concern would arguably be allayed by the placing of limits on government spending, rather than an outright prohibition). But, equally, it might be argued that its effect is to emasculate the agent with the strongest electoral credentials in such referendums, and correspondingly to empower fringe agents with little or no such credentials to bring private funding to bear in ways that may create an illusion of widespread

93. Fn.90.

94. *McKenna v An Taoiseach (No.2)* [1995] 2 I.R. 10; *Coughlan v Broadcasting Complaints Commission* [2000] 3 I.R. 1.

95. See judgment of Denham J., [1995] 2 I.R. 10 at 53–54; and of O'Flaherty J., [1995] 2 I.R. 10 at 43.

96. See, for example, the apparent application of the equality provisions to ideas (rather than to "human persons") by Blayney J., [1995] 2 I.R. 10 at 50, and Denham J., [1995] 2 I.R. 10 at 52, as criticised by Barrington J. in his dissent in *Coughlan*: [2000] 3 I.R. 1 at 45. For a critique of the approach taken to the idea of democracy, see G. Barrett, "A Road Less Travelled: Reflections on the Supreme Court Ruling in *Crotty*, *Coughlan* and *McKenna (No. 2)*" (2011) Institute of International and European Affairs, Dublin, available at: *www.iiea.com/publications/a-road-less-travelled-reflections-on-the-supreme- court-rulings-in-crotty-coughlan-and-mckenna-no2* [Last Accessed March 20, 2015], pp.16–19.

popular support.[97] The argument is more persuasive when taken in conjunction with *Coughlan*. As is often the case in fundamental rights litigation, so much hinged on complex facts particular to the *Coughlan* case, yet the outcome has had a very broad practical impact. It was not disputed that the national broadcaster had been careful in its general coverage to maintain a balance in air-time between competing sides. In its party political broadcasts, however, which represented two per cent of its coverage overall, there was an 80:20 favouring of the "yes" side simply in virtue of the fact that parties from across the spectrum happened to all support a "yes" vote.[98] The judges in the majority insisted that there was an obligation to ensure 50:50 air-time here as well and, in so ruling, effectively removed party political broadcasts from referendum campaigns.[99]

Although neither case concerned questions on the constitutional validity of legislation as such, they seem to cast further doubt on the effectiveness of a system of judicial supremacy, and on the culture of legal constitutionalism that such a system promotes, in ways that complement earlier arguments. First, these cases illustrate the extent of reasonable disagreements on the meaning and application of rights. In *McKenna (No.1)*—a case involving the same arguments brought by the same applicant but in respect of an earlier referendum—Costello J. had quite vehemently ruled that the question was non-justiciable: there was no textual basis for any prohibition on such expenditure and the political branches had been allocated powers concerning the expenditure of public funds.[100] Yet, in the Supreme Court decision in *McKenna (No.2)*, O'Flaherty J. observed that he found it "bordering on self-evident" that such expenditure would be illegitimate in a constitutional democracy.[101] Similarly, while Keane J. and others in *Coughlin* favoured a strict 50:50 air-time balance, Barrington J. in his dissent ruled that this was tantamount to giving private citizens air-time rights equal to those of political parties commanding widespread support and that for the national broadcaster to "set up further broadcasts to contradict the advice of political parties would be to abandon its role as a neutral institution and to descend into the political arena".[102]

Given the extent of the reasonable disagreement that these cases generated among judges, and the essentially political character of the disagreement, their resolution ought to have been matters with which the political arms of government could at least engage. Thus, if a disgruntled citizen were to bring an application before the courts on such questions, the courts, as neutral observers, are well placed to engage in principled deliberation on the matter that might inform subsequent political deliberation. It is appropriate that there would be an institutional mechanism independent of the political spheres where rights-

97. See Barrett, fn.96, pp.18–19.
98. This is outlined well by Barrington J. in his dissent. See *Coughlan v Broadcasting Complaints Commission* [2000] 3 I.R. 1 at 34.
99. See the conclusion of Keane J., *Coughlan v Broadcasting Complaints Commission* [2000] 3 I.R. 1 at 58.
100. *McKenna v An Taoiseach (No.1)* [1995] 2 I.R. 1 at 5–6.
101. *McKenna v An Taoiseach (No.2)* [1995] 2 I.R. 10 at 42.
102. *Coughlan v Broadcasting Complaints Commission* [2000] 3 I.R. 1 at 39.

based light might be shed. But where judges' word is final, their necessarily fallible and fact-specific conclusions can have a far-reaching, and potentially damaging, impact. It is arguable that the combination of these rulings has not only skewed the results of subsequent referendums but also—with a contrived "Punch and Judy" type balance—has undermined their potential as forums for decent polity-wide deliberation on fundamental social and political changes.

Arguably, an institutional system in which judicial conclusions were to inform subsequent political responses, and a culture in which legislators might see themselves as having a role in principled rights deliberation, may well lead to more appropriate practical outcomes. In such a system and culture, for instance, it may be that the Oireachtas would legislate to require "reasonable balance" in air-time in referendum campaigns, for example, as a principled preference to the contrived and distorting notion of 50:50 balance. Or statutory limits might be placed on government, as well as on private funding, in principled preference to an absolute prohibition on government expenditure.[103] Indeed, the Oireachtas may even feel that legislation placing an onus on media to have due regard to particular democratic office-holders (e.g. party leaders or spokespersons, cabinet ministers, leader of the opposition, etc.) during such campaigns may be warranted on the basis of a principle along the lines suggested by Barrington J. in his dissent, namely, that political parties or elected office-holders ought to have a particular role in such campaigns in a democratic society.[104] If, however, the Oireachtas were to legislate along those lines in a system of judicial supremacy, a challenge would be inevitable and almost certainly successful if the court were to follow the logic of the majority in *Coughlan*.

Finally, although *Ryan v Lennon* has been relied upon in this article primarily to introduce and illuminate theoretical arguments, there are certain very practical lessons that emerge. One of the main theoretical insights considered earlier was that in order to secure equally shared popular control over Government, power over key democratic rights must be dispersed across different and differently constituted institutions, in order to counter the capacity of government to close ranks and face down the citizenry in the face of fundamental unrest. The facts surrounding *Ryan v Lennon* shed light on that essentially abstract idea. But the conclusions drawn on the superiority of the new commonwealth model are entirely practical. The only practical conclusion drawn by Quinn from the case was that there ought to be "space" for judges to "prudentially intervene" in order to save democratic systems from self-destructing. But judges *had* a

103. This is suggested by Barrett. See Barrett, fn.96, p.20.

104. Barrington J. opined: "When it comes to advising the people on a major political decision the principal role must rest with their political leaders. A distinguishing feature of a democratic society is that political leadership rests, not on power, but on persuasion. Likewise political authority rests on the consent of the electorate. It is right and appropriate that political leaders should use their authority and the arts of persuasion to lead the people towards the decision which their judgment tells them will best promote the common good. For [the national broadcaster] to attempt to neutralise the advice of political leaders would be to subvert the democratic values which it is directed to uphold." *Coughlan v Broadcasting Complaints Commission* [2000] 3 I.R. 1 at 45.

certain "space" under the model of judicial supremacy; it was just that entering it meant drawing on dubious sources and apparently going beyond the confines of the political structure (just as Walsh J. in *McGee* referred to judges' special role in identifying these rights over which the State had no control). The mechanisms operating under the new commonwealth model offer practical ways to facilitate effective judicial intervention in such circumstances, while obviating the need for judges to cast themselves as God's philosophers, sitting as intermediaries beyond the democratic system.

CONCLUSION

It is hard to imagine that judicial supremacy would be cast aside in any new constitutional reforms in Ireland. It seems to enjoy popular approval or, in any event, does not attract any widespread opprobrium. Opinion polls that canvass the question tend to place judges among the most widely trusted groups and, certainly, much more trusted than politicians, whose constitutional powers would seem to be enhanced in tandem with any diminution for judges.[105] And there is little sustained scepticism directed towards judicial supremacy among legal academics working in Ireland.[106] But the argument here is intended as academic: the aim is to contribute on a theoretical basis and in a background way. As the flourishing movement of political constitutionalism in the international legal academy attests, there are many good reasons to be sceptical about strong judicial power.[107] Some, such as the fact of disagreement on rights, have been canvassed in this article. But there are others too—not least the fact that constitutional courts just do not have the capacity to robustly engage with the rights implications of legislation in general—that go beyond the present scope of this article and that are well addressed elsewhere. Furthermore, if the Irish Constitution is, as some have argued, indicative of a republican State, and if this account of democracy as equally shared popular control best vindicates the essential republican idea of freedom as non-domination, then reforms along the lines suggested by this writer may seem at least intellectually consistent.[108]

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105. An *Irish Times*/IPSOS/MRBI poll published in 2012, cited by Maureen Gaffney in an address to the Magill Summer School, indicated that 71 per cent of Irish people "trusted" judges by comparison with 18 per cent for Government Ministers and 17 per cent for politicians. See Maureen Gaffney, "The Crisis of Trust in Politics and Lack of Reform" available at: *www.macgillsummerschool.com/the-crisis-of-trust-in-politics-and-lack-of-reform* (Last Accessed 20 March 2015).
106. There is an emerging body of sceptical work though. See, for example, E. Daly and T. Hickey, *The Political Theory of the Irish Constitution: Republicanism and the Basic Law* (Manchester: Manchester University Press, 2015); T. Hickey, "Our Constitution and Our Politics: Why Political Culture Matters and Constitutional Text Does Not!" in T. Dorgan (ed.), *Foundation Stone: Notes towards a Constitution for a 21st Century Republic* (Dublin: New Island, 2013); E. Daly, "Beyond Legal Constitutionalism," in T. Dorgan (ed.) (as above).
107. See, for example, Bellamy, fn.35; A. Tomkins, *Our Republican Constitution* (Oxford: Hart Publishing, 2005).
108. After assessing Arts 5, 6, 12, 15 and 28 of the Irish Constitution, Carolan asserts: "The

It can be argued, as Eoin Carolan has, that certain features of contemporary Irish constitutional jurisprudence place the Irish version of judicial supremacy to all intents and purposes in line with the new commonwealth model.[109] Judges in recent decades have demonstrated a degree of interpretive humility in respect of constitutional rights that may seem to place them closer to the contemporary judge on the UK Supreme Court than to the activist tradition exemplified by Kennedy, Kenny and Walsh JJ. The doctrine of the "presumption of constitutionality", for example, places the onus of proof on those challenging legislation on constitutional grounds and requires that there be a clear repugnancy before judges consider invalidation.[110] The related "double-construction rule"—which holds that where two or more interpretations of a statute are reasonably open, judges are to assume that the Oireachtas intended one of the constitutional constructions—bears some resemblance to s.3 of the UK Human Rights Act.[111] And *Tuohy v Courtney* established a deferential threshold concerning the balancing of competing rights in legislation. It held that judges will not "impose their view of the correct or desirable balance in substitution for the view of the legislature … but rather … determine from an objective stance whether the balance contained in the impugned legislation is so contrary to reason and fairness as to constitute an unjust attack on some individual's constitutional rights".[112] The same themes are evident in the Canadian-imported proportionality test identified in *Heaney v Ireland*[113] and used, for example, in *Fleming v Ireland*, which upheld the constitutionality of the statutory prohibition on assisted suicide.[114] Much, thereby, is conceded in practice to the role of the legislature in adjudicating competing rights claims.

State whose institutions correspond to these Articles is, it seems to me, demonstrably a republic." See E. Carolan, "Recovering the Republic? Democratic Government and the Theory of Mixed Government" (2012) *Irish Jurist* 172 at 175.

109. See E. Carolan, "Between Supremacy and Submission: A Model of Collaborative Constitutionalism," available at: *papers.ssrn.com/sol3/papers.cfm?abstract_id=2309875* [Last accessed March 20, 2015].
110. On the doctrine, see O. Doyle, *Constitutional Law: Cases, Texts and Materials* (Dublin: Clarus, 2008), pp.437–439.
111. On the rule, see Doyle, fn.110, pp.441–442.
112. *Tuohy v Courtney* [1994] 3 I.R. 1.
113. The test was set out in the following way by Costello J.: "In considering whether a restriction on the exercise of rights is permitted by the Constitution, the courts in this country and elsewhere have found it helpful to apply the test of proportionality, a test which contains the notions of minimal restraint on the exercise of protected rights, and of the exigencies of the common good in a democratic society. This is a test frequently adopted by the European Court of Human Rights … and has recently been formulated by the Supreme Court in Canada in the following terms: The objective of the impugned provision must be of sufficient importance to warrant overriding a constitutionally protected right. It must relate to concerns pressing and substantial in a free and democratic society. The means chosen must pass a proportionality test. They must: (a) be rationally connected to the objective and not be arbitrary, unfair or based on irrational considerations; (b) impair the right as little as possible; and (c) be such that their effects on rights are proportional to the objective." *Heaney v Ireland* [1994] 3 I.R. 593 at 607.
114. *Fleming v Ireland* [2013] IESC 19.

However, this culture of restraint does not address the essential concerns about strong judicial power, nor does it render the particular model of judicial supremacy satisfactory in light of the deeper concern for equally shared popular control. First, the Irish constitutional model lacks formal provision for political rights-based review of legislation: legislators may thus be inclined to conclude that the rights dimensions of legislation are not their particular responsibility.[115] Secondly, judges—despite a tendency to be deferential to the other branches of government—ultimately retain the final word on the constitutionality of legislation. When they do strike down legislation, they may be said to have exercised what amounts to arbitrary power while also undermining popular control. Put another way, dialogue on and contestation of the relevant judicial appraisal is impossible, except by means of a referendum. And in cases where judges extend deference, the absence of such a deliberative culture will often mean, as it did following the decision in *Zappone & Gilligan*, for example, that the judicial determination is treated as conclusive, thereby precluding on-going deliberative engagement around an important and contested question.

But the overriding objective of this article has been to argue, based on a case that brings the dilemmas to the fore so pointedly and dramatically, that the idea of democracy is central to questions around the value and legitimacy of judicial review. Democracy requires that the *demos* (people) enjoy *kratos* (control). This control must be on-going (rather than simply periodical, exercised through elections),[116] robustly independent and suitably individualised, which in turn requires an ensemble of differently constituted institutions, some elected and authorial, others non-elected and contestatory.[117] So far as the vindication of rights is concerned, the alternative model practised abroad and proposed for Ireland might go some way towards countering the more egregious consequences of the "paradox of constitutionalism" in this particular

115. While the ECHR was incorporated into Irish law through the European Convention on Human Rights Act 2003, it contained no requirement of pre-enactment rights-based review on the part of either the executive or the legislature. As de Londras and Kelly suggest, this renders it something of a "missed opportunity" so far as "the cultivation of a political and parliamentary ethic of rights" is concerned. See F. de Londras and C. Kelly, *European Convention on Human Rights Act: Operation, Impact and Analysis* (Dublin: Round Hall, 2010), p.248.

116. Again, Carolan's analysis is instructive. He insists that the electoral or vote-based conception of representation "say little, if anything, about the relationship between the people and their elected representatives between elections". See fn.108 at 194.

117. Thus, the overall argument is somewhat reminiscent of that made in favour of outright judicial supremacy, in the name of republican theory, by Iseult Honohan (although the institutional conclusions are different from Honohan's). Honohan defends strong form judicial review "as one of multiple deliberative institutions in the process of republican self-government", insisting that republican self-government is assured "through the ensemble of government institutions … [rather than] through an apparently mandated legislature or executive of a unitary people". See I. Honohan, "Republicans, Rights, and Constitutions: Is Judicial Review Compatible with Republican Self-Government", in S. Besson and J. Marti, Legal Republicanism: *National and International Perspectives* (New York: Oxford University Press, 2009), pp.83–101.

setting.[118] It cannot be that "the people" have a direct role in government, at least regularly or on routine matters. Neither can it mean that all government outcomes could ever be satisfactory to all citizens. But it may nevertheless promote the acceptability of such outcomes to those who are frustrated by them. To evoke the republican-sounding claim of its founding father, the Constitution could set the people as masters, albeit in that inescapably limited sense.[119]

118. On the paradox of constitutionalism, see fn.51.
119. Éamon de Valera commented that "if there is one thing more than any other that is clear and shining through this whole Constitution, it is that the people are the masters". See 67 *Dáil Debates* Col.40, May 11, 1937: quoted by J.A. Murphy, "The 1937 Constitution—Some Historical Reflections", in T. Murphy and P. Twomey (eds), *Ireland's Evolving Constitution, 1937-97: Collected Essays* (Oxford: Hart, 1998), p.13.

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