**Dissonant Referendum Design and Turmoil in Representation**

The fruit of a referendum should be political clarity.[[1]](#footnote-1) The people have spoken; the state will act in accordance with their wishes. Yet the Brexit referendum had the opposite effect. After a majority of the UK electorate who voted in the referendum indicated a preference to leave rather than remain in the European Union, the representative government fell into divisive conflict over what policy should be adopted as a response to the expression of popular will. This is the *antithesis* of the clarity that a referendum should produce.

Why has this happened? This Essay argues that, beyond the political and social complexities of Brexit, the current instability can be traced to the humble realities of referendum question design. The referendum pitted a concrete proposal with clear legal consequences (Remain) against a question of principle with no explicit indication of subsequent government action (Leave). In doing so, the Brexit referendum deviated from well-established principles of referendum design by presenting voters with two non-comparable alternatives.[[2]](#footnote-2) Damningly for post-referendum governance, the result of the referendum offered the government little clear legal guidance, but rather simply constrained its policy-making flexibility. Such a referendum forces representative government to exercise general policy-making discretion, but with a constrained palette of policy options which specifically exclude the first-choice preference of many voters.

This Essay uses classical tools of political science to interpret this confusion in democratic governance, and draw forth general lessons regarding the interaction between referendum design and representative politics. Specifically, it applies spatial modelling of political competition to identify the harm caused by flawed referendum design to the relationship between representatives and voters. The battle by representatives and parties in democracies typically consists of a future-regarding struggle over approval of the majority of voters, as each representative and party seeks to obtain victory in coming elections. In the case of Brexit referendum, the vagueness of the Leave option forced Parliament and the government to continue operating in such typical franchise-appeasing approach to representation. Yet because the excluded Remain option did advance a single legally clear policy, the referendum entailed that representatives could not consider the first-rank preference of voters who were defeated. Representatives were thus faced with the dilemma of seeking to continue to satisfy their voters through substantive policy-making even as the referendum bound them to avoid the explicit policy path that many voters would find the most appealing. Neither way by which representatives can proceed through such a dilemma satisfies fair voter representation. The government must either exclude the preferences of defeated voters even as it engages in substantive policy-making and thereby truncate the franchise, or dilute the effect of the referendum by including the defeated voters’ preferences in a constrained policy-making space. The defects of the Brexit referendum thereby reveal a general lesson for referendum design: the alternatives presented by the referendum must not only be clear to voters, but provide contextually coherent instruction to representatives for the subsequent implementation of the referendum.

**The Inconsistent Design of the Brexit Referendum: Some Lessons from the Venice Code**

The choice offered to voters between Leave and Remain may seem to be the classic type of binary options to which a referendum is well-suited: [[3]](#footnote-3)

Should the United Kingdom remain a member of the European Union or leave the European Union?

□ Remain a member of the European Union
□ Leave the European Union

On its face, the question presents voters with two distinct and readily comparable alternatives.[[4]](#footnote-4)

Yet a more critical consideration of the two options reveals they are non-comparable.[[5]](#footnote-5) This point can be helpfully contextualized by the schema advanced in the Venice Commission’s Code of Good Practice on Referendums (the ‘Venice Code’), perhaps the most authoritative statement on the design of referendums in European democracy.[[6]](#footnote-6) The Venice Code asserts that referendum questions must satisfy three central qualities: unity of form (the referendum alternatives must reflect procedurally comparable alternatives); unity of content (voters must not be required to cast a single vote on several unrelated matters, except where there is a total revision); and unity of hierarchical level (referendum alternatives should consistently apply to only one level of law).[[7]](#footnote-7) Given the complexity of the legal consequences of the Brexit vote, it might be legitimately queried if the referendum satisfied unity of content or unity of hierarchical level. However, this Essay argues that the nature of the Brexit referendum alternatives unequivocally violated unity of form.

Unity of form requires equivalency between the type of legal implications of the referendum alternatives set to voters. The most pivotal distinction drawn by the Venice Code is between referendum alternatives that comprehensively articulate the proposed legal change (“specifically-worded drafts”),[[8]](#footnote-8) and those that would require further “drafting and subsequent enactment of a statute.”[[9]](#footnote-9) The former may be the basis of legally decisive binding referendums, whereas the latter may only be the basis for consultative (ie, advisory) referendums. Thus they must not be mixed.

However, this is not the only distinction that the Venice Code draws. It also differentiates between “questions of principle” and “concrete proposals”.[[10]](#footnote-10) Neither is as legally decisive as a specifically worded draft, but they still indicate materially differing levels of specificity as referendum options that can be set to voters. Concrete proposals enable the franchise to indicate with specificity a desired policy change, whereas questions of principle elicit voter opinion on broad issues but require greater use of discretion by the representative government to provide specific legal content. The two types of referendum questions are thus differentiable both as ‘input’ mechanisms for assessing voter preference and as ‘output’ mechanisms for translating the referendum into state action. Concrete proposals allow the electorate to directly steer the course of policy, whereas questions of principle largely serve as mechanisms for pressuring representatives to accord with popular will in policy-making.

In the Venice Code’s own terminology, the Remain option is best classified as a “concrete proposal” and the Leave option as a “question of principle”. As a concrete proposal, the Remain alternative indicated a clear legal path for the government to take: do not alter the relationship between the UK and the EU. Though the option did not articulate the precise statutory or constitutional change that would follow (and thus was not a “specifically worded draft”), it contained the full policy content of the proposed course of action (retain the legal status quo relationship with the EU). The Remain alternative thus demanded little further policy-making discretion or elicitation of the electorate’s preferences. Conversely, as a question of principle, the Leave option provided little information regarding what specific policy outcomes should follow. Did a Leave vote imply support for formal exit from the EU, but retaining strong economic and cultural links? Did it support adopting minimal WTO relations? Some blended intermediary? The lack of certitude was implied in the Government’s own panoply of possible paths that might follow from a Leave vote,[[11]](#footnote-11) which confirm that the Leave alternative could only be a question of principle. By offering one concrete proposal and one question of principle, the Brexit referendum thus lacked unity of form, one of the essential aspects of procedural validity of referendums.[[12]](#footnote-12)

This distinction between concrete proposals and questions of principle has received less attention than the distinction between advisory and binding referendums. Unlike either concrete proposals or questions of principle, binding questions must expressly state the technical change in the statutory or constitutional language that would be effected by the referendum.[[13]](#footnote-13) The Supreme Court in *Miller* observed that it was an unsettled question within the Government whether the Brexit referendum was binding (“the 2016 referendum was described as advisory by some ministers and as decisive by others”).[[14]](#footnote-14) However, it is possible to read *Miller*’s requirement of Parliamentary statute to effect the withdrawal as indicating that the referendum could only be *de jure* advisory. Many scholars have asserted the referendum was advisory;[[15]](#footnote-15) and, by the lights of the Venice Code, both alternatives presented in the Brexit referendum are characteristic of advisory rather than binding referendums in that neither articulates the formal change to statutory or constitutional language that the referendum would effect.[[16]](#footnote-16)

Yet even if the mandate provided by the referendum was only political, it was a political ‘mandate’ in a distinctively obligating sense of the word. In the context of representative government, a ‘mandate’ can refer to a situation where one party or bloc can claim political authority to act decisively, based on particularly resounding popular support. Such is the type of mandate a party or leader asserts to robustly implement a platform following a dominant electoral victory. Yet such a ‘mandate’ has no special meaning. It merely the atmospheric descriptor of a high level of legitimacy or moral standing derived from democratic practice, and the standard dynamic of representation – in particular the equivalent value of each formal vote in future elections to politicians – remains intact.

Because a referendum is a moment of direct self-expression by the franchise, the result of even an advisory referendum is a far more forceful and settled political obligation. Such a referendum creates a mandate for the government to pursue a particular course of action if it wishes to affirm the validity of popular self-rule. As the Supreme Court[[17]](#footnote-17) and ICR Report[[18]](#footnote-18) prosaically state and the Venice Code more wryly notes,[[19]](#footnote-19) the political costs of defying even an advisory referendum may be enormous, perhaps provoking a constitutional crisis. Given norms of popular self-determination in liberal democracy, the distinction between an advisory and binding referendum, while impacting procedures of implementation, may be of less significance than the shift in the locus of policymaking from representatives to the electorate. Where the franchise has indicated support proposed policy change is sufficiently clear, the state must act in accordance with the will of the franchise. For better or for worse, the Brexit referendum outcome has developed into such a forceful obligating mandate.[[20]](#footnote-20)

**Representation in the Shadow of Disparate Referendum Questions**

While it is undesirable to require voters to select between alternatives which cannot be readily compared by specificity of legal consequences,[[21]](#footnote-21) it may be paternalistic to conclude that voters are incapable of meaningfully expressing views (individually or collectively) even if one referendum choice is a concrete proposal and the other is a question of principle. This Essay observes that the fallout of the Brexit vote illustrates that non-comparable referendum questions can have a significantly deleterious impact upon post-referendum *representation*. When, following a referendum, representative government seeks to give policy effect to a question of principle, and the defeated alternative was a concretely worded proposal, the government cannot accurately capture popular will. This effect is due to the subtle constraints a referendum may impose upon representative discretion in the context by which representatives pursue future voter approval.

This effect – apparent in post-Brexit politics – is due to the differing effects concrete proposals and questions of principle have upon subsequent policy-making by representatives. As a concrete proposal, the Remain alternative contained sufficient content for representatives to comprehensively implement a policy as law without further policy-making discretion. The appropriate legal course of action to realise the political mandate would have been clear – retain the current legal relationship with the EU. As the Leave alternate was a question of principle, it required representatives to exercise significant discretion in the implementation of the mandate. In effect, the Leave option delegated to the representative government significant responsibility to satisfy voters in light of an underspecified articulation of the polity’s preferences.

Yet because the Brexit referendum entailed the defeat of a concrete proposal as well as the victory of a question of principle, the government has lacked the typical policymaking flexibility in the process of representation. The defeat of Remain entails that the government must operate under a wholly *negative* instruction that the laws which continue EU membership are unacceptable. Where a referendum possesses unity of form, such explicit constraint of representative action by the popular rejection of one alternative would be twinned with the victory of an alternative that expresses an equally explicit positive instruction. Such would be the case when one concrete proposal is offered against an alternative concrete proposal. Likewise, the victory of a question of principle over another question of principle might not provide highly specified content and thus require representative discretion to implement the referendum, but the defeated option would be likewise underspecified in content and thus would not overly bind the government. In such cases the two options are parallel, and the referendum poses no particular difficulties for implementation.[[22]](#footnote-22)

The pathological effect of excluding one option from the palette of representative options is best understood in the context of the broader dynamics of representative democracy. Such dynamics are typically formalised through spatial models of politics, which postulate that because political actors will prefer the alternative that best satisfies their ideal preference, the victorious outcome will ultimately satisfy the median voter (the voter at the 50% point whose support guarantees a majority).[[23]](#footnote-23) This readily describes representative democracy, where representatives and parties adjust their positions in order to satisfy the median voter and thereby win elections by securing approval of the majority. The majoritarian character of democracy means that individual representatives (within a single district) and parties as collectives (across the electorate as a whole) are driven to adopt policies that will best appeal to the majority of the electorate. When voters participate in referendums, this process is modified, as voters must select between two divergent alternatives, neither of which necessarily satisfies the optimal satisfaction point of the median voter.[[24]](#footnote-24) This is because unlike candidates for an election, the alternatives in a referendum cannot adjust their positions in competition for the median voter; they are set ex ante given the policy question at issue.[[25]](#footnote-25) However, the basic premise of the spatial model still applies for voters: the majority of voters will select the alternative that will satisfy the preferences closer to their ideal preference point.

The disruptive effect of non-comparable referendum alternatives occurs post-referendum, when the policy mandate must be put into effect even as representatives continue to seek voter approval. A referendum that obligates the implementation of a concrete policy should displace the representative competition for voter approval.[[26]](#footnote-26) In such circumstances, the retrospective expression of popular will becomes the mechanism for policy decision-making. Since the referendum alternative selected by the franchise has definitive policy content, it supplants representative discretion. Thus representatives – at least in terms of making substantive choices that implement the referendum – have little opportunity to compete for voter approval.

However, where the content of the victorious referendum choice is sufficiently vague (as could be the case with a question of principle),[[27]](#footnote-27) this displacing effect may not occur. Such questions of principle will tend to lack the specificity to fully inform the policy consequences of the referendum, and the effect of the referendum will depend heavily on representative judgment. Since such action continues to reflect the choices of representatives, post-referendum policy-making will remain focused on attracting voter approval. Thus, despite occurring in the wake of a referendum, representative action following the victory of a sufficiently vague question of principle retains the prospective character of representation.

The situation faced by UK government following the Brexit referendum is precisely that of lawmaking in the wake of a question of principle. As the Leave mandate itself did not have sufficient specificity to expressly indicate the popular will, the onus thus continues to fall on Parliament to engage in policymaking that will placate the electorate into the future.

The unique dilemma posed by the Brexit referendum, however, is that in addition to the victory of a question of principle, a concrete proposal was defeated. Thus the referendum *did* exclude one policy path, due to the concrete nature of the Remain defeat: remaining in the EU. Thus, while continuing to operate within the general model of prospective representation, the UK government may not operate within the entire policy space of possible options.

The immediate effect of this has been to exclude from political consideration the specific first-choice preference of a significant block of the electorate with regards to Brexit policymaking. Since any policy path that includes remaining within the EU is excluded from consideration if the popular mandate is to be respected, only the first-choice preferences of those who wish to Leave are of relevance to representatives. Thus, insofar as the spatial model retains relevance, it does so in a manner that cannot appropriately include the preferences of the entire electorate.[[28]](#footnote-28)

The precise operation of the distortion is ambiguous, and the Brexit referendum is a case study in the consequences of pitting a concrete proposal against a question of principle. If those who voted Remain are still given voice with the policy-making considerations of representatives, it would require determining the non-first-choice ranked preferences of those who preferred Remain. Yet it could also be argued that this would also be distortive, as Remain voters had their opportunity to express their political will in the referendum itself, and lost. Subsequently it is the will of the majority that voted Leave that should be determinative of Brexit policy. Yet this means that representatives would only be respecting a fraction of the electorate: those who preferred Leave, and then would support the specific policy position selected to implement Brexit.

It might be argued that such a constraint of representative policy-making is the appropriate effect of a popular referendum. The Brexit vote enquired if the majority of the electorate found remaining in the EU to be desirable; as it was not, it should be excluded from the slate of policy options, including those subsequently devised by the representative government. Yet the very problem with this use of a referendum is that it creates hybrid political instruction neither adequately informed by retrospective expression of popular will that a referendum seeks to achieve, nor fully within the hands of representatives and thus responsive to voter preferences. This hybrid instruction means that while representation must remain the mechanism of democratic process, it cannot serve the views and preferences of all voters in a fair and equal manner. This principle is captured in the Venice Code’s insistence that referendums must have unity of form,[[29]](#footnote-29) and has manifested in the inability of Parliament to move forward on a majority-satisfying Brexit proposal.

Adopting the premise above – that the Brexit referendum excluded remaining in the EU but otherwise required typical representative decision-making as described by the spatial model – leaves two possibilities. One is that, to give force to the democratic legitimacy of the referendum, representatives should only consider the preferences of voters who selected the Leave option. In other words, the only median voter considered by representatives should be the median Leavevoter. Yet this would exclude the policy preferences of a large number of presumably equal citizens (ie, those who voted Remain), and thereby artificially shift the policy space in which representatives would be expected to seek voter approval in deciding a Brexit option. The result would be a far more extreme Brexit policy than the totality of the franchise would *actually prefer*, because it would be the majority of Leave voters, not the majority of the franchise, whose preferences would be relevant in deciding ultimate Brexit policy.

Moreover, were the government to only legislate Brexit policy while considering the policy preferences of the Leave majority, it might not even produce a policy that the majority of the electorate would desire. Since the Leave mandate itself is underinformed, the government would be forced to adopt some alternative market and international relations arrangements that some Leave voters would prefer and others dislike.[[30]](#footnote-30) Some of these arrangements might even be less preferable to Leave voters than remaining in the EU, but still be preferable to the *majority* of Leave voters.[[31]](#footnote-31) Thus under this approach, the definitive, legally binding Brexit policy might be *less* preferable to the entirety of the electorate than remaining in the EU altogether. In technical terms, this would be a failure of monotonicity (the principle that a voter should not be made worse off by a sincere expression of preferences),[[32]](#footnote-32) since some Leave voters would be less satisfied by the final policy result of their referendum than had they voted Remain. In political terms, such an outcome would be simply perverse in terms of democratic realisation of popular will as well as a clear failure of representative government. This points to a deeper flaw in the referendum should this approach be adopted: the substantive content of the Leave option itself could not have been precisely specified at the time of the referendum, as it was itself dependent on who voted for it. Thus under this approach to resolving the dilemma, Leave voters could not have known what they were voting for at the time of the referendum.

The alternative would be for representatives to incorporate the preferences of Remain voters in deciding Brexit policy (while continuing to recognise that Remaining itself is not a viable option). In other words, the median voter space should still be conceived across the entire franchise with regards to Brexit policy. Yet incorporating Remain voters into the policy space assessment for Brexit would produce a thoroughly watered-down Brexit policy, even as it excluded Remain voters from actually having their genuine policy preferences available as a policy choice. This would further compromise the desire of those who wish for the government to give direct force to the will of the victorious majority as expressed by a majority of the electorate (a discontent especially clear among hard-line Brexiteers in current policy).[[33]](#footnote-33) It could be argued that giving force to Remain voters’ preferences in the current Brexit decision-making would taint the mandate from the referendum, ultimately failing to accord with principles of majoritarian self-rule. Those who preferred Remain had their chance to express their views, and were defeated in a binary accounting; to reintroduce their perspective through representation would water down this direct majoritarian result.

Neither of these alternatives – using representation to create policy that artificially disregards a large chunk of the polity, or moderating the policy result from the Brexit referendum – is satisfactory for democratic self-determination. In addition to making the basic procedural terms of representation unclear and dependent upon representative discretion itself, it diminishes the standing of Remain-preferring voters as equal citizens. If the Brexit referendum is given force yet representation remains the primary mode of Brexit policy-making, Remain-preferring citizens either cannot have their true preferences expressed through representation, or are excluded from representation all-together. In terms of the spatial model, Remain voters are either ignored within representative policy-making consideration, or artificially forced to accept a significant level of dissatisfaction from what the representatives may do to implement their preferences.[[34]](#footnote-34) Of course, had the Leave alternative provided a concrete legal instruction, the defeat of Remain would have left Remain voters dissatisfied regardless – but it would have produced clear, retrospectively legitimised government action from the referendum. The government would simply implement the concrete referendum instruction without concern for the political ramifications (which, if voters are rational, would not be seen as reflective on the party). Following such mechanical implementation, Remain voters would retain their status as equal citizens for all subsequent discretionary representative conduct.

As a political aside, the flawed referendum design and subsequent representative dilemma does help explain the disruptive effect of the referendum upon subsequent politics. In order to retain broader political viability, those responsible for implementing policy as a general matter – the executive but also, more generally, Parliament as a collection of MPs from major parties – will tend to consider policy in terms of its appeal to the entire electorate[[35]](#footnote-35) (the totality of the electorate in the case of the executive, and, through each MP having concern for their particular constituency, the entire electorate through aggregation of districts in the case of Parliament). This would drift towards considering what Brexit policies would be most palatable to the entire franchise, including those who voted Remain. Yet hard-line Brexiteer representatives could assert that, in capturing an uncompromising view purportedly closer to that of the victorious Leave voters, they have claim to a deeper majoritarian legitimacy. This forms the basis for rejecting any softening of Brexit policy to consider the view of Remain voters. Such conflict has been most apparent in the hard-right challenges to Teresa May’s leadership of the conservative party.[[36]](#footnote-36) The fact that Theresa May was able to achieve the unprecedented political feat of surviving *general* challenges to her leadership even as she suffered repeated defeats on obtaining approval of her Brexit strategy: the referendum did not even make clear the popular mandate under which she operated.[[37]](#footnote-37) Thus it was easy for Parliament to reject any specific proposal as failing to satisfy the mandate, but difficult to conceive of a more palatable path. While the nuanced reality of this political infighting has many sources, the non-comparability of the Brexit alternatives was a necessary precondition. Without it, this dilemma would not exist. Either the referendum would have proposed two comparably clear alternatives and there would be minimal debate over use of representative discretion; or the referendum would have not explicitly imposed limitations on policy constraint, and the government would be free to act as it found most appropriate (albeit with information regarding popular will from the referendum).

**Lessons for Referendum Design in Representative Democracies**

Long after the dust of the Brexit vote has settled, it will offer general lessons regarding the nuanced relationship between referendums and representative democracy. Most immediately, it illustrates the importance of posing referendum questions that have provide parallel policy instructions. This is distinct from the two aspects that have traditionally received the most attention in referendum question design: the clarity of the substance of the question to voters, and the status of a given referendum as binding or advisory. Referendum administration in the UK has focused upon clarity in the substance of the questions to ensure that voters are provided with a readily cognisable choice.[[38]](#footnote-38) The Venice Code further emphasises providing alternatives that clearly indicate whether the referendum is binding or merely advisory. The Brexit referendum, however, shows that the subtleties of post-referendum representative government impose a third requirement on referendum alternatives even where a referendum is only advisory: *equivalence in clarity of policy instruction to representatives*. Because even an advisory referendum mandates that representatives, lack of correspondence between the alternatives can distort the subsequent implementation of the popular will.

The Brexit referendum illustrates precisely one such situation in which this can occur: where the victorious alternative is vague in legal instruction, but the defeated alternative is specific, representatives must undertake constrained policy-making. This distorts standard dynamics of representation, as there is no clearly appropriate strategy by which representatives can implement the underspecified popular mandate while simultaneously maximising voter preference satisfaction. Should representatives refuse to recognise any voter preference for the defeated alternative, the policy realisation of the referendum may well be more extreme than the majority of voters would prefer. Yet if representatives continue to incorporate the preferences of the defeated alternative into selecting the optimal policy point, they may ultimately subvert the majoritarian mandate of the referendum.

These effects point to a broader consideration in referendum design, the interaction between the referendum’s prospective mandates and subsequent representative action. This extends beyond the well-trodden distinction between binding and advisory referendums. Because an advisory referendum can create a politically irresistible mandate, the specific content of the alternatives must remain carefully attentive to how representatives might engage in subsequent policy-making. Indeed, given that advisory referendums (particularly in the case of questions of principle) leave substantial discretion to representatives in the referendum’s implementation, setting the questions so as to appropriately instruct the government may require a subtle appreciation of democratic dynamics. Merely because a referendum is advisory does not alleviate the requirement of precision in drafting the questions; and the drafting of a referendum question must look to how it will instruct representatives as well as if it is sufficiently clear and equitable to voters.

Referendums ultimately seek to shift the mechanism of popular self-determination. In principle it enables the franchise to directly chose its own fate with regards to a particular question of policy. As others have noted, the real constraints upon referendums as a process may result in deviations from this ideal.[[39]](#footnote-39) A critical but unrecognised flaw in the Brexit referendum design has illustrated that referendums must also provide satisfactory instruction to representatives, lest the very goal of giving the electorate the opportunity to directly shape policy be jeopardised.

1. See the Report of the Independent Commission on Referendums (July 2018) (hereinafter, the ‘ICR Report’) 58. [↑](#footnote-ref-1)
2. See the Venice Commission’s Code of Good Practice on Referendums (October 2006) (hereinafter, the ‘Venice Code’) sIII.2. See also the ICR Report 64. [↑](#footnote-ref-2)
3. European Union Referendum Act 2015, s. 1(4-5). [↑](#footnote-ref-3)
4. The question was vetted for intelligibility and option equivalency by the Electoral Commission, which deliberately preferred this formulation to a ‘yes’/’no’ question design. “Referendum on membership of the European Union, Assessment of the Electoral Commission on the proposed referendum question” (September 2015) (hereinafter Electoral Commission Assessment) ss5.16-5.22; Polly Hollings and Caroline Roper, “Referendum on Membership of the European Union: Question Testing”, 1 September 2015, s1.2. However, by the Electoral Commission Assessment’s own concession, s1.17, its “scope of responsibility” was limited to *linguistic* clarity of the question rather than its *legal* ramifications. It explicitly disavowed any engagement with the substance of the question. [↑](#footnote-ref-4)
5. See, e.g.., Thomas Colignatus, “Voting theory and the Brexit referendum question” RES April 2017 Newsletter, https://www.res.org.uk/resources-page/april-2017-newsletter-voting-theory-and-the-brexit-referendum-question.html [↑](#footnote-ref-5)
6. See ICR Report 53. [↑](#footnote-ref-6)
7. Venice Code III.2. [↑](#footnote-ref-7)
8. Venice Code Explanatory Memorandum sIII.2.28-29. [↑](#footnote-ref-8)
9. Venice Code Explanatory Memorandum sIII.2.29 [↑](#footnote-ref-9)
10. Venice Code Explanatory Memorandum sIII.2.29-30. [↑](#footnote-ref-10)
11. HM Government, “What are the Alternative?” (23 June 2016, Archived 15 Aug. 2016), https://webarchive.nationalarchives.gov.uk/20160815144140/https:/www.eureferendum.gov.uk/what-happens-if-we-leave/what-are-the-alternatives/ [↑](#footnote-ref-11)
12. Venice Code Explanatory Memorandum sIII.2.27. [↑](#footnote-ref-12)
13. Venice Code Explanatory Memorandum sIII.2.29. [↑](#footnote-ref-13)
14. *R (Miller) v Secretary of State* [2017] UKSC 5 at 119. [↑](#footnote-ref-14)
15. See, for example, Sionaidh Douglas-Scott, “Brexit, Article 50, and the Contested British Constitution”, 79 MLR 1019, 1020 (2016) (asserting that the Referendum was only advisory rather than mandatory). The ICR Report at 81 asserts that the UK constitution does not even allow for binding pre-legislative referendums. The EU Referendum Act itself, however, makes no statement regarding its character as legally binding or mandatory. http://www.legislation.gov.uk/ukpga/2015/36/pdfs/ukpga\_20150036\_en.pdf. The Venice Code, sI.1.15; sIII.5.42, states that ‘consultative’ mandates are not binding, and ought to be explicitly identified as such. The failure to do so might suggest a further drafting failure of the Brexit Referendum. [↑](#footnote-ref-15)
16. Venice Code Explanatory Memorandum sIII.2.s29. [↑](#footnote-ref-16)
17. *Miller* at 125 (it would be “difficult for Parliament to ignore a decisive expression of public opinion”). [↑](#footnote-ref-17)
18. s6.9 (“referendums of this kind are usually seen as politically binding: it would be problematic for politicians simply to ignore the referendum result.”) [↑](#footnote-ref-18)
19. s43 (“The political wisdom of Parliament going against the wishes of (the majority of) the people is clearly another matter.”) [↑](#footnote-ref-19)
20. This can be seen in part by the rapidity by which Parliament responded to Miller by rapidly passing a bill to activate Article 50. See Mark Elliot, “The Supreme Court’s Judgment in *Miller*” 76 CLJ 255, 268 (“supine response”). [↑](#footnote-ref-20)
21. Venice Code Explanatory Memorandum sIII.2.s29 (focusing on voter confusion as the primary harm of failure to satisfy unity of form). This is particularly true because, as Sara Binzer Hobolt, *Europe in Question: Referendums on European Integration* (Oxford: Oxford University Press, 2009) 44 notes, the choice voters face in a referendum is between the state of affairs if the referendum proposal succeeds, and the state of affairs if the referendum is defeated. Thus lack of clarity regarding the consequences of alternatives do not merely have ex-post consequences, but shape the context in which voters decide what state of affairs might best satisfy their preferences. [↑](#footnote-ref-21)
22. This is related to the unity of content principle, Venice Code s30, and the obligation in pre-legislative referendums to ensure “proposals for change are as clear as possible”, ICR Report s6.29. [↑](#footnote-ref-22)
23. The seminal account of this principle is provided in Anthony Downs, *An Economic Theory of Democracy* (1957); for a comprehensive description, see Michael Laver and Michel Schilperoord, “Spatial models of political competition with endogenous political parties” 362 PHIL. TRANS. R. SOC. 1711, 1711 (2007). The majoritarian nature of the struggle pushes parties to seek “candidates close to those of centrist voters.” Kathleen Bawn et. al., “A Theory of Political Parties: Groups, Policy Demands and Nominations in American Politics,” 10 PERSP. ON. POL. 571, 576 (2012). [↑](#footnote-ref-23)
24. Hobolt (2009) at 42-46. [↑](#footnote-ref-24)
25. As Thomas Romer and Howard Rosenthal, *Political resource allocation, controlled agendas, and the status quo*, 33 Public Choice 27, 29 (1978) observe, referendums pose the challenge that those responsible for their design have a great deal of power to set the initial selection terms. Indeed, one of the great ironies of the Brexit vote was that the government that set the referendum sought to exploit the vague terms of the Leave option to influence voters. See note 8 above. [↑](#footnote-ref-25)
26. Failure to do so is ultimately a deficiency of the referendum execution, ICR Report s6.31. [↑](#footnote-ref-26)
27. The example provided of a question of principle by the Venice Referendum expresses such a high level of generality. Venice Code sIII.2, s29. [↑](#footnote-ref-27)
28. This would be understood as disrupting the “supply-side” of median voter selection. Randall G.

Holcombe, *The median voter in public choice theory*, 61 PUB. CHOICE 115, 118 (1989). [↑](#footnote-ref-28)
29. S.III.2. [↑](#footnote-ref-29)
30. Such a concern is captured by the ICR Report s6.33 recommendation that post-legislative referendums may be desirable even when there has been an initial pre-legislative referendum. [↑](#footnote-ref-30)
31. This may well be the case based on survey results, particularly in light of changes preferences, a complexity this Essay leaves to the side. See Jonathan Grant et. al, “What sort of Brexit do the British People want?” King’s College London and Rand Corporation (October 10, 2018), at 8, https://www.kcl.ac.uk/sspp/policy-institute/publications/what-sort-of-brexit-do-the-british-people-want-2018.pdf [↑](#footnote-ref-31)
32. Dan S. Felsenthal and Nicolaus Tideman, *Varieties of failure of monotonicity and participation under five voting methods*, 75 *Theory and Decision* 59 (2013). [↑](#footnote-ref-32)
33. Tom McTague, “Brexiteer calls for leadership challenge to topple Theresa May”, *Politico* 15 Nov. 2018, https://www.politico.eu/article/jacob-rees-mogg-calls-for-leadership-challenge-to-topple-theresa-may/ [↑](#footnote-ref-33)
34. Laver and Schilperoord at 1715. [↑](#footnote-ref-34)
35. See Lawrence Ezrow et. al., “Mean voter representation and partisan constituency representation: Do parties respond to mean voter position or to their supporters?” 17 *Party Pol.* 275, 288 (2010) (mainstream parties respond to general electorate preferences). [↑](#footnote-ref-35)
36. Leading Eurosceptic Jacob Rees-Mogg has framed the challenge to May’s leadership in terms that Parliament “should deliver on the Brexit that we promised.” Peter Stubley, “Jacob Rees-Mogg suggests EU is trying to deliberately 'kneecap' Britain with Brexit 'difficulties'”, *Independent*, 13 October 2018. [↑](#footnote-ref-36)
37. See Heather Stewart and Dan Sabbagh, “Has Theresa May finally exhausted her colleagues’ patience?”, *The Guardian*, 22 February 2019, *https://www.theguardian.com/politics/2019/feb/22/has-may-finally-exhausted-her-colleagues-patience*; Jessica Elgot, “Defeated and withdrawn: the Brexit proposals MPs voted on”, *The Guardian*,14 February 2019, <https://www.theguardian.com/politics/2019/feb/13/the-brexit-proposals-mps-could-vote-on-this-thursday> . [↑](#footnote-ref-37)
38. ICR Report at 101-110. See also the Venice Code Explanatory Memorandum, S I.3.15. [↑](#footnote-ref-38)
39. Romer and Rosenthal at 29 observe that the agenda-setting opportunity of the referendum designer gives them significant power to set baseline; the ICR Report at 61 observes the limit upon the detail with which most voters can engage with policy questions. [↑](#footnote-ref-39)