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Irish Studies in International Affairs, Volume 32, Number 2, Analysing and Researching Ireland, North and South 2021, pp. 1-38 (Article)

Published by Royal Irish Academy

DOI: <https://doi.org/10.1353/isia.2021.0032>



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Getting Ready: The Need to Prepare for a Referendum on Reunification

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ABSTRACT

A positive and open attitude toward developing a strategic national plan for reunification is politically imperative. To plan is not to harass or to presume that a referendum can only go one way. The existing simple majority rule to decide the referendum should remain as against the suggestions for forms of qualified majority made by Bertie Ahern, Leo Varadkar and the late Seamus Mallon. Those who reasonably wish to increase those favouring Irish reunification in the north should focus for now on cultural Protestants, and on 'the others'. Persuading unionists to become nationalists is an improbable project. Fundamental clarity is required on the model of a united Ireland, and/or on the process of constitutional reconstruction that will follow a reunification vote in the north. Securities and power-sharing provisions for British people, and Protestants, need to be built into the model of a united Ireland, or the design of a constitutional convention.

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doi: <https://doi.org/10.3318/ISIA.2021.32b.1>

Irish Studies in International Affairs, Vol. 32, Issue 2, 1–38, *Analysing and Researching Ireland, North and South*
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THE WORLD WE ARE IN

In 2021 the United Kingdom census is highly likely to confirm a demographic majority of cultural Catholics in Northern Ireland, that is of Catholics by belief, or by family origin. This upcoming fact may be masked because of the increasing numbers who refuse to identify their religion, or who declare that they have none. There is, however, an informed consensus that cultural Catholics will outnumber cultural Protestants for the first time since Northern Ireland was created. Historically, most cultural Catholics have voted for nationalist parties. This milestone may therefore herald a potential electoral and referendum majority within Northern Ireland for reuniting Ireland. By contrast, the maintenance of Northern Ireland's place in the Union will require a significant bloc of support from cultural Catholics—a novelty. Given that the demographic tipping point may have occurred in 2015–16 the referendum-tipping point may come some time between 2026 and 2032. It is true that even in this deeply divided place politics is no simple epiphenomenon of ethnic or sectarian demographic shares. Yet the likely electoral trajectories are also clear: both nationalists and the 'others', i.e., those who refuse to identify as nationalist or unionist, will be likely to rise in electoral strength over the decade ahead.

The aftershocks from the UK's withdrawal from the EU continue, complicated and confounded by the global public health crisis created by the coronavirus pandemic. Three major and related uncertainties persistently command attention. The first is how and whether 'the frontstop' arrangements for Northern Ireland and Ireland, annexed in the Protocol to the withdrawal treaty between the UK and the EU, will work, and with what repercussions. If they are honoured, and work, then in one feasible scenario, Irish economic reunification under the umbrella of the European Single Market, and de facto within the EU's customs union, will begin on 1 January 2021. The provisions in the protocol are confined to goods and agricultural production within the Single Market, but services may follow. The Protocol has, however, already

* Many thanks are owed to Kieran Bradley, Pauric Dempsey, Oran Doyle, Brian Feeney, John Garry, Micha Germann, Patrick Griffin, Robert Hazell, Tom Lyne, Christopher McCrudden, John McGarry, Breandán Mac Suibhne, Rory Montgomery, Niall Ó Dochartaigh, Fionnuala D Ní Aoláin, Etain Tannam, and Jennifer Todd. Though each person has improved the paper with criticism or constructive suggestions none is responsible for the text in all its parts, and none should be assumed to agree with me.

This essay often uses the terms north and south as synonyms for Northern Ireland and for the state officially named Ireland. Donegal is the most northerly part of the island and I am not questioning the legitimacy of either jurisdiction.

experienced its first attempted detonation. The secretary of state for Northern Ireland has told the House of Commons that the UK's Internal Market Bill, going through the Westminster parliament as this article went to press, will break international law—in a very specific and limited way, he claims.¹ This threat may not have been driven by unionist ideology; it may be a shock bargaining tactic with the EU, which has requested the UK to honour its international obligations, or it may herald the end of substantive negotiations between the UK and the EU. In the latter case, the UK will complete its exit from the European Union without any formal trade agreement with its former partners. The second uncertainty is whether the Northern Ireland Assembly and Executive, recently restored, will remain stable. The third uncertainty relates to 'the others' in the Assembly, and their supporters outside it. Will this grouping consistently grow in electoral weight in the decade ahead? If so, will its voters be more inclined toward Irish reunification within the European Union than toward maintaining the Union with Great Britain? Or, will they split on this subject along traditional lines?

Any of these interrelated uncertainties may hasten the calling of a referendum on Irish reunification under the provisions of the Good Friday Agreement, and may also shape its outcome. All these matters require the full preparatory attention of the citizens of Ireland, and of the Government of Ireland, even though the latter's first material priority has to be recovery from the public health lockdown and an attendant economic and social crisis. The European question will continue to animate politics within Ireland, Northern Ireland, and Great Britain, and British and Irish relations with the US. Since joint EU membership facilitated British and Irish cooperation over the north, it is widely suggested that the UK's withdrawal from the EU will worsen British–Irish relations. No definitive judgment is yet possible, however. Diplomatic relations between the UK and Ireland may improve, perhaps later in the decade ahead, and that may occur with or without further changes of government in Dublin and London. The two neighbours' treaty obligations formally compel them to honour the Good Friday Agreement in all its parts, and to implement the protocol, and both European and American pressure, especially in the event of a Biden administration, will encourage the British government to enhance its cooperation with Ireland.

¹ *BBC News*, 'Northern Ireland Secretary admits new bill will "break international law"', 8 September 2020, available at: <https://www.bbc.com/news/uk-politics-54073836> (16 November 2020).

The June 2016 referendum on the UK's membership of the EU strongly suggested that the Remain/Leave cleavage in Northern Ireland significantly coincides with the nationalist/unionist or cultural Catholic/cultural Protestant cleavage. It does, but not completely. Every Westminster constituency in Northern Ireland that previously had a safe nationalist majority backed Remain by over 8,000 votes. Remain's lowest margin of victory within safe nationalist seats was in Fermanagh and South Tyrone, by 59 to 41 percent. Remain won both swing seats in Belfast, comfortably in Belfast South, but by a whisker in Belfast North. All constituencies on the border voted to remain; as did urban voters in Belfast and Derry, separately and jointly. However, of the then nine safest unionist constituencies, two voted Remain, North Down and Londonderry East. The first has the lowest share of Catholics, the second may be slowly becoming a marginal seat. Leave prevailed in two of the safe unionist constituencies by just over 500 votes. Differently put, nationalists were more solidly in favour of Remain than unionists were in favour of Leave, as shown in the local outcome of the referendum, a 56 to 44 per cent majority in favour of Remain.

This result was replicated in the Westminster elections of December 2019 in which the combined vote of the largest Remain parties—Sinn Féin, the Alliance, the SDLP, and the Greens—constituted 55 per cent, a total that excludes Remain voters among the micro-parties. This combined Remain vote total was almost identical to that displayed in the European Parliament elections of May 2019. Going forward, 'Remain' MPs are now a majority of Northern Ireland's Westminster delegation: 10 out of 18. Their respective parties, Sinn Féin (7), the SDLP (2), and Alliance (1), jointly constitute the first non-Unionist majority of Westminster MPs from Northern Ireland's delegation—though for at least as long as the oath of allegiance to the Crown remains obligatory for MPs who take their seats, Sinn Féin will not fully participate in that body. The Alliance winner in North Down, Stephen Farry, is a cultural Catholic in a constituency with few Catholics—striking evidence of hostility to the DUP's 'pro-Brexit' policy among unionists who are prosperous and educated professionals. Less noticed, in Lagan Valley the vote share of the DUP incumbent, Jeffrey Donaldson, fell by 16.4 per cent. Surging into second place behind him was the Alliance party's Sorcha Eastwood, improving her party's previous performance by 17.7 per cent. She too is a cultural Catholic. These two contests demonstrated a significant swing to the pro-European Alliance among cultural Protestant voters. One obvious question ahead is whether socially liberal Protestant Remainers and socially

liberal cultural Catholic Remainers who currently back parties who designate as ‘others’ (notably the Alliance and the Greens) will move jointly to favour Irish reunification within the European Union. No prediction is offered here, but if they do move in that direction the pressure to hold a referendum will materialise sooner than many commentators currently expect.

THE INTERVENTIONS OF THREE LEADERS OF CONSTITUTIONAL IRISH NATIONALISM 2017–19

Three Irish citizens had started a necessary conversation on the subject of a future referendum before the pandemic shut down public life. Former Taoiseach Bertie Ahern, former and likely future Taoiseach Leo Varadkar, and Seamus Mallon, the late Deputy First Minister of Northern Ireland had commended, or elaborated, or flew a kite, on a major constitutional and treaty change, justified in the language of prudence. Namely, they questioned or suggested modifying the simple majority rule requirement in a referendum in the north that would initiate Irish reunification. Their arguments should be engaged on their merits—their motives, integrity, patriotism, or party-political interests will not be questioned here.² Rather, their legitimate concerns should be addressed constructively, guided by the text and ethos of the Good Friday or Belfast Agreement (hereafter the Agreement).

On 6 April 2017 Ahern argued before the Seanad Select Committee on Brexit that ‘The only time in my view, and I will argue this for the rest of my life, we should have a border poll is when the nationalists and republicans, and a respectable sizeable amount of unionists and loyalists are in favour and on the basis of consent’.³ Running for the leadership of Fine Gael in the same month Varadkar declared that ‘Real lasting workable unity can only come about with a decent measure of support from both communities.’⁴ Mallon’s memoir, *A shared home place*, was written with Andy Pollak, and published in 2019. For convenience I shall assume it was entirely authored by

² I was a friend and admirer of Seamus Mallon, whom I met regularly in London between 1988 and 2001.

³ *RTE News*, ‘Brexit challenge difficult but not insurmountable—Ahern’, available at: <https://www.rte.ie/news/brexit/2017/0406/865735-brexit/> (16 November 2020).

⁴ *Irish Independent*, ‘Sinn Féin’s push for border poll “alarming”, says Varadkar’, available at: <https://www.independent.ie/irish-news/politics/sinn-feins-push-for-border-poll-alarming-says-varadkar-35585809.html> (16 November 2020).

Mallon rather than Pollak, even though the converse may be the truth.⁵ In his thirteenth chapter, 'Parallel consent, generosity and other ideas', Mallon suggested that the 'parallel consent' of the *two* northern communities should be required for Irish reunification, that is, a concurrent majority, with nationalists and unionists required to show 50 per cent plus one support within their respective ranks before reunification proceeds.

Two different ideas are evident here. Ahern and Varadkar want qualified majority support—with significant ('respectable', 'sizeable' or 'decent') evidence of unionist support, whereas Mallon wants to extend one of the rules in the Northern Ireland Assembly to resolving the sovereign status of northern Ireland. Neither idea is politically workable, however, and the case for either of them dissolves upon scrutiny.

Let me leave to one side for now an obvious paradox: any unionist who votes for Irish reunification is, by that very act, ceasing to be a unionist; therefore, in principle, there can formally never be any unionist support for Irish reunification—as most unionists will tell you if asked politely. The clue is in their named political allegiance and identity. To target fairly the key meaning of the three men's proposals I shall start by assuming they are seeking evidence of the political conversion of a significant number of unionists (Ahern and Varadkar) or just over half of them (Mallon) before reunification should proceed.

THE RULE IS NOT GOING TO GO AWAY

The existing rule for a change of the sovereign status of Northern Ireland (50 per cent plus one) is explicitly required by the text of the Agreement, now solemnly endorsed in two international treaties—that between the UK and Ireland, and more recently in the Withdrawal Agreement between the UK and the EU. It has also been part of settled law in the UK since the Northern Ireland Constitution Act of 1973 (Article 1), and it opens the Northern Ireland Act 1998: Part One, Section One. Majority rule has two obvious virtues: it is neutral between change and the status quo, giving each voter an equal opportunity of being decisive, and it is the regular rule in international relations for deciding the transfer of sovereignty.

⁵ Seamus Mallon with Andy Pollak, *A shared home place* (Dublin, 2019). The book's call for another 'Opsahl Commission' may derive from Pollak who edited that commission's proceedings. Andy Pollak (ed.), *A citizens' inquiry: The Opsahl Report on Northern Ireland* (Dublin, 1993).

Trying to change this rule would be ill-judged. Moving the goalposts would profoundly disrespect what voters, north and south, concurrently endorsed in the 1998 referendums, in a resounding double majority of 71.1 and 94.4 percent respectively. Ireland has just argued before the world that the UK's withdrawal from the EU should not jeopardise *any* component of the hard-won Agreement. The government ensured—through astute diplomacy—that the Agreement is to be protected '*in all its parts*' by the EU-27, as well as the UK. Along with the EU, the US Envoy to Northern Ireland, the US Speaker of the House of Representatives, and the Presidential nominee of the US Democratic Party, Ireland has just firmly complained of the UK's express intent to break international law. Ireland should therefore take great care. Initiating any major change to the Agreement would look extraordinarily strange—and appal the Irish in the north, the Irish diaspora, and surprise our allies in Europe.

Politically, constitutionally, and diplomatically, changing the majority consent rule on sovereignty would have to start through a Review of the Agreement, preceding constitutional change in both jurisdictions. That Review would have to be 'carried' against Sinn Féin and its allies in the North, and the south, that is, against a majority of Northern nationalists, and a large swathe of voters, likely a majority, in the south. That is just not going to happen, not least because it would break the norm of 'parallel consent' related to reviews, and because it would provoke a collapse of the Northern Assembly and the North-South Ministerial Council. No prudent Irish government would consider such policy.

Some who consider changing the rule may assume that any Irish government has a veto over the holding of a Northern referendum. Legally, it does not. The secretary of state for Northern Ireland is obliged to hold one if objective evidence emerges that opinion has changed in the north, that changes his opinion. A resolution favouring reunification endorsed by a majority of Northern MLAs, or by a majority of Northern Ireland's Westminster MPs, or a credible run of surveys suggesting the requisite shift in opinion may constitute sufficient evidence. The secretary of state has some discretion but is constrained by established norms of legality, fairness, and reasonableness in the exercise of his or her function—having regard to issues that the relevant statute specifies may be taken into account. It would be extremely sensible for there to be British and Irish consultation before any referendum, but it would not be proper under existing UK law for the secretary of state to grant a veto to the south over whether a referendum should be held—that would

require fresh enabling legislation. These considerations further advance my theme, namely the need for preparation in the south, long before a Northern referendum.

The Agreement provided power-sharing across three strands—north-north; north-south, and east-west—in *conjunction with* the majoritarian consent rule on sovereignty. All were part of the fundamental compromise. There is a strong case for keeping some or all of these arrangements, with suitable emendations, if and when the majoritarian consent rule is applied and leads to reunification in a referendum. In 1998 Irish nationalists, north and south, accepted that reunification required majority consent in the north—not the consent of *the* majority of the unionist community, and *not* the consent of a qualified majority. Nationalists let go their well-founded claim that the will of the majority of the Irish people as a whole had been overridden by the unilateral partition of 1920, and that Northern Ireland had been unjustly territorially defined, not least because of how the boundary commission promised in the treaty of 1921 had functioned. In return, Northern nationalists obtained major reforms of policing and the administration of justice, a battery of equality rights and commissions, unionist acceptance of the three power-sharing arrangements, and the entrenchment of the possibility of reunification by majority consent in an agreement protected by a treaty. Ireland's Constitution was amended to respect the principle of consent both for Northern Ireland's current standing as part of the UK, and for its possible reunification with the rest of the island. If the advice of Ahern, Varadkar or Mallon were followed and the simple majority-rule for reunification were modified then the reasonable expectations of Northern nationalists would be profoundly shocked, and their settled rights would be undermined. The rights of 'the others', i.e., those who refuse to identify as nationalists or unionists, and who may prefer to be citizens of a reunified Ireland within the EU, rather than of a UK without the EU, would also be modified. And the change would somehow have to be supported by Southern citizens who want reunification!⁶

⁶ Many of these currently vote for Sinn Féin, which recently won the highest number of first-preference votes of all parties in the Irish general election of February 2020 (24.5 per cent). Sinn Féin voters are not alone, isolated, or extremist in favouring reunification. Many who voted for the historically pre-eminent parties, Fine Gael (20.9 per cent) and Fianna Fáil (22.2 per cent) favour Irish reunification according to the provisions of the Good Friday Agreement. Fine Gael's official name in English is the United Ireland Party, while the Republican Party is that of Fianna Fáil. One should not presume weak support for Irish reunification among the nearly one third of the electorate who voted for numerous independents, or for the Greens, an all-island party, Labour, the Social Democrats, or for two more all-island parties, Solidarity-People Before Profit and Aontú.

Changing the rule would be profoundly unjust. Since the Ireland Act of 1949 Northern nationalists have been assured by successive British governments that Irish reunification required majority consent by a Belfast parliament or (as now) by a majority of those voting in a referendum held in Northern Ireland. Northern Ireland's current status as part of the UK rests on the consent of a simple majority, not of a qualified majority (of say sixty per cent, or of two-thirds of the electorate). A change to require a qualified majority vote for the north to reunify with Ireland should logically require that a qualified majority vote be required to sustain the status quo. If a qualified majority for the Union with Great Britain were not currently present in the north then joint British and Irish sovereignty would be the fair response, not the maintenance of the Union.

With key figures in the British Labour party, and the approval of its then leadership, I once fully explored this logic, designing a model of shared sovereignty in and over Northern Ireland that elaborated and significantly modified ideas first proposed by John Hume and the SDLP. The model suggested a balanced rule for change *after* shared sovereignty went into effect: a qualified majority would be required for a reunited Ireland but also for Northern Ireland's complete integration into the UK.⁷ That is very different to what Mallon recently proposed.

In the peace process and the negotiation of the Agreement, all shared sovereignty proposals and formulae were put to one side. To suggest a qualified majority in the north for Irish reunification, but not for the maintenance of the Union, as Ahern and Varadkar have perhaps unwittingly suggested, is an argument for one-sided minority rule, and neglects the logical case for shared sovereignty in the present. Northern Ireland was created through the organisation and lobbying of a minority that rejected fairer boundaries: either a nine county Ulster, or a four-county north-east Ulster. Key leaders among their descendants, and most of their voters, signed up to the Agreement in 1998, however—or subsequent to the minor modifications in the St Andrews Agreement of 2006. Are Northern nationalists really now being asked to say that unionists should be empowered to keep Northern Ireland in the UK even if that preference has just minority support, and is against both the text and ethos of the Agreement?

⁷ Brendan O'Leary, Tom Lyne, Jim Marshall and Bob Rowthorn, *Northern Ireland: sharing authority*. (London, 1993).

That makes no sense. As Richard Humphreys has noticed, ‘Generally, people who say that one cannot coerce hundreds of thousands of unionists into a united Ireland have no real problem with coercing hundreds of thousands of nationalists into a United Kingdom. If one takes equal respect seriously, one has to accept the consequences of a reciprocal test.’⁸ Quite so. In 1998 Ireland, north and south, agreed to the equivalent protection of rights, north and south, regardless of whether London or Dublin held sovereign authority. Rights provisions and institutions were mandated that could in principle transfer from UK to Irish sovereignty. Voters mandated the incumbent UK government to exercise rule with ‘rigorous impartiality’ and made the same provision for a future Irish government with sovereign authority over Northern Ireland. Qualified majority voting was endorsed for the Northern Ireland Assembly, but not for the sovereign status of Northern Ireland.

The type of change mooted by Ahern, Varadkar, and Mallon would not be impartial—it would have to be imposed on one community in the north because it would not be conceded, and it would likely be strongly resisted by a very large portion of the Southern electorate, hitherto largely a silent party on this constitutional subject since they consented to the Agreement in 1998.

Requiring qualified majority support for a united Ireland would be an enormous—and unsought—concession to that political minority within the north who have positively wanted the UK to leave the EU—even, and perhaps especially, if that means restoring a hard border. Many of the same politicians are currently lobbying to nullify the text and ethos of the 2019 Protocol in the Withdrawal Agreement even before the print has fully dried on that parchment.

Seamus Mallon’s thinking on parallel consent would lead to unacceptable—and likely—unintended consequences. Recommending ‘generosity’ does not address the foregoing considerations, that is, the current case for joint sovereignty as a reciprocal corollary of his proposal, and it neglects the likely strategic responses of other agents. Equally importantly, implementing Mallon’s proposal is impractical, not least because it overlooks the rights and interests of ‘the others’.

To work effectively in practice Mallon’s proposal might require voters in the polling booth to designate themselves nationalist or unionist. In the

⁸ Two books by Richard Humphreys merit attention. Richard Humphreys, *Countdown to unity: debating Irish reunification* (Dublin, 2009); and Richard Humphreys, *Beyond the border: the Good Friday Agreement and Irish Unity After Brexit* (Dublin, 2018). He argues in favour of what I call below the full transfer of the Good Friday Agreement. I disagree with his thesis that it is obligated.

alternative, it would require them to self-designate in advance on separate electoral registers. How else, after all, would one measure parallel consent? A related difficulty arises for Ahern and Varadkar: how would they measure ‘decent’, ‘sizeable’, or ‘respectable’ support? None of the three leading citizens’ proposals properly consider ‘the others’, but if one incorporates them into thinking through Mallon’s proposal, as one should, a normative question immediately arises.

Are three majorities to be required, namely that of nationalists and unionists respectively, and overall, or of four, that is, including a majority of ‘the others’? Mallon’s proposal would certainly look unfair if ‘the others’ were to outstrip nationalists and unionists in electoral size. Another normative question is whether and how to prevent strategic voting. For example, Sinn Féin voters could designate as unionists, or DUP voters could designate as nationalists, on the parallel electoral registers. Perhaps such tactical identity-shifts would be permitted as long as no one has the opportunity to vote on two registers!

To be fair, Mallon’s proposal has one merit: it imposes no threshold requirement on turnout, a good thing given that any threshold might encourage a boycott by the expected losers.⁹ Most importantly, however, Mallon’s proposal fails to cater for the likely directions of significant electoral change, or of demographic change, which might underpin the former and the calling of a referendum.

INSTRUCTIVE SCENARIOS

Let me sketch two simple scenarios of how feasible change confounds the proposals of three of our leading citizens. Readers will easily think of more.

In scenario I, visualised in Figure 1, it is 2032, and a referendum has been held in the North. Assume that our polling and surveys are so good that we know exactly how support broke down across the three major groupings. Assume that designated nationalists have reached 50 per cent of the Northern electorate (however that is measured). Assume that one in fifty of them will

⁹ The Venice Commission’s Code of Practice on Referendums is clear: ‘It is advisable not to provide for: *a.* a turn-out quorum (threshold, minimum percentage), because it assimilates voters who abstain to those who vote no; *b.* an approval quorum (approval by a minimum percentage of registered voters), since it risks involving a difficult political situation if the draft is adopted by a simple majority lower than the necessary threshold’ (European Commission for Democracy Through Law [Venice Commission] (2018) III. 7. p. 14).

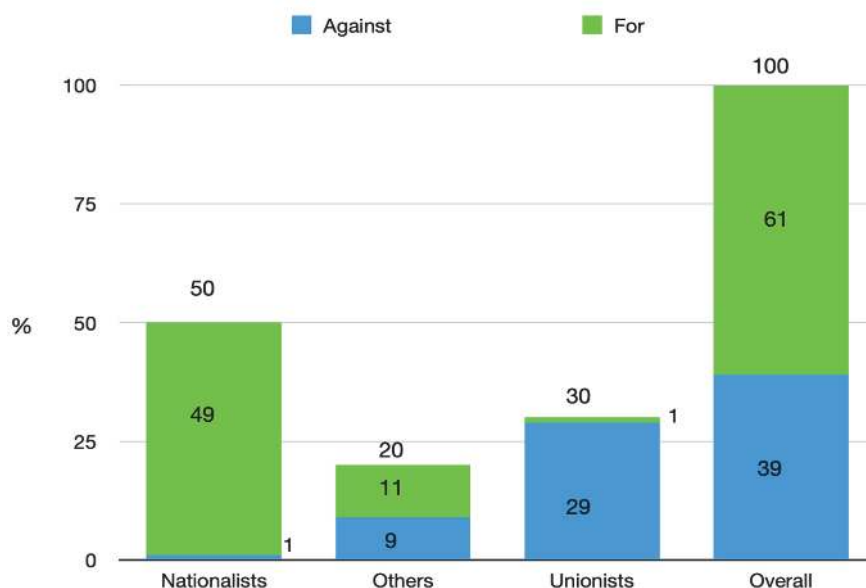


Figure 1. Votes against and for Irish reunification in a hypothetical referendum in Northern Ireland producing a clear qualified majority. Here a pro-reunification simple majority is nearly accomplished by nationalists alone, but a decisive qualified majority emerges because of a narrow pro-reunification majority among the others. All numbers in this figure are percentages of the entire electorate: a full turnout is presumed..

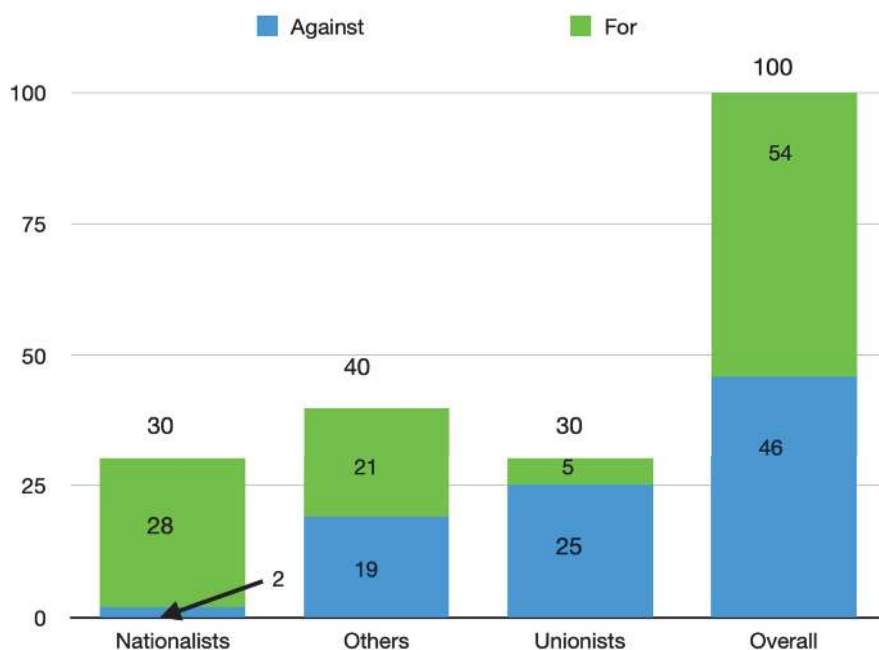


Figure 2. Votes against and for Irish reunification in a hypothetical referendum in Northern Ireland with a clear majority in favour. Here a clear simple majority is accomplished through a conjunction of a super-majority among nationalists (28 per cent), a narrow majority among the others (21 per cent), and the pivotal contribution of one in six unionists (5 per cent). All numbers in this figure are percentages of the entire electorate: a full turnout is presumed.

vote No to reunification because, for example, they dislike the idea that a reunified Ireland is scheduled to rejoin the Commonwealth. Unionists, by contrast, have fallen to thirty per cent of the electorate, but we can imagine that one in thirty of them are persuaded by the campaign to vote for reunification. The others, still twenty per cent of the electorate, are split much more deeply, perhaps according to their cultural origins. Cultural Catholics, among the others, determine to vote for reunification to rejoin the EU, whereas those of cultural Protestant origin, fearing resurgent Catholicism, decide they wish to maintain the Union. The new ethnic minorities among the others split evenly, depending on where they reside. In this scenario, shown in Figure 1, there is over sixty per cent support for reunification, a clear qualified majority, and a double majority of nationalists and of the others. But followers of Ahern, Varadkar and Mallon would be obliged to reject this level of support as insufficient because neither a majority nor a ‘decent’ or ‘sizeable’ or ‘respectable’ number of unionists have voted in favour.

In scenario II, visualised in Figure 2, it is 2032 and a referendum has been held in the North. The others have become the plurality designated group, reaching a full 40 per cent of the electorate. They are understandably applying strong pressure to change the existing power-sharing rules of the Northern Assembly. By contrast, both nationalists and unionists have fallen to 30 per cent of the electorate respectively. A referendum is held, however, because the secretary of state is swayed by evidence that a majority overall would vote for Irish reunification. The others split on this question, with 21 out of 40 in favour of reunification, perhaps for the same reasons as above. Two out of every 30 nationalists reject reunification in this scenario, perhaps because they think Ireland has become too secular, too dominated by atheists. Five out of every 30 unionists, however, vote for reunification for exactly the same reason. Inspect the overall result in Figure 2: there is a concurrent majority among nationalists and others, but 5 per cent of the electorate who are unionists have determined the outcome. Their votes are pivotal to the formation of the majority (54–46). Mallon’s rule would reject reunification here, but Ahern and Varadkar would have to explain whether one in six unionists was ‘sizeable’, ‘decent’, or ‘respectable’ enough to endorse reunification.

These two scenarios are not manipulative special cases. They are legitimately based on current possibilities. In scenario I the size of the likely nationalist electorate has been strongly expanded in accordance with current demographic possibilities. In scenario II, by contrast, I have expanded the

growth of the others, strongly extrapolating from their recent successes in Northern elections. In the most plausible future, the most likely direction of travel is for both of these trends to operate. Namely, a relative rise in the numbers of cultural Catholics will boost both Northern nationalists and ‘the others’.

Consider one last and decisive objection to Mallon’s ill-thought through proposal. Imagine, consistent with both of these scenarios, that between 2020 and 2032 the proportion of the electorate that turns out to vote unionist were to fall to roughly 30 per cent. Then under Mallon’s rule, 15 per cent of the Northern Ireland electorate plus one, would have the right to block reunification. That would be an absurd unionist veto. Ahern and Varadkar’s suggestions do not immediately end in the same absurdity, but that is because their proposals are imprecise. What, we might ask, do they think the threshold for consent should be? Fifty per cent plus one including a specified proportion of unionists (or former unionists)? What proportion though? And how would that be measured, and when? And what about ‘the others’?

BEING REALISTIC, AS WELL AS JUST

So far, obvious difficulties have been illustrated in floated proposals to modify or not apply the agreed rule, a simple majority, for determining the outcome of a Northern referendum. The current and future leaders of Fianna Fáil, Fine Gael and the SDLP should think hard before proposing any constitutional change to the referendum rule, a project they would likely lose to the profit of their current chief political competitor, Sinn Féin. They should consider too what would have happened had such ideas been floated by British politicians. They would have been condemned instantly as proof of perfidious Albion, inventing a new unionist veto just as the cause looked endangered.

In any case, there is no British precedent for altering the established rule for Irish reunification toward a qualified majority. The UK legal practice in referendums has almost invariably been 50 per cent plus one, with no turnout requirement, as seen in the formation of the Welsh Assembly on a 50.5 percent ‘yes’ in the 1997 referendum, on a 50.2 percent turnout, and in the entire UK’s exit from the EU with 51.9 percent voting Leave, on a 72.2 percent turnout. There has been some variation in UK referendum practice, but unionists know that if the turnout threshold was set at 40 per cent, as in the Scottish devolution referendum of 1979, they would have to turn out because if they did not

nationalists could win with or without a small quotient of ‘others’.

Qualified majorities are usually set at 60 per cent (as in the US Senate) or at two thirds (as in US constitutional amendments in Congress). The strange requirement of 55 per cent support for independence in a referendum, on a turnout of over 50 per cent, eventually agreed in Montenegro’s secession from Serbia, on the suggestion of an EU mediator, is entirely unique—as far as I know. It was also wholly *ad hoc*, emerging from negotiation, rather than from any principled argument. Both sides imagined they would win under these numbers! Replicating such rules would be foolish: they would not only require unilaterally modifying the Agreement, but they would not guarantee Ahern or Varadkar’s requirements of ‘sizeable’ or ‘decent’ or ‘respectable’ support from unionists (or former unionists), let alone Mallon’s parallel consent. But the Montenegro case should remind us of two desirable objectives: the referendum regulations should not incentivise a boycott, and controversies over the franchise should be settled long in advance.

There is, in short, no wise statecraft in any published thought about modifying the existing decision-rule, only entry onto an unworkable and deeply unjust path that would, unfortunately, serve to confirm the most extreme claims of ‘dissident’ republicans. Ahern, Varadkar, and Mallon’s proposals look misguided upon scrutiny, but none of these politicians are or were fools. What concerns them can be expressed more simply. They want the referendum to carry with more support than 50 per cent plus one, not solely on a long-delayed Catholic demographic advantage, and they are fearful of another civil war.

THE REFERENDUM PROVISIONS OF THE GOOD FRIDAY AGREEMENT

The UK has made the holding and passage of a referendum in favour of a united Ireland, by a simple majority determination, its condition for the cession of Northern Ireland to Ireland. Formally, Ireland accepts and supports that condition. In return for modifying its Constitution in 1999 Ireland also understands that the UK is bound to uphold the Good Friday Agreement ‘in all its parts’—as recently affirmed in the Protocol to the Withdrawal Agreement between the United Kingdom and the European Union that entered into force on 31 January 2020.

Any future referendum in Northern Ireland will address whether the Union of Northern Ireland with Great Britain is to persist, or whether Ireland will be united, but what kind of referendum will that be? According to the ‘Constitutional Issues’ heading of the Good Friday Agreement, subsection (iv), the two sovereign governments, with the participants in the multi-party negotiations,

affirm that if, in the future, the people of the island of Ireland exercise their right of self-determination on the basis set out in sections (i) and (ii) above to bring about a united Ireland, it will be a binding obligation on both Governments to introduce and support in their respective Parliaments legislation to give effect to that wish.¹⁰

This wording suggests a self-determination referendum that legally obliges the governments to bring forward appropriate legislation. Politically it would be impossible for that legislation not to implement the result if it favoured a united Ireland. This clause also envisages a concurrent—though not necessarily simultaneous—exercise of the right of self-determination of the people of the island, north and south.

A deliberately constrained exercise of self-determination is envisaged, however. Northern Ireland is not fully free to determine its political status, in either UK or Irish constitutional law, i.e., it has no right to independence. The same is true in relevant international law: Northern Ireland was not numbered among the territories scheduled for decolonisation after the formation of the United Nations.¹¹ So, the Northern referendum will *not* formally be about decolonisation.¹² Nor will it be formally about secession—if secession is understood to imply the withdrawal of a territory and its people from a confederation, federation, or a union, in order to create an independent sovereign

¹⁰ Government of the United Kingdom (1998): 1 (iv), p. 2.

¹¹ The case for understanding the creation and development of Northern Ireland through the history of English and British colonisation is compelling (Brendan O’Leary, *A treatise on Northern Ireland: colonialism. the shackles of the state and hereditary animosities* (III Vols. Vol. I, Oxford, 2019), but in international law only those colonies named as such after the Second World War enjoy the fully free right to determine their political status. The right of external self-determination also applies to peoples ‘subject to alien subjugation, domination and exploitation’, according to a UN Declaration of 1970 (Antonio Cassese, *The self-determination of peoples: a legal reappraisal* (Cambridge, 1995), 90ff—for discussion); Northern Ireland does not fit that description since 1998.

¹² The argument has been made that the political decolonisation of Ireland was accomplished in 1998 when both parts of Ireland endorsed the Belfast or Good Friday Agreement (Brendan O’Leary, *A treatise on Northern Ireland: consociation and confederation. From antagonism to accommodation?* (III Vols. Vol. III, Oxford, 2019).

state.¹³ Rather the referendum is about the potential ‘transfer of sovereignty’. In short, a majority in Northern Ireland, under the Good Friday Agreement, has no right to create a new sovereign and independent state, only the right to leave the Union with Great Britain to join a sovereign united Ireland.¹⁴

The same section on ‘Constitutional Issues’ in the Good Friday Agreement recognises

the legitimacy of whatever choice is freely exercised by a majority of the people of Northern Ireland with regard to its status, whether they prefer to continue to support the Union with Great Britain or a sovereign united Ireland

and that

it is for the people of the island of Ireland alone, by agreement between the two parts respectively and without external impediment, to exercise their right of self-determination on the basis of consent, freely and concurrently given, North and South, to bring about a united Ireland, if that is their wish, accepting that this right must be achieved and exercised with and subject to the agreement and consent of a majority of the people of Northern Ireland.¹⁵

‘[To] bring about a united Ireland, if that is their wish.’ The sole alternative to remaining in the Union is ‘a united Ireland’, or a ‘sovereign united Ireland’. Voters may validly understand this future referendum to be a reunification referendum, i.e., a reuniting of the two jurisdictions, north and south, because a majority vote for a united Ireland would reverse the partition of the island in 1920 in the Government of Ireland Act—though it will not necessarily reverse the creation of Northern Ireland, or its Assembly or Executive.

¹³ There are several discussions and listings of secession and independence referendums. Jean Lapointe, *Le référendum de souveraineté: comparaisons, critiques et commentaires* (Quebec, 2010); Jean Lapointe, ‘Language and sovereignty referendums: the convergence effect’, *Nationalism and Ethnic Politics* 18 (2012), 113–28; Matt Qvortrup, ‘Referendums on independence, 1860–2011’, *Political Quarterly* 85 (2014), 57–64; a longer list may also be constructed from the database in Fernando Mendez and Micha Germann, ‘Contesting sovereignty: mapping referendums on sovereignty over time and space’, *British Journal of Political Science* (2016), 1–25.

¹⁴ Government of the United Kingdom (1998): 1 (i), p. 2.

¹⁵ Government of the United Kingdom (1998): 1 (i and ii), p. 2.

In 1801 the Union of the Kingdom and Parliament of Great Britain and the (Protestant) Kingdom and Parliament of Ireland, as they then were, entered into force. Ireland entered the Union as one unit but was partitioned in 1920 against the preferences of an island-wide majority. A future referendum in favour of a united Ireland would restore a politically unified and distinct island wide-polity. Not under the Crown, however. Rather a sovereign, democratic, and secular republic is the widely understood meaning of a united Ireland—certainly under Ireland’s existing constitution.¹⁶ There will be no religiously defined citizenship, or religiously defined head of state, but rather a reunification of the people and territory of the island (and its adjacent islands) within one self-governing jurisdiction.

The argument has been put that it will not be a reunification referendum. Ireland has—it has been said—never been a unified and autonomous polity except as a colonial dependency of the British Crown. The idea that the Kingdom of Ireland was a ‘sister kingdom’, even when it won its ‘legislative independence’ in 1782, is not plausible. There is some historic evidence that there was, albeit briefly, an island-wide polity before 1169, but we do not need to litigate this evidence. In British law there is no question that as and when the referendum happens it will be a reunification referendum, because under ‘The Articles of Agreement’ of 1921 between Great Britain and Ireland (‘The Treaty’), the Irish Free State was recognised as a dominion with the same standing as Canada, and as a unified state. Northern Ireland, however, was given the right to secede from the Irish Free State, subject to a boundary commission, and to paying its full fiscal obligations. Northern Ireland exercised this right shortly after the coming into force of the Constitution of the Irish Free State in 1922. So, this referendum, from a British legal perspective, will reunify Ireland if that is how the vote goes.¹⁷

The ‘Constitutional Issues’ section of the Agreement specifies two further provisions related to any future referendum. The two governments, with the agreement of the parties, recognised in (vi)

the birthright of all the people of Northern Ireland to identify themselves and be accepted as Irish or British, or both, as they

¹⁶ Any role for the Crown would be confined to one international organisation: if Ireland were to rejoin the Commonwealth, and if the British monarch remains the head of the Commonwealth.

¹⁷ For details see O’Leary, *A treatise on Northern Ireland: colonialism*, chapter 7; and Brendan O’Leary, *A treatise on Northern Ireland: control. The second Protestant ascendancy and the Irish state* (III Vols, Vol. II. Oxford, 2019, chapters 2 and 3). There is no doubt in Irish or British law that Ireland is the successor state of the Irish Free State.

may so choose, and accordingly confirm that their right to hold both British and Irish citizenship is accepted by both governments and would not be affected by any future change in the status of Northern Ireland.

And just before that statement in the text, in (v), the two sovereign governments affirm that,

whatever choice is freely exercised by a majority of the people of Northern Ireland, the power of the sovereign government with jurisdiction there shall be exercised with rigorous impartiality on behalf of all the people in the diversity of their identities and traditions and shall be founded on the principles of full respect for, and equality of, civil, political, social and cultural rights, of freedom from discrimination for all citizens, and of parity of esteem and of just and equal treatment for the identity, ethos, and aspirations of both communities.¹⁸

These provisions offer a permanent pledge of the right to British citizenship (as well as Irish citizenship) to ‘all the people of Northern Ireland’ and a commitment, in the event of a vote for a united Ireland, that going forward there will be a rigorously impartial government of fully equal citizens in a diverse Ireland—with full respect for their identity, ethos, and aspirations.

This array of provisions therefore not only constrains the outcome of the referendum—namely, Northern Ireland cannot become independent—but it also contains future securities about the nature of a united Ireland, notably, the voluntary maintenance of British citizenship rights among the people of Northern Ireland. Lastly, the same referendum question may be posed no earlier than seven years later if the vote for a reunited Ireland does not obtain a simple majority.¹⁹

When all these provisions surrounding the possible Northern referendum are spelled out—a qualified self-determination referendum with no right to independence, guarantees of enduring (and inheritable foreign) citizenship rights, commitments to impartial government of diverse and equal citizens under either option in the referendum question, provision for a recurrence of

¹⁸ Government of the United Kingdom (1998): 1 (vi) p. 2.

¹⁹ Government of the United Kingdom (1998): p. 3, and (1998): Schedule 1.3. These are pledges by the UK government, endorsed by all the parties to the Agreement. Also found in Annex A: Schedule 1 of the Agreement.

the same referendum after seven years, all combined with the possibility of a matching but perhaps sequentially later referendum in the south—it is easy to conclude that the future Northern referendum is internationally and comparatively unprecedented. This distinct bundle of elements certainly is. Since they were solemnly made and democratically ratified throughout Ireland they should be maintained, and thoughts on the possible referendum should be guided by them, and future planning configured with respect to them.

Careful thinking on persuasion as opposed to obtaining losers' consent

The existing provisions, though complex, already partially structure what the referendum will be about, and what securities will exist for the potential losers. They partly address the concerns of Bertie Ahern, Leo Varadkar and Seamus Mallon, but not sufficiently. A key ambiguity has to be unpacked to make that clearer. In a highly regarded—and regular—*Northern Ireland Life and Times* survey, conducted in 2018, and more recently in 2020, just over a quarter and just less than a third of the adult population in Northern Ireland, self-identified as ‘unionist’ (see Figure 3). Differently put, a super-majority of the Northern Irish is already non-unionist—though it is equally, or more, true that a super-majority is non-nationalist in response to the same question (just over a fifth and nearly a quarter of the population in 2018 and 2020).

Let us not query the survey, or the specific question, though there may be issues with both.²⁰ Instead the relevant question should be whether these core unionist identifiers are to be the key target of a policy of voluntary persuasion? They certainly need to be approached with consistent respect and dignity, and invited to participate in all deliberative forums and citizens assemblies, but respect also means recognising that more likely than not they will maintain their identifications. Plainly the far more obviously amenable ground for suasion is to be found among those (50 per cent in 2018, and 39 per cent in 2020) who self-identify as ‘neither’ unionist nor nationalist—as well as among the small numbers of ‘don’t knows’ and other responses. For the same reason, the principal target of immediate suasion is not the approximately 40 per cent of the Northern electorate who currently vote for unionist parties in region-wide elections on turnouts of between 55 and 75 per cent. These voters are not a majority, let alone the majority, and are likely, in most current expected scenarios, to fall over time as a proportion of the electorate.

²⁰ Since its inception the NILT Survey has consistently underestimated support for Sinn Féin, so it has had a problem with shy republicans.

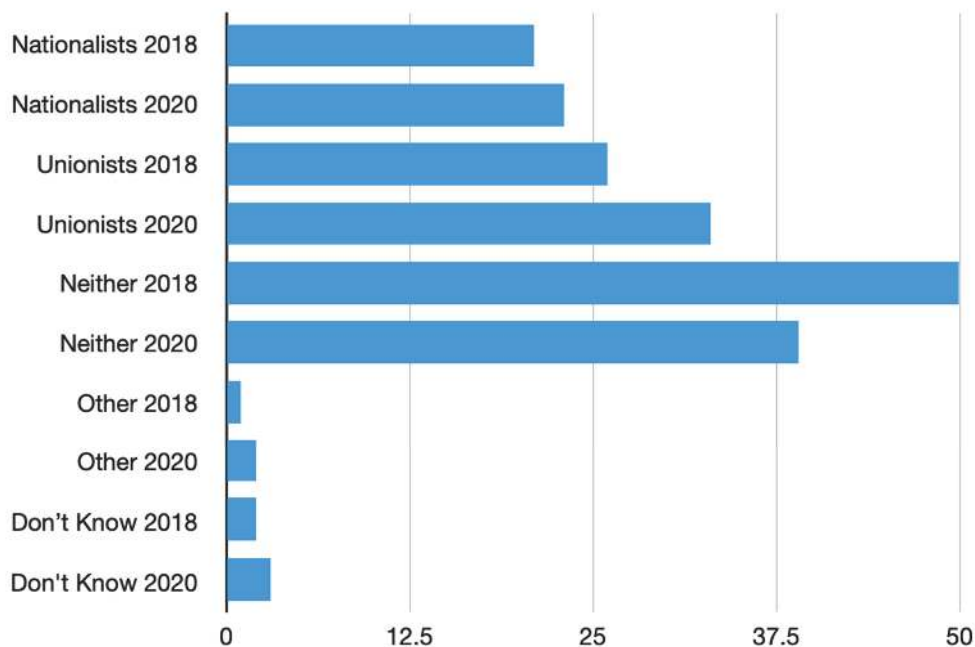


Figure 3. Answers to the question: Generally speaking, do you think of yourself as a unionist, a nationalist or neither? The x axis represents respondents as a percentage of the sample. Source: Northern Ireland Life and Times Survey 2018 and 2020.

Much should be done to offer them opportunities to be heard, to participate in citizens' assemblies or constitutional conventions, to negotiate appropriate securities, accommodations, and rights, and to signpost clear and fair processes governing their individual and collective futures. But realists should not expect any significant shift among those who vote unionist before they have lost in a referendum.

The appropriate target of policy regarding unionists can be summed up in a simple formula known to my professional tribe of political scientists. It is not technical; indeed, it is rather brutal. It is called 'obtaining loser-consent', or, simply 'losers' consent'. The necessary condition of a successful democratic process is that the losers accept the outcome, or, more realistically, that sufficient numbers of the losers accept the outcome, so that it can be implemented. In the marshalling of preparations, of managing reason and emotion, those who favour or who simply expect Irish reunification, must endeavour to ensure, as best they can, that unionists accept that when they have lost in a referendum, that they have lost fairly, under the provisions of the Agreement;

and, in addition, that upon losing, they have not lost everything—their identity, interests, cultural preferences. Their British citizenship rights will be respected in the reunified Ireland. They will be equal citizens and face no discrimination or exclusion—under the protection of European Union law and the European Convention on Human Rights and Fundamental Freedoms—and they may enjoy many other negotiated positive or collective rights.

The unstated ambiguity in the thinking of Ahern, Varadkar and Mallon emerges from this appraisal. Their undeclared target of persuasion is Protestants, not unionists; that is, either self-defined Protestants, or all cultural Protestants, that is, those self-defined by religious belief *and* those of Protestant background and heritage who may be agnostic or atheist. Many, surely, would agree that it would be a tragedy if Irish reunification took place with *no* support at all from cultural Protestants, that is, if reunification was entirely dependent on the votes of cultural Catholics. Yet spelling matters out in this manner should make all informed people realise that such an entirely ‘sectarian’ result is highly improbable. Right now, there are cultural Catholics who are content with the Union, even if they do not identify as unionists. There are also smaller numbers of cultural Protestants who recognise that independent Ireland is now very different to Cosgrave’s or de Valera’s Ireland, and significantly more secularised than Northern Ireland. They carry Irish passports, not entirely instrumentally, support the Irish rugby team, male or female, and they have experienced exiting the European Union as a loss. In short, it is already true that there are some cultural Catholics and cultural Protestants lined up for the Union and for Irish reunification respectively.

Which of these two groups will grow, if either, and at what pace, in what we may optimistically call the post-pandemic world, cannot be known with apodictic certainty. What can be said is that those who want a majority to emerge for Irish reunification have a double task. Namely, to reduce the proportion of cultural Catholics in the north who prefer the Union though persuading them of the merits of Irish reunification, and to increase the number of cultural Protestants who actively prefer Irish reunification as a better option than the current Union. Fortunately for such persuaders, that double task is not contradictory. One of the best ways to facilitate loser’s consent is to use the period immediately ahead to make unification more attractive to ‘the others’, particularly to cultural Protestants. Another is to build a contingent soft-landing for unionists, should they lose in the referendum.

Given Irish history, especially in the north, no one can preclude the recurrence of significant violence whatever action or inaction occurs in the south over the next decade. Many may use the threat of violence by others—not necessarily by themselves, of course—to try to prevent the holding of a referendum, or to block the necessary preliminary planning, or to talk metaphorically of ‘not frightening the horses’. To let such counsel be decisive, however, is precisely to allow peaceful and democratic change to be blocked by fear, when such fear could be reduced by appropriate and open preparation and planning—and persuasion, through provision of actual or contingent constitutional changes. The point of the Agreement was to provide institutional ballast to make violence less tempting to all. All voices were heard, the text was painfully negotiated, and everyone knew that the possibility of a future referendum on reunification sat on the horizon.

Almost a generation later, the referendum is now closer which is all the more reason that thought needs to be given to ensure that the Northern referendum, if and when it happens, occurs under secure, peaceful, and democratic conditions. That not only mandates working the Agreement as best as possible in the decade ahead, but also requires overt and considered preparation for a transparent and fair referendum process *and* for a clear specification of what a united Ireland would be. Centrally, it will require clear arrangements for an orderly transfer of power between the sovereign authorities. It requires, for example, that the Police Service of Northern Ireland becomes progressively the fully reformed, representative and accountable service set out in the Patten Report, so that Catholics are not policed by loyalists and Protestants do not fear being policed by republicans, and instead there is widespread trust in a representative police service. Much more than that of course will be needed and considered in future research in the ARINS project for which this paper is a herald.

THINKING CAREFULLY ABOUT A POSSIBLE FUTURE REFERENDUM

As part of its determination not to infringe formally on UK sovereignty in 1998, at the same time as it recognised that sovereignty for the first time, Ireland left the decision on a reunification referendum with the secretary of state for Northern Ireland, who is obliged to hold such a referendum on the

basis of objective evidence, e.g., a majority resolution of the Northern Ireland Assembly, if it is functioning, or a consistent run of credible public opinion surveys. In principle, however, that referendum could be initiated in the north without southern input, notice, or preparation. Such a unilateral manoeuvre would be most unwise, but it has to be catered for in southern planning. Three steps are obvious.

Step 1. Rejuvenating the B-IIGC

Through a myopic decision, perhaps done in good faith to appease the DUP, in the last decade Irish governments allowed the British-Irish Intergovernmental Conference (B-IIGC), the key guardianship body of the Agreement, to be mothballed. That folly was apparent before and after the UK's vote to leave the EU in 2016. Any Irish government, of whatever character, must breathe life into this body, and not just to preserve the Agreement in all its parts—of which the B-IIGC is one. The Conference should handle non-protocol questions related to the UK's withdrawal from the EU. It is the obvious vehicle for rational deliberation and planning on future possibilities, long before a secretary of state calls a referendum. No other formal forum exists in which the two sovereign executives, and their officials, can discuss and contingently plan the modalities of the potential transfer of power—such as evaluating assets and liabilities, guaranteeing citizenship and residency rights, decommissioning or handing over military, naval and air bases, clarifying maritime borders, and preparing compatible legislation to give effect to a positive vote for reunification in their respective legislatures. These matters can only be effectively addressed by the sovereign governments. Such planning does not mean that either government has to presume just one outcome of a future referendum: both have to plan for either outcome. They can also jointly roll out projects and policies that should happen anyway, whether there is reunification or not—such as full motorways between Derry/Londonderry and Dublin, and between Belfast and Dublin; all-island public health planning; the strategic coordination of tertiary education; and ensuring representative, accountable, and effectively co-operative police services.

Dublin governments should seek to be consulted on all aspects of non-devolved functions affecting Northern Ireland, *and* on formally devolved functions if the executive and assembly fail to function or are suspended. Nine paragraphs of the Agreement were devoted to the B-IIGC. The first specifies its establishment under a new British-Irish Agreement 'dealing with

the totality of relationships'.²¹ The possible agenda of the B-IIGC, when the Northern Assembly is functioning, is therefore the totality of British-Irish relationships *minus* the *exclusively* devolved powers of the Assembly. The *all-island* and *cross-border aspects* of rights, justice, prisons, and policing are part of the remit of the B-IIGC; the devolution of functions in these domains does not remove these matters from the conference's remit. The B-IIGC is obliged to keep under review the international treaty and the machinery and institutions 'established under it', and should be expected to play an active role in handling the transfer of powers that would accompany a decision on both sides of the border to reunify Ireland. It is also an appropriate forum in which the secretary of state for Northern Ireland may listen to discussion on whether a referendum is warranted.

Step 2. Clarifying what a united Ireland will mean

Ill-judged and ill-prepared referendums can be disastrous, as we have seen in 2016 in the UK, and elsewhere. The UK's decision to hold a referendum on membership of the European Union with an unclarified substantive question, and inadequate procedural protections, produced an institutional and policy mess. The most important lesson for Ireland is to plan to ensure that any referendum on reunification, if and when held in the north, meets the best standards of preparation, procedural propriety, *and*, above all, clarity. The south, to remind a phrase, cannot stand idly until the referendum is triggered by a secretary of state appointed by Boris Johnson's successor within the Conservative party, or by Sir Keir Starmer at the head of a Labour government. Northern Irish voters will need to know what they are voting for and against. The choice between maintaining the Union or a united Ireland is insufficiently clear on its own, even if this is the choice that may be specified on the referendum ballot. According to existing UK law, the independent Electoral Commission of the UK must ratify any question or questions in any referendum. That is another reason why the B-IIGC has to be constantly active. It would be bizarre if the two governments failed to use this forum for referendum preparation, e.g., to finalise the wording of the question, and to address such matters as whether the responses available will be Yes or No, or,

²¹ The *standing* B-IIGC was to 'subsume' both the Anglo-Irish Intergovernmental Council and the Intergovernmental Conference established under the 1985 Agreement, i.e., to 'encompass' or 'include' in standard dictionary definitions. Given that the Inter-governmental Conference of the 1985 Agreement was elsewhere eliminated, the 'subsumption' was of that conference.

for example, Remain in the United Kingdom or Reunify with Ireland within the European Union.²²

Moreover, it is the independent *duty* of sovereign Ireland to ensure that if a referendum is held Northerners will choose between two well-defined alternatives, A and B, and not as in the UK's recent referendum between A (the status quo) and not-A (where not-A was allowed to mean every possible mode of UK existence outside the EU). It will be the duty of the government, political parties and civil society, interacting to the maximum feasible extent with their Northern—and unionist—counterparts, to define B (a united Ireland) properly in advance. This paper deliberately takes no position here on exactly what B should be, but I maintain that ensuring that it is well-defined can occur in two ways: *either* by the careful elaboration of a specific *model*, *or* instead by a well-specified *process* with judicial securities. The former seems more realistic.

The model approach

If the south develops and publicises its preferred territorial model—unitary, federal, or confederal—then Northerners will know the constitutional and institutional structures and financing arrangements into which they will be incorporated. These territorial models have many potential variations, and it is not my purpose here to advance one in particular. Rather it is to recommend that detailed deliberation through citizens' assemblies, forums and ministerial planning commence shortly to clarify what will be on offer in the referendum. That in a nutshell is the *model approach*. If the model route is chosen, then four models are likely candidates for the south to offer the north when it votes. Two are variants on a unitary state; the third and fourth are federation or confederation. The working assumption would be that one of these four models will be solemnly pledged by the Dublin government, after a decade or less of consultation and negotiations within the south, and steady engagement with Northern representatives of political parties and civil society, with extensive use of deliberative and consultative methods to test Northern opinion, including possible privately sponsored citizens' assemblies.²³

The first model may be called, to spell out its implications, the **Full Transfer of the Good Friday Agreement**. Northern Ireland would continue to exist,

²² UK legislation could be passed, after consultation in the B-IIGC, to exclude the Electoral Commission from having any role in the question-setting; after all, it did not exist when the Good Friday Agreement was made and ratified. Good inter-governmental co-operation should render such a step unnecessary.

²³ Here I draw on materials in O'Leary, *A treatise on Northern Ireland: consociation and confederation*.

but not as a devolved entity inside the United Kingdom. Rather it would have a devolved assembly inside the now reunited Ireland, consistent with Article 15.2.2 of Ireland's Constitution, with any necessary constitutional amendments to empower its executive. Under this Full Transfer model, *mutatis mutandis*, the full package of institutional arrangements agreed on 10 April 1998, as subsequently modified, would transfer into a united Ireland, including both the Northern Ireland Assembly and its power-sharing Executive. There would no longer be a border across the island that marked a sovereign demarcation, but the border would retain legal and institutional significance: it would still matter because the Northern Assembly would exercise authority inside Northern Ireland for those powers for which it had constitutionally delegated responsibility. The all-Ireland Oireachtas and the Government would exercise powers in Northern Ireland—roughly, those currently exercised over Northern Ireland by the Westminster Parliament and UK cabinet. These arrangements could transfer without insuperable complication into a united Ireland, recognised by the Oireachtas, the Irish Parliament. The Northern Assembly would perform its existing functions, and its existing statute book would remain in place, though it would not cover areas where the Irish Constitution applies. Roughly speaking, these constitutional domains are where British authority now applies notably, the currency, fiscal policy, the head of state, foreign policy, and external relations. Though Seamus Mallon recommended a 'willingness on the part of nationalism to put forward some arrangement more congenial to unionists than a unitary state', his memoir unconscionably failed to recognise that one of his suggested arrangements, namely, constitutionally protected autonomy within a decentralised unitary state, is fully compatible with the Agreement, and accommodates many Northern differences.

Nevertheless, with this model several tricky questions have to be addressed. What is called the 'West Lothian question' in Great Britain would arise on a much bigger scale.²⁴ As initially designed in the UK's devolutionary package of the late 1990s, Scottish MPs voted in the Westminster Parliament on laws that affected England and Wales, and indeed, Northern Ireland, but English, Welsh, or Northern Irish MPs did not vote on matters devolved to the Scottish Parliament. Applying a similar arrangement will be a much bigger problem in this version of a united Ireland, because Northern Ireland would provide roughly one third of the population of a unified Ireland, and therefore roughly

²⁴ *BBC Newsround*, 'What is the West Lothian question?', 25 September 2014, available at: <https://www.bbc.co.uk/newsround/29355003> (16 November 2020).

one third of the deputies in Dáil Éireann. Proposals to address that issue would have to be known before the referendum. Would there be a secretary of state for Northern Ireland, appointed by the Dublin government, and could he or she be a Northerner, and would southerners argue that the taoiseach would have to be a southerner under this model of asymmetric devolution? What would happen if a majority party within one of the designated communities collapsed the executive? Would the Northern Assembly have the right to vary taxation from that elsewhere in Ireland, and the right to issue bonds? These are merely the opening questions. For example, how would a government function if it did not have both a parliamentary all-island majority, and a majority in the North?

The second model we may call an **Integrated Ireland**; it resembles the traditional model of a united Ireland held by many Northern nationalists and Irish republicans, namely, 'a 32-county unitary Irish Republic'. Under this model, Northern Ireland would be abolished as a political entity, but key provisions from the Good Friday Agreement would be carried over. The Irish government would be legally obliged to conduct itself impartially across religions, nationalities and ethnicities; the same rights would have to be protected as previously pledged; and there would have to be cross-border institutional relationships between all these islands. The Irish state's fundamental rights provisions would apply across the island, as modified by the European Convention on Human Rights and by European Union law. That would be the minimum. Other formal or informal securities could be offered. For example, it would be possible, though controversial, to build in legal provisions requiring a minimum of five Northerners and three persons of cultural Protestant formation in every fifteen-person Irish cabinet, either transitionally or permanently. A credible representative judiciary and police service would also have to be proposed.

Tricky questions would immediately arise for this model as well. Would Northern local government be remodelled on the Southern pattern, restoring city and county government as appropriate, or would the existing arrangements stay to minimise disruption? Would local governments, however organised, have their powers enhanced? Could provision be made, transitionally, or permanently, for designated minorities in the Oireachtas to trigger qualified majority votes on defined legislative subjects, regulated by the Speaker and so on.

Let me repeat some results from deliberative polling carried out with John Garry and others of Queen's University Belfast, reported in *Irish Political*

Studies and *Regional Studies*.²⁵ One might expect that, obliged to choose, Ulster Protestants would prefer the full transferred Good Friday Agreement model to an integrated Ireland. That is what we expected before we conducted an experiment checking immediate preferences and later outlining the possibilities in considerable depth. In the course of this experiment significant numbers of Ulster Protestants changed their minds. They reflected that power-sharing had not worked smoothly within Northern Ireland. Others deemed keeping the existing power-sharing institutions unappealing, because under them unionists would be a minority locally governed by (albeit with) a Northern nationalist majority. Some may have calculated that they would have better prospects of influence as a large minority (one sixth) perhaps unified behind a major political party or a coalition of parties in a centralised Irish unitary state; that way they could be part of reshaping all of Ireland. One cannot safely extrapolate from these experimental results to predict preference-formation over the next decade. Rather the crucial point is that people's preferences are shaped by institutional opportunities, and when invited to reflect on different possible futures numerous citizens are capable of shifting from entrenched positions. There is an entire preparatory research program here: what protections would Protestants, losing unionists, and British citizens want to see within a continuing Northern Ireland within Ireland, or in a reunified and integrated Ireland?

The third model would create the **Federation of Ireland**. The immediate question would be: what type of federation would it be? One variation would reconstitute the four historic provinces of Ireland—Leinster, Munster, Connaught and Ulster—with the all-island federal government having key exclusive functions, perhaps headquartered outside Dublin. Alternatively, instead of the four historic provinces, a second variation would create new city-regions as federal entities. Each region would have at least one big city with its surrounding suburbs and countryside. In one subvariant, Northern Ireland would remain as a large city-region with Belfast as its capital, organised with the transfer of the Good Friday Agreement institutions; in another, Northern Ireland, along with the south, would be decomposed into several

²⁵ John Garry, Brendan O'Leary, John Coakley, James Pow and Lisa Whitten, 'Public attitudes to different possible models of a United Ireland: evidence from a Citizens' Assembly in Northern Ireland', *Irish Political Studies* 35 (3) (2020), doi: <https://doi.org/10.1080/07907184.2020.1816379>; John Garry, Brendan O'Leary, Kevin McNicholl, and James Pow, 'The future of Northern Ireland: border anxieties and support for Irish reunification under varieties of UKEXIT', *Regional Studies*, forthcoming special issue: 'The multi-level dynamics of UK exit from the EU' (2020), doi: <https://doi.org/10.1080/00343404.2020.1759796>.

city-regions. Lastly, a two-unit federation could be created, with Northern Ireland and the existing republic as the constituent units. I would not recommend the latter because of the poor track-record of two-unit federations, which in this case would be magnified because one unit would be three times larger than the other in population, but the decision is not mine to make. All federal designs would necessarily differ from the models of the full transfer of the Agreement and an integrated Ireland because sovereignty would be shared between the federal government and the regions (or provinces) in a new constitution. Crucial here would be the allocation of powers between the federal government and the new regional governments.

The fourth and last, but likely least feasible, model of reunification that might be proposed in the referendums is **The Confederation of Ireland and Northern Ireland**. A confederation is a Union of member states that delegate their revocable sovereignty to shared confederal institutions, as with the EU. The member states retain the right of secession, so either Northern Ireland or Ireland could secede. Confederation would imply the formation of a new political system in which the two member states are joined in a common state, jointly establishing a confederal government with delegated authority over them for specific functions. In Ireland there has been (limited) discussion of the creation of an all-island confederation based on two states, a new sovereign Northern Ireland state, and the existing Republic of Ireland. These two states, possibly building upon and expanding the existing North-South Ministerial Council, would have to delegate power and authority to bodies with all-island jurisdiction, by treaty. Northern Ireland would retain the full provisions of the Good Friday Agreement, with the authority to modify its institutions in accordance with existing norms.

Though the four models briefly sketched here are the obvious templates to start or complete Irish reunification I would expect neither federation nor confederation to be formally offered by the south before the Northern referendum—except in a significantly future tense through a constitutional convention.

Pragmatic, not just constitutional reasons, explain why a federal Ireland, however desirable, would be unlikely to materialise as an immediate proposal. Though it would meet Mallon's call for generosity, currently there is little push to recreate historic Ulster, namely, a nine-county entity. Most Northern Irish Protestants may safely be expected to prefer the six-county Northern Ireland to restoring the Ulster that their precursors chose to relinquish. But the key question would be how would one reconstruct the south to create comparable federal units, given that two-unit federations have a

very poor track-record? How would southern opinion be taken or expressed? What would Donegal's preference be? (Almost certainly to be in the same federal unit as Derry). In particular, how could one create new units before being certain that reunification is to occur?

In addition, voluntary federations usually evolve from pre-existing institutions of comparable status 'coming together', or through a decision by an existing state to federalise 'to hold together'. But the first condition does not apply to this case, and the second could only apply *after* Ireland unifies. If there is a reunification referendum, and if there is a functioning executive in Northern Ireland, it will represent the institutional interests, identities, and ideas, of a devolved unit, and it would be negotiating with the sovereign government of Ireland, in which there has been no historical disposition toward federation, and no experience of devolution. Radically restructuring the state through federalising before reunification is secured is simply unlikely: who would argue for extensively disrupting the south for an outcome that may be defeated in a referendum in the North? It is therefore reasonable to suggest that federation is most likely to materialise only after an all-island constitutional convention convened for that purpose. These remarks are not intended to close off discussion on a federation. Some successful small countries with generally good habits of co-existence have federations—Switzerland has 26 cantons; and Belgium has three territorial and three community governments. But if the south, collectively, proposes a federation, then the division of powers, and the process of federalisation, have to be considered in advance, and a decision made on whether Northern Ireland will be a federal unit, and if so, what the other units will be; or, in the alternative, whether there will be multiple new units across the entire island—if so, detailed thought will have to be given to how they are chosen, and to their powers.

Confederation, by contrast, may be judged strictly incompatible with the Agreement, at least immediately. That is because a proper confederation would involve a sovereign independent Northern Ireland state joining in a treaty of confederation with the sovereign and existing Republic of Ireland. Neither Irish nor British governments have ever recognised Northern Ireland's right to independence; it is not envisaged by any construal of the Agreement; and there is little current demand for it. Unless the Irish government were to declare it so, confederation is not an obvious 'united Ireland', given that the first step would involve Ireland's recognition of a sovereign and independent Northern Ireland. Indeed, this option may conceivably violate Ireland's

Constitution, because it may not be compatible with Article 3.²⁶ If Ireland wishes to propose a confederation with Northern Ireland then that means recognising that Northern Ireland would be granted the status of a sovereign state with the right of independence, including the right to leave the EU upon joining the confederation (but presumably not the right to refuse to join the EU upon confederation), and the right to secede from a united Ireland. Since joining the EU is likely to be part of the attraction of voting for reunification it would seem far easier for the north to join a unitary state or a federation rather than become independent and seek separate admission to the EU.

Whichever model the south deemed appropriate to offer before the Northern referendum that choice would have to be extensively researched, deliberated, and scrutinised, tested by the fire of public opinion and public reflection—with as much engagement of British, Protestant, and Unionist people in the north as possible. The prospects of whatever is chosen would be brightest, of course, if a cross-party consensus was built around the model that was to be offered. Minimally, transitional legislative provisions and contingent constitutional amendments, along with a transition fund, would have to be prepared for the chosen model. In short, what is required now, well before any possible Northern referendum, is to clarify the model that will eventually be posed, and to conduct the work on clarifying the benefits and costs of each model, availing of domestic and international expertise, and constantly to update the initial estimations.

The process approach

If instead a governmental decision is made that model-choice should be postponed until after reunification then no less preparatory work will have to be done by the south, both in justifying that decision, and in preparing the ground for a constitutional convention. The *process approach*, by contrast to the *model approach*, would postpone the precise specification of which model of a united Ireland will emerge. It would start from the premise that the south should not choose for the north, in the way in which the Federal Republic of Germany

²⁶ Article 3.1, 'It is the firm will of the Irish nation, in harmony and friendship, to unite all the people who share the territory of the island of Ireland, in all the diversity of their identities and traditions, recognising that a united Ireland shall be brought about only by peaceful means with the consent of a majority of the people, democratically expressed, in both jurisdictions in the island. Until then, the laws enacted by the Parliament established by this Constitution shall have the like area and extent of application as the laws enacted by the Parliament that existed immediately before the coming into operation of this Constitution' (*Bunreacht na hÉireann* (Constitution of Ireland, as amended), (Dublin, 1937).

chose for the former DDR. Rather, all of Ireland should choose together. This approach would argue that after the north votes to reunify with the south there would have to be a democratic, all-island, constitutional convention, elected by proportional representation, convened to propose a brand new constitution, or to propose amendments to the existing Constitution (including its Preface), which would remain in force, pending renewal or replacement. The process approach, in short, postpones the pattern of a united Ireland—unitary, federal or confederal—until Northerners are in a reunified Ireland.

The key difficulty of the process approach is that Northerners, whether unionist, nationalist, or other, will not know the outcome of the constitutional convention, though that is also true of southerners. One correspondent has described the process approach as ‘like voting for an engine without seeing the car.’ Securities or guarantees would have to be given before the referendum about how the convention would work. The convention, for these reasons, would have to be obliged to work under a set of principles, and to operate under the constraint of guaranteeing that a set of rights and affirmative governmental duties will be in the final constitution drafted by the convention. These provisions will have to be published well in advance by the south, as its solemn pledges, before the Northern referendum. All Northerners, unionist, nationalist and other, will then know their minimal future rights and expectations. It is possible to provide a workable mechanism to make these commitments credible, for example, a variation on that used in the transition from apartheid in South Africa.²⁷ Namely, the judiciary, comprised of a panel of the Irish Supreme Court, and an equally-sized panel of the judges from the Northern Ireland Court of Appeal, would be tasked to ensure that any draft constitution is compliant with the principles and rights pledged by the south before the referendum. If they do not approve the text then it will not go before the people for ratification until it has been suitably amended. In the process approach, there would have to be transitional arrangements under the existing constitution: the government would have to be recomposed, and the Oireachtas would have to be provisionally expanded, to ensure proportionate Northern representation in both institutions. That in a larger nutshell is how the process approach might work. To preserve constitutional order, Ireland’s Constitution would remain as the default until replaced.

²⁷ Samuel Isaacharoff, ‘Courts, constitutions and the limits of majoritarianism’, in Joanne McEvoy and Brendan O’Leary (eds), *Power-sharing in deeply divided places* (Philadelphia, 2013), 214–30.

Step 3. Open not fearful contingent planning is required

It is time for a genuine debate in the south about what form of Irish reunification should and would be on offer, as and when such a referendum is held in the north. That counsel is not just correct for citizens of the Republic, whether in the south or the north; it is the minimal courtesy owed to potential future citizens among northern unionists and others. To debate and prepare is not to prejudge the outcome, still less is to harass prospective citizens. Rather it is intended to stop chaotic fast-paced crisis-decision-making at a point unknown, and to allay fears in advance as best as possible. Debate must occur and endure even if unionist politicians, for coherent strategic and tactical reasons, decide not to debate possibilities or attend forums, until, from their perspective, an adverse referendum outcome occurs. Yet every effort must be made to ensure that they cannot say they were never consulted, nor given an opportunity to comment on plans, White Papers, contingent legislation or contingent (or actual) constitutional amendments. Southern politicians and civil society need to consider in depth what changes, if any, they would like to make to the Constitution *either* in advance, e.g., to encompass the identities and interests of new minorities, including a large British minority, *or* that would go into effect contingent upon reunification.

It is essential to prepare detailed and credible answers to questions that will inevitably arise in a referendum campaign. What will the financing of the relevant institutional arrangements look like? Will southern or Northern health practices prevail? How will education—primary, secondary, and tertiary—be organised? Will there be an attempt to fuse the best of existing practices, or to keep Northern autonomy—if so, in what domains? The same questions arise over police and civil services. There is a case in principle for a ‘mix and match approach’ to reunification in which the best of northern and southern practices and policies would go into a reunited Ireland. The UK is obliged to pay the pensions of those who have contributed to public sector pensions, but what will replace the pensions for those in-career? Proper answers to these questions can only be provided through planning, through detailed and credible sectoral analysis and research, accompanied or followed by deliberative forums and assemblies.

The answers to all these and more symbolic questions—including those internally focused on flags, emblems, anthems, and parades, and those externally focused on international alliances—cannot and should not come from one pen or voice, or from hasty decision-making by a coalition cabinet just before the referendum is called, when short-term party interests could be

too much to the fore. Rather, what Ireland requires is a developed national reunification strategic plan that is as all-party as possible. Not a rigid plan, with a single critical path, or a *diktat*, but a plan based on large-scale and intensive consultation and research, and one capable of surviving scrutiny from friendly and ferocious fire. A strategic plan that will be published as a credible text, one that can undergo regular review and revision, but that will define a united Ireland—so that it will no longer be an abstraction.

Many believe that there is already a parallel consent requirement for Irish reunification, i.e., that a majority vote is required in referendums in both jurisdictions, a concurrent majority. Some lawyers disagree. They point out that is not explicitly constitutionally obligated by Bunreacht na hÉireann. It is, however, a very good idea to have a matching (but not simultaneous) referendum, just because of the momentous changes involved in reunification, which may require numerous constitutional amendments, or the full replacement of the existing constitution. That would be best accomplished through a double mandate from the north and the south.

The Irish Constitution states that

It is the firm will of the Irish Nation, in harmony and friendship, to unite all the people who share the territory of the island of Ireland, in all the diversity of their identities and traditions, recognizing that a united Ireland shall be brought about only by peaceful means with the consent of a majority of the people, democratically expressed, in both jurisdictions in the island.²⁸

There is a positive obligation here to unite all the people, subject to important constraints, notably respect for ‘all of the’ diversity of identities and traditions. There is also a positive obligation that a united Ireland must materialise through peaceful means, namely, that set out in the Agreement, and it requires the consent of a majority in both the north and south (though the article is silent on the requirement for a matching southern referendum or referendums, a majority of the people is most easily expressed through a referendum). Arguably it is a current obligation to meet these existing solemn commitments, in considered consultation with the full array of Northern opinion, unionist, nationalist, and other, knowing that engagement will be resisted in some quarters right up until the point where a reunification referendum is won in the north.

²⁸ *Bunreacht na hÉireann*, Article 3.1.

Democratic expression in the south on reunification could, in principle, occur through enabling legislation by the Oireachtas, but most would agree a matching southern referendum is required, though it need not take place on the same date as the Northern referendum. Whatever one's judgment on these matters it surely needs to be clarified by the government with great legal care that there will be a southern referendum, or referendums—or not; and exactly when one (or many) should take place after the Northern referendum. There is, in places, a right to silence, but, going forth, silence on these subjects is not sensible.

Those who do not want reunification to happen, north and south, are of course entirely free to say so, and to campaign for that option as vigorously as they wish—peacefully. It is far better that their objections are known and replied to and accommodated as justly as possible. It would be best if politicians and public opinion in the south did not hide for another five years under the *principle of unripe time*, namely, 'that people should not do at the present moment what they think right at that moment, because the moment at which they think it right has not yet arrived'.²⁹

A ministry with a mandate to prepare for the possibility of national reunification should be legislated, given the scale of planning required, and to provide continuity across changing Irish governments, and because, lest we forget, the Agreement allows for a reunification referendum seven years later if there is a No vote on the first occasion. Irish reunification is not a matter exclusively for the Department of Foreign Affairs or to be left in a sub-unit of the taoiseach's department devoted to all-island matters—though that is a welcome upgrade from the status quo. We can and should do better. The best calibre ambitious civil servants, with profiles from across numerous departments, are required. They need to be resourced to commission fundamental research from outside their ranks. Irish reunification, if it happens, will cut across every dimension of Irish public life and nothing short of a ministry, in my view, is necessary to create the right kind of coordinated planning for a change of this order.³⁰ A Brexit department was mooted and rejected recently, but reunification is of an order of magnitude greater in

²⁹ Francis Macdonald Cornford, *Microcosmographia academica* (Cambridge, 1993 [first published 1908]), 29.

³⁰ My exposure to this idea first came through supervising the PhD thesis of Miryang Youn, *Women in two nations and four states: a comparative study of the impact of political regimes and culture on the status of women in the two Koreas and the two Germanies, 1945–89* (PhD thesis, The London School of Economics and Political Science, 1997). Dr Youn has subsequently become the head of the women's unit at the Korean Ministry of National Reunification.

significance for all of Ireland. The ideal ministry would not, however, be a traditional one, at some remove from the public. Rather, it would work to include citizens in engagements over the choice of a model or a process; to support research, deliberation and citizens' assemblies. It would be tasked with coordinating the national strategic plan, making operational the provisions in the national strategic plan for reunification—best made through successive citizens' assemblies or a preparatory constitutional convention.

The merits of successive citizens' assemblies, or of a preparatory constitutional convention, to deliberate at length over different futures, should be the subject of uninhibited public discussion. Clarity is required on who has the right to vote in the referendums, in the north and south respectively. Detailed consideration of the proper rules and best practices on campaign conduct, financing, and media regulation is imperative. The ideal aim, never capable of full realisation, should be to accomplish a common Irish deliberative space, north and south, both actual and virtual, free from all external impediment, including Russian bots and other forms of disinformation. Ireland had a New Ireland Forum in 1984. It hosted the Forum for Peace and Reconciliation in 1995—in which 'others', not just nationalists, participated. It is now time to consider a Forum on Irish Futures, all-party, i.e. with all political parties committed to democratic and peaceful means, but not confined to political parties.

No prediction is being made here that a referendum on reunification is immediately imminent, but anyone whose life expectancy has them alive in 2026–34 will almost certainly see one, provided they endure. Those keen on such a referendum need to be cautious. If they want a positive outcome for reunification then they will need to build support for it, north *and* south. It is in their interests to have broad rather than narrow support in both jurisdictions. Time is on their side, but by impatient passion, they might discourage those frightened of chaos or civil war, or of imagined (and real) costs. The south, by virtue of the Agreement, as well as the North, has a collective right to say No to reunification, by a simple majority. But the south also has a duty to prepare properly for a Yes, and to learn and know what that Yes will mean. It is incumbent upon the government and the Oireachtas to begin preparations now, admittedly much earlier than some expected before the summer of 2016 or the spring of 2020. The horrors of the pandemic, and its economic fall-out, are common global difficulties of first-order concern. They should not be allowed to obscure the imperative to prepare for a foreseeable outcome and referendum(s) that will be galvanising and of momentous significance.

Read two responses to this article,
'The Hermeneutics of the Good Friday Agreement'
by Christopher McCrudden,
<https://doi.org/10.3318/ISIA.2021.32b.2>
and 'On the Sanctity of Borders'
by Fionnuala Ní Aoláin,
<https://doi.org/10.3318/ISIA.2021.32b.3>
and the reply by the author,
<https://doi.org/10.3318/ISIA.2021.32b.4>