



PROJECT MUSE®

Beyond the Path of Least Resistance: Constructing a Referendum Franchise that Reflects the People of Northern Ireland: A Response to ‘The Franchise in Irish Unification Referendums’ by Christopher McCrudden, Oran Doyle and David Kenny

C.R.G. Murray

Irish Studies in International Affairs, Volume 32, Number 2, 2021, pp. 221-224 (Article)

Published by Royal Irish Academy



➔ For additional information about this article

<https://muse.jhu.edu/article/810111/summary>

Beyond the Path of Least Resistance: Constructing a Referendum Franchise that Reflects the People of Northern Ireland

A RESPONSE TO ‘THE FRANCHISE IN IRISH UNIFICATION
REFERENDUMS’ BY CHRISTOPHER MCCRUDDEN, ORAN
DOYLE AND DAVID KENNY

C.R.G. Murray

Newcastle Law School, Newcastle University

In their recent ARINS paper for *Irish Studies in International Affairs*, Christopher McCrudden, Oran Doyle and David Kenny explore the important question of whether or not a special franchise should be put in place for a referendum on the (re)unification of Ireland held in Northern Ireland. Such

Author’s email: colin.murray@newcastle.ac.uk

doi: <https://doi.org/10.3318/isia.2021.32b.21>

Irish Studies in International Affairs, Vol. 32, Issue 2, 221–224, *Analysing and Researching Ireland, North and South* © 2021 The Author(s). This is an open access article licensed under a Creative Commons Attribution-NonCommercial 4.0 International License.



a special franchise will inevitably be compared to the conduct of the Scottish Independence referendum in 2014 (and any future Scottish Independence referendum). It is also, however, a more complex proposition because such a referendum will need to be considered in terms of its direct comparability to a concurrent referendum on (re)unification held in Ireland.

As McCrudden, Doyle and Kenny identify, these impetuses pull in different directions, and as a result, as they state, ‘the most sensible approach to take to the franchise issue is likely to be to adopt a Venice-informed presumption against departure from the existing franchise’. As constitutional lawyers, it is always reassuring to clothe arguments as to the appropriate franchise for a referendum in the Venice Commission’s Code of Good Practice on Referendums, but its soft-law terms are unlikely to stand up against the expectations around special franchise arrangements in the likely context of a (re)unification referendum. Just because discussion of a possible referendum is currently taking place without the involvement of Northern Ireland’s unionist parties does not mean that the franchise issue will not become increasingly contested.

The conclusion of the Anglo-Irish Agreement and Brexit’s Ireland/Northern Ireland Protocol illustrate that unionist parties can rapidly transition from refusing to engage with ideas that do not align with their account of Northern Ireland’s constitutional status where there is perceived to be no benefit in engagement, to hyper-engaged obstructionism. Political unionism’s current studied lack of engagement in a (re)unification referendum is not accidental. The main unionist parties want to do nothing to lend credibility to the possibility of such a vote. Disengagement should not be confused with disinterest.

Successive Conservative secretaries of state for Northern Ireland have made it abundantly clear that they would require overwhelming evidence of majority support in Northern Ireland before they would regard the UK government as being under a duty to conduct such a referendum. Even if opinion polls or election results suggested a shift in public opinion, the UK government has given no indication of what evidence it would regard as definitive. The Northern Ireland parties, however, also know that the secretary of state has the power to initiate the process separate from the legal duty to do so, and that the UK government’s calculus around a vote could shift (especially as influential pro-Brexit commentators increasingly form conjecture about the benefits of Northern Ireland ceasing to be part of the UK for the purity of Brexit).

In such an eventuality, a protracted contest is likely to emerge over the legitimacy of the arrangements for the referendum. The franchise for a (re)unification referendum is going to be the subject of intense horse trading

dominated by the potential threat of boycotts or disruption of the process. Nationalist parties, with one eye to demographics in Northern Ireland, are likely to see the same benefits the Scottish National Party saw in enfranchising 16- and 17-year olds for the purposes of the 2014 independence referendum. And in response, with a definition of the people of Northern Ireland being included in Annex 2, some unionists are likely to view the exclusions it would entail as making it an attractive basis for the franchise.

Given that prospect, Aoife O'Donoghue and I assessed the application of the definition of the people of Northern Ireland for citizenship purposes to the issue of a referendum franchise. It was not our intention to suggest that Annex 2 of the 1998 Agreement provided the basis for a vote; indeed we spent several pages of the article exploring the absurdities that would arise if it was used in this way.¹ It is nonetheless necessary to flag those absurdities, because as soon as a special franchise is mooted for a referendum on (re)unification, there will likely be efforts to suggest that Annex 2 should be applied not only to determine citizenship entitlements but also the franchise for a referendum because of the exclusions that it enables.

None of which is to depart from McCrudden, Doyle and Kenny's analysis on Annex 2, but rather more is needed than simply saying that the normal rules of interpretation would make its use for the franchise illogical. Its absurdities must be manifest for all to see before it will be taken off the table in the run into a referendum. But McCrudden, Doyle and Kenny go further in ultimately coming down against any special franchise. In a context in which elected politicians talk openly of 'guerrilla warfare' against the Ireland/Northern Ireland Protocol,² all that is needed is for some within a deeply divided society to promote an account that the (re)unification process cannot undermine the gains of the peace process.

Amid such difficulties, there is an obvious attractiveness to running a (re)unification referendum in Northern Ireland on the basis of the existing Assembly franchise. But this is perhaps a counsel of despair. After all, the Northern Ireland Assembly has not been trusted with defining its own franchise rules, as the Scottish parliament and the Welsh are able to do under the Scotland Act 2016 and Wales Act 2017, because of the memory of franchise manipulations in the era of the Northern Ireland parliament and a consequent refusal to trust the current Assembly with comparable competences.

¹ Colin Murray and Aoife O'Donoghue, 'Life after Brexit: operationalising the Belfast/Good Friday Agreement's principle of consent', *Dublin University Law Journal* 42 (1) (2019), 147–90: 182–84.

² Brian Hutton, 'DUP declares "guerrilla warfare" on Northern Ireland Protocol' *Irish Times*, 28 February 2021. Available at: <https://www.irishtimes.com/news/ireland/irish-news/dup-declares-guerrilla-warfare-on-northern-ireland-protocol-1.4497441> (2 April 2021).

Accepting the existing Assembly franchise might therefore be advanced as a realistic option but, freighted with such baggage, it is hardly an auspicious start to the referendum process. Northern Ireland's elected representatives deserve at least an opportunity to dispel this account. The secretary of state's first course of action, ahead of the duty to call a referendum being triggered, should be to request that the Northern Ireland Assembly debate and vote on a special franchise.

McCrudden, Doyle and Kenny acknowledge this possibility, but set it aside, possibly because they foresee the potential for such a process to collapse into acrimony. It would create an opportunity for opposition for a vote to be voiced, but that should be uncontroversial within a democratic governance order. It need not, however, facilitate naked obstructionism; a time-limited exercise could take place as part of the necessary process of preparing the people of Northern Ireland for a vote. In this short response I set to one side the issue of the consequences of such a development for alignment of franchises for the concurrent referendums across both jurisdictions in Ireland.

The principle of consent gives the people of Northern Ireland the ability to recast or reaffirm their constitutional order. Simply preserving the Assembly franchise, however, excludes foreign nationals resident in Northern Ireland, 16- and 17-year olds and all prisoners serving sentences from the vote. Imposing the existing franchise by fiat from London, with all of these attendant exclusions, is a singularly un-transformational start to a process which will redefine the island of Ireland, irrespective of the outcome. When some amongst these groups will be able to vote in a future independence referendum in Scotland run on the basis of the Scottish Parliament franchise, the Northern Ireland Assembly should be able to give active consideration as to whether similar rules should apply to a (re)unification referendum. If the Assembly chooses not to act, at least these groups will not have been excluded from this momentous decision over the island's future without meaningful consideration.

Read the article by Christopher McCrudden,
Oran Doyle and David Kenny
'The Franchise in Irish Unification Referendums',
<https://doi.org/10.3318/isia.2021.32b.18>