COMMENT: DELIBERATION, PARTICIPATION, AND THE CONSTITUTION

Robert Howse challenges us to consider possibilities for large-scale participation in constitutional deliberation. There is no contesting the proposition that true deliberation is a good thing in itself. Also incontestable after the twin débâcles of Meech Lake and Charlottetown is where ownership of the constitution lies: with the people at large.[1] Are these propositions nonetheless incompatible?

Meaningful deliberation requires debate to affect not just the outcome but the alternatives over which final choice lies. This is obvious in the contrast between the Meech Lake and 1980-82 events, as Howse points out. As a *fait accompli*, Meech Lake obviously permitted no deliberation. But the Charlottetown Accord makes the point even more forcefully. Voters at least got the final word, and no one can say that the manipulatory intent of the Accord's framers succeeded. Millions of voters entered into serious consideration of the pros and cons of the document. Although many voters simply used the Charlottetown document as a lightning rod, a vehicle for punishing Brian Mulroney or the political class in general, many did not. Certainly the 43% of the electorate who voted Yes (a group strangely absent in much post-referendum comment) cannot have done this.[2] And a very large, if intrinsically unknowable, fraction of No voters did not just say No for the sake of doing so. Alain Noël's characterization of the process strikes me as pretty close to the mark. So our work[3] on the referendum also indicates, as does anecdotal experience. The referendum was strikingly like the 1988 election as a moment of intense, widespread pondering of a complicated document on its merits. But was it deliberation? Not by the criterion with which this paragraph began: for all the weight voters attached to the choice, they were not invited to help *shape the alternative* to the status quo, just to pronounce on one, highly bundled, preformulated measure. The critical thing, then, is that a proposal, once fronted, is allowed to evolve through some kind of deliberative process, such that the question finally considered reflects authentic exchange, rather than just *in camera* deal-making.

But 1992 teaches an absolutely basic lesson, that the political class can no longer claim intrinsically superior capacity to deliberate on the constitution. First of all, to say that voters at large cannot, given time and help, make choices on their own constitution is pretty damning. To affirm such a proposition is to question the very basis of democracy. If we cannot entrust voters with choice of constitution, how can we justify letting them choose their government? Unless we are utterly cynical about the quality of electoral choice, simple respect for voters requires us to take the possibility of direct popular participation in constitution-making seriously. Realism counsels us that mass decision-making will commonly be flawed; the material in question is human, after all. This brings us to the second part of the lesson. In 1992, highly educated voters were most

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[1] Even if, as Russell reminds us, we do not know who the people are, constitutionally speaking.

[2] This is not to suggest that all Yes votes were the product of close scrutiny of the document. Simple trust in the political class must have been roughly as prevalent among Yes voters as distrust was among No voters.

[3] The first manifestation of which is a chapter in the Watts-Brown volume. See also R. Johnston, A. Blais, E. Gidengil & N. Nevitte, *The Challenge of Direct Democracy: The 1992 Canadian Referendum* (Montreal: McGill-Queen's University Press, forthcoming).

likely to vote Yes, were most likely to vote as their political betters wished. I freely confess that this describes myself, and like many Yes voters I felt affronted by the result. But only for a while. As the reality sank in of how bad the Charlottetown Accord truly was, the more plausible it became that the people – to be more precise, No voters – saved the political class from itself. If the people only rarely know best, the track record of the political class now hardly seems better. Practical considerations obviously dictate that a political class exist, for ordinary political matters. But 1992 undid any cognitive basis for its monopoly on constitutional questions. No longer can the political class claim to know best.

If this argues for dealing voters in, it does not say whether popular participation should extend beyond simple Yes or No at the end. It may grate that voters do not get to shape the ultimate alternatives, but is it realistic for the process to be structured otherwise? We may accept in principle that voters who get to make policy-like choices should also make constitutional ones, but it may still be necessary to reserve the power of initiative to the political class. To sustain this case, however, we have to get by the suspicion that in 1992 voters, not leaders, knew best. Why was the Charlottetown Accord so bad? One reason was that the Accord's structure inescapably reflected the specific sequence in which concessions were extracted, it was *path dependent*. The absence of serious consideration of asymmetric division of powers may have reflected Quebec's absence from the game until too late. Quebec's absence also permitted a Senate based on equal representation to creep onto the menu, even though Peter Lougheed had attempted to prepare Albertans for a fall on this particular dimension in Calgary months before. Once equal representation was on, it could not come off. This then necessitated some kind of guarantee for Quebec.

This path dependence in turn reflects the inevitable impinging of partisan considerations on constitution-making. This is not to say that key participants acted only as narrow partisans, for they manifestly did not. But they were bound to reckon long-term electoral consequences. And when they transcended partisanship, it was for the most part to make concessions best understood as *cross-party*, to maintain the party game for the long run. Such bargains are inevitably complicated, even incoherent. If simpler, principle-based changes are required, they must emerge from a forum independent of party politics. Although no such forum exists, it is worth considering as a thought experiment how voters at large might save the political class from itself yet again, by being allowed to shape the choice finally submitted to referendum. The whole body of the electorate cannot do this, but a representative sample might. Representative is here meant *statistically*, all citizens with an equal probability of selection, selection effectively by lot, most pointedly *not* by election. Those chosen will inevitably be transformed by the process, will end up being quite unlike their fellow citizens. But they start out as ordinary folks, distinguished only by a throw of the dice, as jurors do. This resembles a constitutional convention, of course, and is exactly the institution proposed by James Fishkin.[4]

Did the winter 1992 constitutional forums fit this bill? Howse is right to detect in them the outline of future processes. But the 1992 forums ultimately failed on two

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[4] J.S. Fishkin, *Democracy and Deliberation: New Directions for Democratic Reform* (New Haven: Yale University Press, 1991).

counts: they did not control their own agendas; and they were, in the end, merely consultative.

On the first point, the Halifax forum merits special dissection, for it has been held up, by Howse and by media coverage at the time, as the breakthrough that almost occurred on asymmetric federalism. But the voice portrayed by the media as exemplifying English Canada's acceptance of asymmetry belonged, as I recall, to Shelagh Day. Candid footage of the "ordinary Canadians" at the forum indicated no such embrace. Most of the news around the forums was made, in the end, by the usual suspects. The loudest after-the-fact protests at exclusion were by groups which, if not heeded, were nonetheless heard. Missing in the commentary were those not even heard.

Then there is the matter of consultation, as opposed to decision. Deliberation requires participants to take responsibility for their opinions, not just to assert ideal preferences but to internalize the predicaments of other participants, to imagine the consequences of stalemate or failure, to imagine the consequences of a pyrrhic victory. Consultation can encourage these things, if it forces erstwhile strangers to keep each other's company for a while, but if it becomes clear that the consultation will have little real role in setting the question, it will quickly dissolve in some participants' extremism and other participants' apathy. Some citizens will always act responsibly, others will never do so. But most will act responsibly if indeed they are made responsible for the outcome, if they sense that their choices have real consequences. The most persuasive evidence of this is, to come back to an earlier point, voting in 1988 and 1992. In 1988, many were unhappy with the result, questioned whether the government ultimately received a true mandate. In 1992, most were unhappy with the complexity of the Charlottetown bundle, felt manipulated by the process. In each case, though, voters sensed that the stakes were very high, that they could not afford to take the choice, however unpleasant, lightly.

The 1992 and 1988 votes also stand out, unfortunately, as departures from the electoral norm. Canadians clearly had the stamina to engage in soul-searching twice in four years. Do they have the stamina for more frequented and protracted constitutional deliberation? Or is twice in four years pushing the high end? Evidence from other countries is mixed to negative. All evidence concerns referendums and kindred mechanisms, of course, for no country has ventured down the path of randomly-selected constitutional conventions. Where referendums are frequent, participation is not spectacularly high, indeed it is usually below the norm for party-based elections.[5] Particular referendums can draw high turnouts, but frequent consultation may wear voters down. More deliberative, less manipulated engagement with the electorate might possibly draw more turnout, but we have no basis for predicting this. More likely is that constitutional deliberation, like socialism, ruins too many evenings. However it is structured, popular consultation is most fruitful if it is occasional.

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[5] See D. Butler & A. Ranney, *Referendums around the World: The Growing Use of Direct Democracy* (Washington, DC: The AEI Press, 1994), Table 2-1 and *passim*. Referendum turnout is lower than general-election turnout in virtually every country which conducts both kinds of vote, and general-election turnout is lowest in the two countries with most frequent resort to referendums, Switzerland and the US.

But this brings us up against a point made earlier: that true deliberation requires an agenda open to modification from the floor. How can the constitutional agenda be open if popular consultation, to be authentic, should also be rare? If only the political class gets to propose measures, and only by clearing some extraordinary parliamentary threshold, then frivolous measures and too-frequent consultation will be avoided. But deeply felt popular concerns will also be bottled up. At the same time, it may be too easy for élites to pass culturally arrogant, insensitive measures, where the sensitivities in question belong to the broad mass of voters. This was a subtext in 1992, in the referendum but also in some of the darker mutterings around the consultative forums. Conversely, keeping the agenda absolutely open, with very forgiving rules for initiation of measures, risks overload and manipulation. This is a true quandary, for which no simple institutional fix exists. If Canada moves toward an open process, it will pay a price. But a price is already being paid for the closed nature of the existing process. Choice between the current process and some more open process should be clear-headed, should recognize the costs of each.

Moving to an open process will not merely privilege one part of the current élite debate at the expense of another part. Much commentary on deliberative constitution-making presupposes that open forums will follow scripts familiar from discourse already heard. Philip Resnick's suggestions are absolutely a case in point. One hears in Resnick a protest at exclusion from the process, hence the desire to shift the forum. But Resnick's own ideas dwell squarely within the walls of the ongoing, public process *circa* 1992. He was not at the centre of opinion, of course, but neither was he over the horizon. Are his ideas, or other ideas on the margins of what is still élite debate, likely to gain weight if, somehow, authentic representatives of the non-political class are given control of the process? Alternatively, would proper deliberation have induced voters to accept the Charlottetown Accord's most contentious features, for example the 25% seat guarantee for Quebec?

On both questions, the evidence so far is slender and mixed, but leans to the negative. There is a hint that focussed attention on a question can shift opinion toward the centre of opinion in the political class. For instance, support for capital punishment tends to become less one-sided when Parliament is seized with the question. It may be relevant that this very question reveals the political class at its most reflective, unconstrained by party discipline. Contrary evidence concerns a proposal right at the centre of recent debate, recognition of Quebec as a distinct society. In the five years that this notion was on the table, support for it never grew, even though the overwhelming majority of elected politicians repeatedly asserted its virtues. The most powerful philosophically or legally respectable arguments against such recognition required great sophistication to grasp. It is reasonable to object that that five-year exposure was still not deliberation. True, the clause was modified and moved in an attempt to accommodate popular anxieties, but these shifts were as arcane as the original objections, almost certainly lost on most voters, indeed on most non-lawyers. At the level voters can realistically deal with, on the principle, they just did not budge.

An even more compelling instance is élite deliberation on Senate reform. Here negotiators believed (or acted as if they believed) they were tracking deeply felt popular sentiment. And Senate reform was widely discussed inside and outside party élites. It was pretty clear in our referendum study data that voters struggled with, for example,

the appropriateness of the grant of power to the proposed new chamber. And so they should have, for the calculus of Senate power was complex and inherently speculative. Still, two things burned right through the data: voters who had opinions on the question overwhelmingly thought the new institution had too much power; and given a choice between the new Senate, the existing Senate, or no Senate at all, almost as many chose the old as the new and both options were swamped by outright abolition. All the deliberation washed over voters.

But if voters are not always good listeners, neither are those who dominate élite discussion, not even (not especially?) law professors and political scientists. We hear what serves our own purposes. If we want Senate reform, we start a conversation going and, with luck, other élite actors pick it up. Pollsters grab the ball and frame questions in terms set by élite debate. Voters answer the questions given them. If the only way to signal distaste for the existing Senate is to assent to a question referring to Senate reform, then so be it. Rarely are respondents asked if there is anything more they would like to say about the institution. More generally, Canadians are not asked what, if anything, about the constitution offends them. My sense is that the answer is: the amount of attention paid to it. For many, this will be disingenuous, code for too much attention to Quebec, Aboriginal peoples, women, whatever. But not for all, or even most.

To reply that constitutional change is nonetheless necessary is itself suspect. It exemplifies the very élite arrogance we started with. A more temperate reply is to state that real problems exist. But insistence that these problems require *constitutional* solutions is unsustainable. Moreover, insisting on treating them as constitutional questions invites the very pathologies we should try to avoid. If questions are constitutional they must be framed under the shadow of the amending formulas. Even if the existing formula is too restrictive, any formula worth its name will still require extraordinary majorities. This being Canada, it will be hard to sell any change that does not pass muster somehow with at least two, possibly three founding peoples. The threshold must thus be high and this alone is a prescription for frustration. For referendums, the cross-national record suggests that élite consensus boosts a ballot measure's prospects. Attaining élite consensus often necessitates the inclusive bargaining so many found abhorrent in Charlottetown, and so we are back where we started. Howse takes as a lesson of Charlottetown that measures should not be bundled, that voters should get to vote one issue at a time. I think this is right at bottom. It is in the end, a matter of respect for voters, for even where the threshold for a measure's passage is a simple majority, bundled measures defeat majority rule. Conversely, where votes proceed one issue at a time, the natural majority should prevail.[6] But most ostensibly unidimensional questions are vulnerable to the charge that they really embrace more dimensions. Thus narrowly worded references to the people can be just as manipulative as broadly worded, bundled ones. The answer, though, may be not to ban such attempts at manipulation outright, but to keep the agenda open.

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[6] Technically the preference of the median voter should dominate. An exposition of the logic of single-issue voting can be found in J.N. Enelow & M.J. Hinich, *The Spatial Theory of Political Competition: An Introduction* (New York: Cambridge University Press, 1984). Where two or more dimensions are engaged, there is commonly no equilibrium, no natural majority. If there is an outcome, it reflects arbitrary control of the agenda and thus lacks the moral claim (at least in utility theory) of a median result.

This too takes us in a circle. For the more open the agenda the swifter fatigue sets in. It is not that Canada starts with a surfeit of democracy. Certainly, serious constitutional change will never again proceed without some kind of direct injection of popular sentiment. But if Canada is to become more democratic, the route will not be exclusively, or even mainly, through democratized constitutionalism. A constitution permanently debated and amended is not much of a constitution. Where democracy should flourish is in day-to-day decision-making, about schools and neighbourhoods for example. Perhaps if parties leave the constitution aside for a while, they too can get about their perfectly legitimate business of structuring day-to-day politics on the larger scale.

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