

(Ir)responsible Government , Deliberat(iv)e Deferral, and the Evasion of Democratic Constitutionalism since Meech Lake

Introduction

The Meech Lake Accord was a watershed in both the history of citizen-state relations in Canada and in the history of attempts by Canadian political leaders to improve ethno-cultural relations through institutional reform. Freshly-minted Charter Canadians not only declined to be deferential to political elites; their newfound activism greatly complicated nearly every major aspect of the task at hand, most notably by exposing the anachronism of national dualism. Although the Accord crystallized in the public mind longstanding provincial grievances concerning recognition of Quebec's cultural distinctiveness, the role of the federal state in the social union, provincial rights concerning Senate and judicial appointments, and immigration, it is the disputes concerning "process"—more specifically the precise balance of representation, consultation, deliberation, participation and direct decision-making to be shared between elites and citizens in constitutional negotiations --- that loom largest in any explanation of the Accord's demise, and indeed of the country's subsequent inability to achieve significant constitutional or quasi-constitutional change of any kind (outside of the courtroom).

An important aspect of these popular and intellectual debates has been the assumed compatibility of deliberative democracy with direct (plebiscitary) democracy and participation as means of legitimating constitutional change or other major shifts of

public policy. This paper shall argue that elites have triangulated between referenda, deliberative mechanisms and representative government in response to the need for political legitimacy and in ways that are largely coloured by calculations of self-interest and strategic bargaining. As a result, the objectives of constitutional reform—including ethnic comity and enhanced citizenship—have become more, rather than less, difficult to attain. The author proposes that a more purely deliberative model of institutional change is needed if progress is to be made in managing moral and ethnic conflict and improving Canadian democracy.

The paper begins by examining the early attempts to reconcile the two contradictory legacies of the *Constitution Act, 1982*, a government-dominated process embodied in the new amending formula, and a newly mobilized and rights-conscious citizenry activated by the Charter. These attempts begin almost immediately after the conclusion of the Accord in April 1987 when the debate begins in earnest and continue until the defeat of the Charlottetown Accord in a referendum in 1992. It is argued that what emerges during this period is a “deliberative gap” between the extremes of executive dominance and plebiscitary democracy, driven by the politics of legitimacy. The paper then looks at the evolution of democratic theory over the same time period, with particular emphasis on the ‘deliberative turn’ in democratic theory. What makes the theory of deliberative democracy especially relevant to the Canadian situation is its concern with decision-making in contexts characterized by deep moral disagreement and cultural diversity. While powerful criticisms have been made of particular versions of deliberative theory by critics who claim that it either sells short diversity, sells short practice, or is insufficiently cognizant of power, I shall argue that

Canada's present predicament is as much about evasion of responsibility on the part of elected officials as it is about the marginalization of suppressed voices or the absence of proper conversational precepts for constitutional debate. If the disjunction between the weakened institutions of representation and the blunt instrument of referendum is the most glaring weakness in Canada's post-Meech Lake processes of institutional reform and constitutional change, then the remedy is likely to be found in improving either the deliberative capacity of representative bodies, or improving the deliberative character of referenda. While both strategies have merit and are not mutually exclusive, it is submitted that it is the former strategy that has the greater potential for success.

Accordingly, the paper concludes with a specific recommendation for increasing the role for citizen deliberation and initiative, while keeping legislators on the hook for actually enacting constitutional and quasi-constitutional reforms .

The Meech Lake Accord and the New Politics of Constitutional Change Post-1982

Peter Russell aptly described the generation of political leaders who devised the Meech Lake Accord as "practising elite accommodation within a system of consociational democracy" (Russell 1988: 104). This traditional style of federal-provincial bargaining, neatly summarized by Donald Smiley and others as "executive federalism", is justified in the context of constitutional amendment by the need to secure the consent of both orders of government. Furthermore, in a constitutional negotiation concerned primarily with the country's most fundamental and longstanding linguistic and cultural cleavage, the French-English axis of Canadian federalism, private accommodations among elites can

be, and were, seen as the only way to secure agreement in a way that minimized conflict (Lijphart, 1977).

Be that as it may, this perspective—identified by Alan Cairns as the ‘government’s constitution’—inevitably clashed with the alternative perspective, the ‘citizens’ constitution’. The latter may have had roots early in the post war period, as Cairns acknowledges, or may even be related to postmaterialist value change, as Neil Nevitte avers. But the speed and strength of its development, and the precise form that it took, was undoubtedly a result of the enactment of the Canadian Charter of Rights and Freedoms. Opinion polls confirmed that the salience and legitimacy of arguments based on individual rights had grown, as citizens became defined as bearers of Charter rights. Furthermore, groups that had been accorded specific constitutional status in the Charter (women, aboriginals, official language minorities, ethnic minorities, and historically disadvantaged groups listed in the equality rights provision) pointed to these sections of the Charter in parliamentary committees and in the media in order to claim their standing as constitutional actors and to ground their arguments (Cairns 1988: 125-127). This frustrated culture of participation reflected a deep incoherence in the constitutional order, best described by Cairns as the unhappy marriage in 1982 of two incompatible institutional logics, that of the Charter and that of the amending formula:

With the benefit of hindsight it is evident that the scholarly concentration on the Charter as the major outcome of 1982 underestimates the significance of the amending formula, with its capacity to change the constitution by a collective fait accompli of governments and derisory public input. ...The fact that both the federal government and the citizen groups they mobilized on their side in 1980-81 were much less aggressive in struggling for citizen input in the amending formula than in battling for a stronger Charter has led to the present constitutional

incoherence in which these two legacies of 1982 speak to Canadians with very different voices, and contradictory messages (Cairns 1988:123).

An often overlooked aspect of this incoherence was that elite attitudes toward the rights revolution were highly selective, alternately amplifying, muffling and channeling popular demands in accordance with political agendas. The famous denunciation of the Meech Lake Agreement as having been made in private by “eleven men in suits” was largely absent, and easily ignored, just five years earlier. As Garth Stevenson wryly observed in his review of the Meech Lake literature,

“...it is inexcusable, particularly for Pierre Trudeau, not to acknowledge that the process is the only possible process under the amending formula to which Trudeau and nine provincial premiers agreed in November 1981. I argued for a more democratic process of amendment in the *Canadian Forum* in 1981, in a book published in 1982, at a conference at the University of Western Ontario in 1983, and in *Socialist Studies* in 1984. No one at the time paid the slightest attention, other than to repeat Bill Bennett’s assertion that executive federalism was “the Canadian way.” Now everyone wants to shut the stable door, long after the horse has escaped.”(Stevenson 1988: 175)

Even more stinging, Stevenson found some “disturbing parallels between the revolutionaries and the ancien regime. Some of the opponents of Meech Lake, particularly the feminists and spokesmen for various ethnic minorities, are just as paranoid about constitutional change, as obsessed with their own parochial interests, and as illogical in their arguments, as the provincialists who opposed the Victoria amending formula and the Charter in 1981. ...The argument that the distinct society clause threatens gender equality, or that limiting the spending power will prevent the funding of daycare, are oddly reminiscent of the arguments, heard seven or eight years ago, that the Charter

was a threat to property rights or that the Victoria formula would deprive Alberta of its oil.” (Stevenson 1988: 174). Stevenson’s comment that the discourse on popular participation was being shaped by and subordinated to power politics had roots that went back at least as far as the Parti Quebecois’ *etapisme* and strategies surrounding the timing and wording of the 1980 referendum on “sovereignty-association”. The novelty of the Meech debate was that this pervasive constitutional paranoia, as Cairns put it, was multiplied and extended to non-state actors who no longer had to rely upon one of the two levels of government as their principal mouthpiece. (Cairns: 1988 134).

This resulted in a further complication, namely the asymmetry between Quebec and the rest of Canada in terms of the electorate’s identification with the provincial state in interprovincial bargaining. While not untouched by cultural pluralism or the rights revolution, the province’s francophone majority was quite willing to back its government’s demands for more provincial autonomy, even when those demands largely took the form of prerogatives and powers of first ministers. The questionable constitutional legitimacy of the Canadian Charter in Quebec was deftly handled by the Parti Quebecois government between 1982 and 1985, which routinely invoked the section 33 notwithstanding clause in the federal Charter, while not invoking the same clause in its provincial Charter. The relative indifference of Charter Canadians to the repercussions in Quebec of rejecting what were seen as “minimum” demands was matched by widespread indifference among nationalist Quebecois to particularistic demands of individual provinces or groups within English Canada, or to the charges of elitism levelled at the agreement. The two solitudes spoke in plain French and plain English, but not to each other.

It should already have been apparent (and was apparent to the most astute constitutional observers, such as Cairns and Stevenson) that simply allowing more participants into a competitive zero-sum game for constitutional status was not going to be an easy or straightforward solution to the Meech Lake impasse. However much the failure of the Accord could be attributed to a democratic deficit, simply “democratizing” the constitutional change process could be no guarantee of success. Greater attention to the aforementioned incoherencies, overlapping interests, blind spots and asymmetries was needed. Nevertheless, Canada’s ever-responsive prime minister, Brian Mulroney, pressed ahead with characteristic alacrity and determination, promising that “Next time I’ll consult and I’ll consult and I’ll consult and I’ll wear the Canadian public out. I will not leave one voice unheard” (quoted in Bothwell 1995: 217). Certainly, the constitutional reform process that characterized the “Canada Round” over the next two years included a great deal of popular consultation and participation, including: legislative hearings in every province, a travelling commission of inquiry, a series of semi-public conferences, and two simultaneous referenda, one in Quebec (in which 55.4 percent of voters rejected the Charlottetown Accord) and one in the rest of Canada (in which 54.2 percent of voters ultimately rejected the Accord). The failure of the Canada Round apparently left a bitter taste in mouths of Quebecers and Canadians alike, with the former nearly voting to leave the country in a referendum on sovereignty, and the latter collectively taking an indefinite leave of absence from mega-constitutional reform.ⁱ

Discussion of a possible middle ground between ordinary representative processes and the use of referenda began with the laments expressed by constitutional observers about the anemic role of parliamentarians and legislators in the amending process, and (as the failure of Meech led to the Charlottetown process), worries about how best to manage the newly unleashed forces of popular participation by interest groups and an expanding constitutional agenda. Alan Cairns, noting that no aspect of the federal government's 1980 constitutional package attracted as much hostility as the referendum proposal, argued that the best that could be hoped for in the short run was a strengthened role for parliamentarians in the amending process, greater involvement of citizens in the committee hearings of all 11 federal and provincial jurisdictions, and a greater degree of tentativeness in governmental agreements. Governments could have modified the amending process without resort to the amendment procedure, i.e. they would have been "simple acts of political will". ... "While the viability of this halfway house between Meech Lake and referenda is unclear, it would unquestionably be a step in the right direction" (Cairns 1988: 142-43).

Katherine Swinton, a professor of constitutional law at the University of Toronto Law School, later expressed dismay at the growth of the constitutional agenda in the "Canada Round", noting that "it is time to discuss proposed changes to the constitution in a disciplined and focused manner".ⁱⁱ In an article on "The Lessons From Meech Lake" in the University of Toronto Law Journal in 1992, Swinton argued that it was important to recognize that any expansion of public participation would have to take place "within the present constitutional structure". Noting that leading scholars such as Peter Hogg

(Swinton 1992:155-57) and Peter Russell (158-63) were championing ambitious proposals for referenda and constituent assemblies respectively, she argued that in order to be able to evaluate such proposals, it was first necessary to distinguish between the three stages of the amendment process: formulation of positions, negotiation of an amendment, and ratification.

“The lesson from Meech Lake is not that the people wanted in at ratification, because they were there—in interest-group appearances before legislative committees, letter-writing campaigns, and polling results. The real resentment was directed at an earlier stage, when the negotiations first occurred with regard to the general content and then the language of the amendment. If there is a desire to be involved, this is the stage that requires change.”(158)

Yet the outcomes of Russell’s constituent assembly are as contingent upon the variables of timing, wording, context and political machination as are the potential outcomes of Hogg’s referenda and initiatives. Swinton, like Cairns, is not musing about an abandonment of constitutional policy formulation and negotiation in favour of some purer expression of popular sovereignty, the precise nature of which we are unlikely to agree upon. Rather, the emphasis is upon a more measured insistence that the reform process must “bring in the public at every stage—formulation, negotiation and ratification—and *demonstrate* respect for citizens’ views”(168, emphasis added).

Bargaining, trade-offs, and compromise remain crucial; but Swinton points out that the analogy between Meech Lake and collective bargaining always did a disservice to the latter. In fact, wise union negotiators generally keep in close touch with the bargaining unit with a view to ratification; at Meech Lake the ‘bargaining unit’ did not get adequate respect (160). As we shall see, the normative status of ‘bargaining’ and the question of

what best combines reasoned discussion with popular input into representative processes of negotiation are important issues in contemporary democratic theory.

Cairns in 1988 and Swinton in 1991-92 were representative of two groups of constitutional scholars just three years apart, both decrying the lack of a middle ground, but who were speaking from opposite sides of a chasm. Those writing during the Meech Lake debate feared an executive domination so complete that the constitutional revisions might lack legitimacy in large parts of the country. Those writing during the Charlottetown process feared a surfeit of ostensibly legitimating features—a much expanded agenda, consultations prior to negotiations, and a referendum campaign for ratification—would prove either too difficult to negotiate or too difficult to sell across the country. Both fears proved to be warranted. Subsequent constitutional changes that relied upon Section 43, “Amendments relating to some but not all provinces”—on bilingualism in New Brunswick in 1993 (without a referendum), and the Inuit referendum ratifying the creation of Nunavut in 1992—showed that constitutional reform could still happen, provided that (1) complex or potentially divisive issues were handled through deliberative bodies or (2) issues submitted to referendum were not overly complex or divisive. But larger issues of more general import, concerning the nature of the Canadian state, citizenship, or civic identity, remain unresolved due to the lack of a stable middle ground of accountable and deliberative representation. In short, the haphazard politics of legitimation has run aground owing to a lack of intellectual coherence between its discrepant elements of representative, deliberative and plebiscitary democracy.

Unfortunately, as Johnston, Blais, Gidengil and Nevitte describe in their analysis of the Charlottetown referendum, (1996) the politics of referral in several Canadian provinces were motivated by the damage already done to political elites by the Meech Lake debate, and the need for a “safety valve” to avoid further deligitimation through divided parties and political opponents bent on harnessing populist backlash. “At one point or another, the sequence from Meech Lake to Charlottetown embodied every tactical move ever seen in referendum history, in Canada or elsewhere” (Johnston et.al 1996: 258). The need for referenda as legitimation for major constitutional change thus became well established in the early nineties, but not because of the inherent suitability of referenda for ratifying complex compromises for divided societies. In fact, the established literature dating from the 1970s suggested that rule by simple majority presupposes underlying socio-political unity; more segmented societies require more consensual or proportional decision rules coupled with elite accommodation to maintain their integrity. As Johnston et..al observe, “Even when , as in 1992, a referendum’s rules are super-majoritarian, direct votes are brutal in their transparency.” (Johnston et. al 1996: 252). Yet, the post –Meech environment could be described as one in which elite accommodation had broken down and the purgative ritual of externalizing intra-party and intra-regional divisions through referenda and citizens’ assemblies was deemed to be salutary. The more recent failures to achieve quasi-constitutional reform of the electoral system in Ontario and British Columbia display a similar disjunction to Charlottetown, but with an added element of elite abstention. In both cases, the noble stated rationale of having a citizens’ assembly in order to avoid conflict of interest on the part of politicians was accompanied by the slightly ignoble device of a 60% threshold for ratification by the

public and the politically convenient luxury for the politicians of not having to deliberate, or even publicly weigh in. *Why was it not sufficient to apply the “conflict of interest” rationale at the agenda-setting/policy formulation stage of the process, and then kick the ball back to the legislature for refinement and debate?* Then, instead of protecting itself from the public through barriers to majority voting, the legislature would have to do so through the more finely-tuned and deliberative instruments of legislative debate and amendment.

One wonders how a more purely deliberative process, giving the recommendations of the citizens’ assemblies the status of a legislative initiative that would then have to be debated and voted by the legislature, would have been handled by the politicians of British Columbia and Ontario. How legitimate would their ultimate decisions have been, if politicians were still ‘on the hook’? Surely the point of deliberative democrats is that legislatures would have to defend *with reasons* any departure from the Citizens’ Assembly recommendations to a skeptical public---and under such conditions the public might be expected to identify more with the Citizens’ Assembly than they have in recent referendum campaigns, precisely because their skepticism would then be focused on the elected politicians. Would a vote of the federal Parliament on, say, the Law Commission’s recommendations for electoral reform any longer be considered legitimate? My guess is that it would, at least until constituencies disfavoured by the proposal began to mobilize public opinion in favour of a referendum. That is because electoral reform might not be considered a change of sufficient scope or magnitude to warrant recourse to a national referendum. (It is difficult to avoid the precedent established for a referendum in the current political context, however.)

There are many observations that can be made in trying to make sense of the double failure of Meech and Charlottetown. Adding a three –year ratification period to the Meech Lake Accord, was intended to be legitimating, but the terms and understandings of the Accord itself were so clearly in the rigid form of a *fait accompli* – willing to recognize only “egregious” errors while reserving to the 11 original governments the sole right to determine what “egregious” meant. Changes in government in four provinces, all of which had growing constituencies with reservations about the Accord led to more open and meaningful legislative processes, most famously of course in Manitoba and Newfoundland. But when coupled with a rigid and virtually unchangeable agreement, such innovations merely had the effect of building political pressures without building in a safety valve, dooming the Accord.

Many of these same pressures spilled over into the very different debacle of Charlottetown. While the vast and rapid expansion of constitutionally –recognized actors was legitimating and probably necessary, the concomitant expansion of the constitutional agenda was driven by several logics that were at odds with a successful result. One was the tendency to parcel and delegate pieces of the constitutional agenda to particular stakeholders whose priority it was to achieve that particular gain, without sufficient consideration of how it would affect the external or secondary preferences of others. This may have been enough to pacify those groups and provinces who had been anxious to exercise their newfound constitutional muscle to scuttle the Meech Lake Accord , and who were now signatories to Charlottetown. But it could not be safely assumed to satisfy ordinary citizens, who also had newfound constitutional muscles to flex. Another factor was the aforementioned usage by provincial territorial, aboriginal and party leaders of the

referendum device as a safety valve for externalizing and evading conflicts and divisions within provinces, parties and interest groups. No doubt an awareness that there would be a referendum further down the road made it easier to make concessions, but not necessarily the concessions conducive to a “yes” vote on referendum day.

As Avigail Eisenberg has perceptively written, referenda have their own implicit institutional logic, one that runs counter to the politics of difference. “[I]n employing a referendum as a means to resolve a pressing issue, governments or elites legitimize the referendum as the appropriate way to decide the issue and in so doing legitimize the particular understanding of political equality that underpins the democratic idea of referendums. This understanding requires that each voter be given the same amount of political power in making the decision at hand because each has a similar stake in the decision. ...”(Eisenberg 2001: 150). Eisenberg goes on to explain that while referendums contain a logic that favours minority rights claims for similar treatment, drawing upon an *undifferentiated* conception of equality, they are not a favourable medium for claims based upon a *differentiated* conception of equality.

Notice that Eisenberg’s analysis applied differently to different parts of the Charlottetown Accord, in accordance to the kind and degree of differentiation being claimed. Constitutional elites at the bargaining stage treated at least three expressions of minority rights claim as equivalent or commensurate entities that could be balanced or traded off against each other: the distinct society clause, the Triple E Senate and the guarantee of 25% of House of Commons seats. The first presents a modest threshold for educational or deliberative processes to clear in a majoritarian vote: this merely involves

explaining the need to recognize national minorities in a constitution that already enshrines minority education, multiculturalism and section 35 aboriginal rights, something that highly educated voters were already inclined to accept, according to the polls(Johnston et.a 1996: 281). The second presents a higher and more difficult threshold but was probably possible to justify in light of the “everyone is a minority” argument and the need to balance representation by population and the potential for tyranny of the majority that it represents. But the Quebec representation guarantee in the House of Commons flouts the undifferentiated conception of equality precisely in the institution where it ought to matter most. Here , the hurdle to educative and deliberative processes may well have been prohibitive, because even more information, reflection and discussion on the part of voters probably would not have increased their inclination to ratify. There is evidence for this in the studies by Johnston, Blais, Gidengil and Nevitte: “Our analyses suggest that removing the 25 percent guarantee might have brought the Charlottetown Accord closer to success. Of course, this also necessarily implies removing the Senate provisions, making the deal look much more like its predecessor, the Meech Lake Accord....[i]n that event, more thoughtful voters might win out. In 1992, thoughtful voters did not form a distinctive constituency for the Yes.” (279, 285). The irony that a modified Meech Lake would have been easier to ratify than Charlottetown is worth dwelling upon.

While Charlottetown represented an advance in terms of recognizing difference, it also represented a descent into factionalism and group politics. In the language of contemporary democratic theory, Charlottetown might look like good step in the right

direction from the standpoint of representative or associative democracy (because of the much broader range of powerful and influential actors, representing a wide range of citizens), but a step in the wrong direction from the standpoint of deliberative democracy, which was attenuated by the referendum campaign, or even from the standpoint of plebiscitary (direct) democracy, because political compromises achieved through the multiplied accentuation of difference isn't the sort of thing that sells well in a referendum.

The Deliberative Turn in Democratic Theory

Eisenberg's observations about the meaning of democratic equality in complex societies are good places to begin a reflection on the development of democratic theory over the past two or three decades. The growth of new social movements in the west, along with the collapse of Communist in eastern and central Europe, spawned a new interest in civil society within national boundaries and the prospects for cosmopolitan democracy beyond them. Associative theorists such as Paul Hirst and Joshua Cohen have attempted to reclaim the egalitarian project of social democracy through such non-state mechanisms as worker participation and cooperatives (Carter 2002). Continuing processes of decolonization, when combined with the fall of communism and globalization, helped to constitute "The Third Wave ' of Democratization' (Huntington 1991). Certainly recognition of difference and inclusion has also been important to democratic theory and practice, including greater recognition of gender, indigenous groups, and nationalism. The most important recent developments in democratic theory have had to reckon with identity politics in both of its main forms: where ethnic, racial or other groups seek greater equality and inclusion in liberal democratic politics; and where those groups seek

protection of their identities against erosion through recognition, autonomy or self-government (Young 1990, 2000; Frazer 2002; Canovan 2002). In a nutshell, the sudden and unexpected rise in the number of democracies in the world has led to a rise of interest in the study of democracy, which in turn has sparked a renewed interest in democracy's underlying theoretical difficulties. Happily, deliberative democrats and other democratic theorists have been increasingly concerned with decision-making in contexts characterized by deep moral disagreement and cultural diversity, which is why it is not surprising that several Canadian political theorists—notably James Tully, Simone Chambers, Alain Noel, Charles Taylor, Charles Blattberg and Will Kymlicka—have made important contributions to democratic theory during the past two decades.

In *On Political Equality* (2006), Robert Dahl argues that belief in democracy as a goal or ideal implies viewing political equality as a goal or ideal as well. Since philosophers from Aristotle to Rousseau and beyond have generally viewed an ideal society as being characterized by active citizen engagement with others in pursuit of, and debates about the common good (90), we should accept the view that political equality is an ideal that we should strive to attain (49). But he accepts that realization of this ideal faces formidable barriers, some of which are rising around the world and some of which are falling (75-77). The chief barrier in the United States and other advanced western democracies comes from the baneful effects of consumerism and capitalism on the culture of citizenship. Yet he holds out hope that political inequality may decline as more and more citizens pass the “quality of life threshold” (109):

“...[A]s more Americans discover the hollowness inherent in our culture

of competitive consumerism and the rewards and challenges of active and engaged citizenship, they might well begin to move the United States considerably closer to that distant and elusive goal” (120).

The normative purposes claimed for democracy can be seen as falling into two main camps, one congenial to capitalist mass market culture the other less so. The tradition of *aggregative democracy* regards the preferences of individuals as given and concerns itself with how best to reveal and count those preferences in order to discover the common good. The only political equality required in this view is the equal right to vote and run for office. The tradition of *deliberative democracy* is defined “as a form of government in which free and equal citizens and their representatives justify decisions in a process in which they give one another reasons that are mutually acceptable and generally accessible, with the aim of reaching conclusions that are binding in the present on all citizens but open to challenges in the future.” (Gutmann and Thompson 2004:7). It is concerned with the *formation* of citizens’ preferences in order to *create* the common good. This is done by expanding the use of deliberative reasoning among citizens. The legal and moral outcomes of these deliberations are considered legitimate “if and only if they could be the object of a free and reasoned agreement among equals” (Cohen) or if “all affected persons could agree [to them] as participants in rational discourses” (Habermas). “What distinguishes deliberative democracy from most of its predecessors is the view that democracy requires not only equality of votes, but also equal and effective opportunity to participate in processes of collective judgement” (Warren 2002: 174). In other words, the ideal of deliberative democracy is premised upon a more radical form of political equality than is commonly found in more liberal minimalist/aggregative

forms of democracy. This is true even of the less radical proceduralist deliberative theories, such as that of Amy Gutmann and Dennis Thompson:

‘Even if, as one critic [Frederick Schauer] suggests, “all of the inequalities of society in general” were “replicated in the content of deliberation,” it would not discredit deliberation. The process of deliberation as we understand it here is self-constraining; its own defining principles provide a basis for criticising the unjust inequalities that affect the process (*Democracy and Disagreement* 1996: 17).’

The greater capacity of various forms of deliberative democracy to recognize and give expression to complex and differentiated equality provides us with an important clue to explaining the ‘deliberative turn’ in democratic theory and practice in recent decades. Deliberative democrats argue that existing liberal democratic arrangements are not sufficiently sensitive to the problems associated with pluralism, complexity and inequality in modern societies. Although liberal minimalism and aggregative democracy (and even their more participatory cousin, direct democracy) are founded upon the principle of political equality, they militate against a robust view of active and informed citizenship. Furthermore, they are inimical to reconciling conflicts that flow from, or are exacerbated by, deep social divisions. The traditional model of active liberal citizenship, civic republicanism, suffers from a different set of problems: an exclusive definition of community, an affinity for elitism and for smaller and more homogeneous communities, and an ideal of the common good that aims at preserving the fundamental characteristics of the republic, i.e. ruling out options that would transform its basic character (Carter & Stokes 34). Thus, a large reason for deliberative democracy’s ascendancy is its comfort level with identity politics and new social movements ---- its emphasis on pluralism, whether of people or of ideas---and its tolerance of moral conflict and disagreement.ⁱⁱⁱ

Characterizations of deliberative democracy show an interesting variation. In Carter & Stokes' survey of contemporary democratic theory *Democratic Theory Today* (2002), most of the contributors are fairly dismissive of "post-modernism" and the "radical democratic pluralism", stating that Michel Foucault and his followers "would argue that democratic theory is simply another regime of truth facilitating the governing and disciplining of populations"(Carter & Stokes 2002: 10); and that "a compelling critique of the radical pluralist argument might therefore be found in its ambivalence towards the very conditions –the rule of law and sovereignty—that make democracy (at whatever level) possible". Mark Warren's chapter on deliberative democracy in this book therefore relies on the work of Jurgen Habermas, whose theory is radical enough to suggest 'equal and effective opportunity to participate in processes of will formation', while still being rooted in existing liberal values, practices and institutions. Although these writers' commitment to working through existing institutions to realize both liberal and democratic values is commendable, their version of deliberative democracy has drawn a lot of fire from First Nations scholars, radical pluralists and other philosophers of democracy.

An example is Glen Coulthard's critique of Seyla Benhabib's *The Claims of Culture: Equality and Diversity in the Global Era*, which takes aim at her anti-essentialist, social constructivist approach to culture and identity politics. Benhabib argues in her work that pluralism (the existence of different cultures) can be rendered compatible with cosmopolitanism (the Kantian and Habermasian ideal of world citizenship) provided that the conditions of egalitarian reciprocity (equal rights for minorities), voluntary self-ascription (individuals can choose the communities that they

wish to be members of) and freedom of exit and association are fulfilled. “Intercultural justice between human groups should be defended in the name of justice and freedom and not of an elusive preservation of cultures” (Benhabib 2002:8). Cultural recognition in Benhabib’s view is to be achieved through the “inclusion” of traditionally marginalized groups into a widening “democratic dialogue” with the citizens of the surrounding society. This recognition and inclusion comes with some strings attached, however: cultural norms and practices and boundaries must be contestable in accordance with the three normative conditions. The cultural preservationism associated with cultural essentialism is, in Benhabib’s view, inherently rigid and restrictive and prone to becoming repressive, inequalitarian or exclusionary.

Coulthard, a Dene (First Nations) political theorist, points out that Benhabib’s opposite strategy of anti-essentialism will not necessarily solve the problem of inequality or pave the way to a successful emancipatory politics. That is because (1) her condemnation of exclusionary practices can sometimes misidentify essentialist identity claims rather than context of colonial relationships as the primary source of those practices, (Coulthard 2010: 143-146); and (2) indigenous activists may legitimately wish to employ essentialist notions of culture and identity in order to critique oppressive power relations and transcend forms of colonial exploitation and domination (146-148). An example of the former mistake is the case of women reinstated by Bill C-31 but not afforded full band membership by some First Nations communities (whether because of sexist prejudices, political self-interest or practical motivations relating to the effect a mandated increase in membership has on the capacity of some small communities). In such a case, Native womens’ legal victories have only been the narrow and hollow ones

of equal access to a colonial system of band membership and Indian registration.

Examples of the second kind can be found in Patricia Monture-Angus's and Bonita Lawrence's proposals for regeneration of matriarchal and kinship governance structures as a strategy of reparation and resistance to patriarchal relations enforced by the Indian Act; or in Taiake Alfred's critiques of universalist notions of capitalism and so-called progress. Coulthard, following Michael Hardt and Antonio Negri as well as other critics of social constructivism, makes a persuasive claim: "[t]hat by employing the so-called social fact of cultural fluidity, narrativity, and contestability as a standard against which democratic theorists, judges, policy makers, and the state ought to assess the legitimacy of claims for recognition, Benhabib's theory potentially sanctions the very forms of power and discrimination that anti-essentialist democratic projects are supposed to undercut" (149).

Not that these criticisms constitute a full-blown defence of cultural essentialism, which runs into its own problems of authenticity and "true" representation. The point must be that any approach to democracy – be it essentialist or non-essentialist, liberal/pluralist or radical/post-structuralist, or indeed whether it accepts or eschews the label "deliberative"—cannot lose sight of *relations of power* as the most fundamental object of analysis. This probably implies more than just an intellectual appreciation that discourse cannot be understood outside of its constitutive context of power (Noel 2006:432-433); it may also imply that *any* approach to democratic practice and institutional design that attempts to do so is likely to "undercut" the achievement of either authentic equality of participation or emancipation from historical structures of domination.

This failing may even prove to be true of Charles Blattberg's claimed alternative to deliberative democracy, which recommends a "conversational" mode of dialogue that takes aim at truly reconciling conflicts and differences as opposed to either the "monarchist" trumps of constitutional rules or "polyarchist" bargaining of compromises that aim at nothing more than "accommodation." Blattberg paints a compelling picture of how the "patriotic" politics that he envisages is more likely to lead to a politics of the common good –and a polity the constitution of which is made up of "expressive" rules in the Wittgensteinian sense, i.e. rules firmly rooted in our shared practices and more open to the possibility of "real integration between the communities concerned" (Blattberg 2003: 100-101). *Shall We Dance? A Patriotic Politics for Canada* is at the very least a very useful reminder of how the strategies and mechanisms that we have developed for coping with diversity and disagreement can cause us to unwittingly perpetuate and exacerbate conflict and miss opportunities for shared understanding and common endeavour. But his critiques of both Trudeau's Charter-centred pan-Canadianism and Mulroney's quintessential polyarchal bargaining at Meech Lake and Charlottetown, while extremely illuminating, also show how patriotic politics risks leaving out as much as the alternatives.

According to Trudeau, a major purpose of the Charter was to combat the "centrifugal forces that were threatening to break the federation apart" (Trudeau 1990:362). Blattberg notes with irony that the Charter itself is fundamentally centrifugal: "[f]or rights encourage negotiation, that adversarial form of dialogue that is all about balancing the terms of a conflict against each other rather than integrating or reconciling them. ...To assert rights, then, is to take an adversarial stance, and there is no conversing

with an adversary...And if there is no place for conversation, then there is no room to affirm the public common good that, unlike some abstract theory of justice, constitutes the true integrity of a citizenry” (Blattberg 2003: 87-88). Rights talk is part of a “neutralist theory of justice that leaves no room for the recognition of nationhood”(70), another aspect of Trudeau’s “monarchist” doctrine.(74). One wonders, however, whether a search for common ground between Trudeau and Levesque could have led to reconciliation, or whether expressive rules operating as substitutes for rights could provide the kind of security for minorities that in turn is a foundation for dialogue between equals. Quebec nationalists are now less angry, while other Canadians feel less shocked and threatened by the prospect of secession and have begun to think about the meaning of “English Canada”(Resnick 1994). Both groups are more cosmopolitan in outlook than ever before. We are arguably in a far better position to engage in patriotic conversation about the common good today than we were twenty years ago in the highly charged atmosphere of Meech Lake and its aftermath; but paradoxically (from the standpoint of patriotic theory) that is largely because of the Charter of Rights, section 35 of the Constitution Act, 1982 and Bill 101 (The Quebec Language Charter). The legal rights created by these statutes have had both the direct effect of creating greater security for cultural and national minorities and the indirect effect of creating greater awareness of, and respect for, other groups in the larger political culture—despite the heightened adversarialism that results whenever the boundaries of those rights are being tested or contested. (Since that legal contestation will also arise when the boundaries of expressive rules are being applied as well, it should perhaps not be seen, even by Blattberg, as a disqualifying attribute.)

This ineluctability of legal rules and procedures underlies any discussion of democratic theory or constitutional politics. Blattberg criticizes deliberative or discursive democrats such as Alain Noel and Mark Kingwell for relying upon a “neutralist theory of conversation” and “regulative rather than expressive procedures” for judging the quality of deliberations (30-31); Joseph Carens and Samuel La Selva for (“confusingly”) conflating conversation and bargaining, as when they call for “negotiations...as a way of pursuing mutual understanding”(31); and even Charles Taylor, Jeremy Webber, and James Tully are criticized, since “their failure to distinguish adequately between conversation and negotiation ultimately leads to pluralism *tout court*”(32). In other words, pluralism is an unattractive concept, since it implies non-ideal and un-patriotic compromises, so ‘deep pluralism’, which makes common ground and durable expressive rules even more difficult to achieve, can hardly be much of an improvement.

In contrast, I prefer to see all three groups of theorists Blattberg refers to as “deliberative” in the broadest sense of the word, although the latter group are of course more wary and skeptical of what might get left out—or smuggled in-- under the authority of “reasons” “procedures” and “justifications” of government. They differ not only in terms of their modes of dialogue, but in what they see as the challenges posed by varying political contexts to the quality of democratic practices—in particular, the relationship between reason and power (Noel 2006). An unwillingness to completely part company with the language of interest and bargaining is sometimes rooted in an acute sensitivity to power and its attendant inequalities. To be sure, procedures and principles developed for the purpose of regulating conflict need to be regarded as

provisional and revised in the light of power's imbalances, effects, and marginalizations--as well as in the light of their potentials for achieving full reconciliation and realizing alternative possibilities. But to jettison them altogether may be to make the perfect the enemy of the good (after all: might not rights-claims be necessary to establish which identities and interests are worthy of expression in the first place?) And in order to provisionally secure the good, both liberal legalists and radical pluralists may have something indispensable to contribute.

According to John Dryzek, deliberative democracy has roots in two distinct traditions --Anglo-American liberal constitutionalism and European critical theory-- which have recently met on largely liberal terms, largely thanks to Jurgen Habermas in Europe and Amy Gutmann and Dennis Thompson in America (Dryzek 2000: 8-17). But unlike Carter, Stokes & Warren *et.al*, he laments this convergence, arguing that we need to retrieve the critical edge of deliberative democracy by distinguishing between *liberal constitutionalist* and *discursive* strands of deliberative theory; the latter is necessary if there is to be any continued quest for democratic *authenticity* (i.e. substantive rather than symbolic democratic control and actual citizen engagement and competence).

Nevertheless, Dryzek gives liberal constitutionalists full credit for using deliberative theory to reconcile liberal and democratic elements of constitutionalism: by stressing how deliberative principles can justify liberal rights; by describing how liberal constitutions promote deliberation; and by describing constitution-making itself as a deliberative process. In particular, Gutmann and Thompson get credit for understanding and accepting the presence of deep moral disagreement: "They do not expect deliberation to produce consensus, but they do expect it to yield understanding and mutual respect,

thus making even deep moral conflicts on issues such as abortion more tractable (17).”

What Dryzek and other discursive theorists insist, however, is that there is a need to curb strategic interest-based bargaining; allow and even encourage a plurality of contesting discourses; allow different kinds of communication beyond the rational communication privileged in western cultures; and recognize that the best way to learn such values as reciprocity, publicity and accountability is through the process of deliberation itself, rather than as stipulated pre-conditions of entry to the forum. In addition, true critical theories are distinguished by their attention to extra-constitutional agents of democratic influence; since Habermas sees law-making as the only rightful mechanism for transforming public opinion into administrative decision, he is disqualified from calling himself a critical theorist, according to Dryzek (26-27).

Whether or not James Tully would accept the label of “discourse theorist” in Dryzek’s sense, he neatly avoids both the criticism of theorising “above” or “outside” of practice and the criticism (levelled by Habermas and others at ‘contextualist’ thinkers) of being “context-bound”. He does this by using Foucauldian genealogy to examine and “problematise” existing practices and then using a combination of insights derived from both Foucault and Wittgenstein in order to describe activities of intellectuals and citizens that are at the same time ‘context transgressing without being context transcending’ (Tully, along with Stanley Cavell, Chantal Mouffe and a few others, has helped to rescue Wittgenstein from a conservative reading that would root rule-following in some ungrounded proposition or hegemonic practice that would be inimical to revision. Tully 2008a: 52-53.) Tully's stated aim is "to establish pedagogical relationships of reciprocal elucidation between academic research and the civic activities

of fellow citizens"(3). He calls this style of theory "public philosophy", the purpose of which is "to throw a critical light on the field of practices in which civic struggles take place and the practices of civic freedom available to change them"(3). The reason this philosophy is distinctive is that it eschews the traditional approach of theorizing in a manner that is detached from relationships of normativity and power in which citizens find themselves. It is described as being 'in a new key' in that Tully is combining "historical studies and a reciprocal civic relationship" in his own unique style(9); implicitly, he is inviting us to do the same.

Foucault's conception of a "discourse" refers to the sets of rules governing the "validity" of statements and the classification of objects of analysis and how they are organized into a system of possibility for knowledge. He thus situates, relativizes, and replaces traditional units of analysis such as the "text" the "theory" and the "research programme". His method is to ask what rules permit certain statements or truth-claims to be made--e.g. systems of classifying animals discussed in *The Order of Things* or the classification of psychiatric illnesses in *Madness and Civilization*--and to display their contingency, their constructedness, and how they have been shaped (at least to some extent) by power. This creates a space in which subjects can start to understand and to modify their own discourses and practices (Tully 2008a: 73-83). The relevance of this approach to constitutional change is apparent in Tully's critique of liberal deliberation:

When formerly excluded people are 'included' in practices of democratic deliberation, they often find that the practical knowledge of the practice is different from the ones to which they are accustomed. This is often overlooked by the dominant groups, for it is their customary way of reasoning together. ...If deliberation is oriented to a consensus, then, given reasonable disagreement, this will ensure that some minority voices will be silenced along the way. Moreover,

deliberation involves a visceral or passionate dimension that was ignored in the more abstract accounts. (Tully 2008b: 116-118)

Tully's approach is used effectively to argue that marginalised groups such as First Nations can use this knowledge to 'unblock processes of citizenisation'. It does so without running into Coulthard's objection to Benhabib, since the citizens engaged in practices of civic freedom are thereby enabled to affirm as well as modify existing rules and practices. Similarly, Iris Marion Young's "communicative democracy", which values forms of communication that are non-deliberative, is also important to consider as a means of de-privileging dominant groups and attaining more meaningful democratic equality (Young 2000: 52-80). Young makes the distinction between '*external exclusion*' (i.e. those issues that concern how people are kept outside the process of discussion and decision-making) and '*internal exclusion*' (i.e. issues that concern ways that people lack effective opportunity to influence the thinking of others even when they have access to for a and procedures of decision-making). According to Young, a theory of democratic inclusion requires "an expanded conception of political communication, both in order to identify modes of internal inclusion and to provide an account of more inclusive possibilities of attending to one another in order to reach understanding"(56). In addition, Young's ideal of *differentiated solidarity* is committed to wider regional *institutions* that both recognize group distinction, granting a prima-facie value to local autonomy, and *require intergovernmental negotiation, mediation, joint planning and regulation* (197-198; 228-235, emphasis added); hence its relevance to the politics of federalism and constitutional change.

Bringing Institutions—and Politicians-- Back In

In recent years, political elites in Canada have allowed increased *participation* by citizens by means of regular policy consultations, occasional mini-publics on constitutional matters, and occasional referenda, in response to the need for political legitimacy. These efforts have achieved little in terms of advancing either institutional reform or national unity, at least in part because they have not aimed at remedying the deliberative gap that often exists between representation and ratification. Indeed, deliberative democrats are generally right to be “critical of the increasing use of initiatives, recall, and referenda, which typically take place under conditions that are even less deliberative than ordinary elections” (Gutmann & Thompson 2004: 60). It often appears that when results of town hall meetings or other deliberative experiments are combined with a referendum or plebiscite they do not enjoy a much higher rate of ratification—in other words, voters are not terribly impressed that their fellow citizens have deliberated about a proposed topic and are not especially deferential to the outcomes of deliberative mini-publics.. This fact has been echoed in Canada recently by the recent deliberative experiments in B.C. and Ontario with respect to electoral reform which saw the recommendations of Citizens’ Assemblies defeated in the BC elections of 2005 and 2009 and the Ontario election.

Such results should not be surprising, given the weak logical connections between deliberation and decision-making.”Deliberation must end in a decision, but deliberative democracy does not itself specify a single procedure for reaching a final decision. It must rely on other procedures, most notably voting, which in themselves are not deliberative.” (Gutmann and Thompson 2004:18). Gutmann and Thompson’s example of the role of deliberation in the work of the Oregon Health Commission in the early 1990s at least

exemplified the ‘reiteration of deliberation’ through successive stages of leader revision and citizen reaction, before ending in a majority vote in the legislature. The contrasts with Canada’s recent experiments with citizen deliberation are instructive.

First, the main premise underlying the constitution and selection of citizens’ assemblies in electoral reform matters was deemed to be the need to overcome the problem of “conflict of interest” on the part of politicians, who had invested in political strategies for winning under the existing system and who were therefore the greatest beneficiaries of that system. But the requirement of a 60% supermajority threshold in both Ontario and BC (which caused the BC vote of 57.69% to be defeated in 2005) was arguably also unnecessary and self-serving, notwithstanding the suggestion of a precedent in the *Clarity Act*. Furthermore, the non-involvement of legislators in a process that put Citizens’ Assembly recommendations directly to the voters enabled them to avoid responsibility—and to subtly signal to the electorate that electoral reform was not a priority.(Fafard 2009: 193). It is intriguing to speculate how provincial legislatures would have handled these bills if they had been treated as citizens’ initiatives, and politicians had been forced to publicly justify acceptance, rejection or amendment of these proposals. Or, if these legislators had been forced to engage in civic dialogue with the Assembly, in a manner similar to the Oregon process.

Second, the experiences of the 2005, 2007 and 2009 provincial referenda on electoral reform raised doubts about the adequacy of the media as a forum for the deliberative conduct of referenda. Pilon’s study of the 2007 referendum campaign in Ontario suggests that democratic theory can be operationalized in order to evaluate the

“deliberative performance” of various media outlets. Habermas’s inclusive and equal ‘ideal speech’ situation requires not only equal space and broad inclusion but a “critical deliberative dynamic”. One way to test for the latter would be to look for different kinds of validity claims that participants make (meaning, knowledge, appropriateness and sincerity) and ask whether and to what degree leading media outlets have managed to satisfy them (Pilon 2009: 6). On these counts Pilon found five of the leading daily newspapers in Ontario to have been wanting.

Third, there is a striking difference between the provisionality and open-ended nature of the more purely deliberative Oregon process and the finality of the Citizens’ Assembly process, in which there were fixed terms of reference, little or no reciprocal dialogue between citizens and elected representatives, and finally a decision in which citizens were ultimately faced with a ‘take-it-or leave-it’ referendum decision. Gutmann and Thompson cite as an example the growing sense of unfairness that many of the participants in Oregon felt about how rationing of health care services would cause some resources to be transferred from some poor citizens to other poor citizens. This led to a call for an increased health care budget that was beyond the terms of reference for deliberators at the community level—at first glance, a disadvantage of the deliberative approach. But, since both citizens and legislators were then forced to confront the unfairness of the rationing scheme (an issue that they had previously evaded), the legislators then acted to increase the amount of resources so that no poor people would be made poorer as a consequence of the deliberations. Revisions were also made to the deliberative procedures themselves, so that the citizens most affected by the policy would be more adequately represented in the future (Gutmann and Thompson 2004: 19-20).

The difficulties confronting referendum democracy are of course compounded at the national level when the issues are inter-cultural relations and major constitutional amendments. Several problems affecting any prospects for successful democratic constitutional change were said to have emerged from Meech Lake and its sequel, the Charlottetown Accord: 1) the rise of the Citizens' constitution organized around Charter rights greatly complicated the ability of elites to engineer legitimating change; 2) the asymmetry between basically legitimate elite bargaining in Quebec (at least on federalism issues) and illegitimate elite bargaining in English Canada; 3) ratification by referendum has achieved a quasi-conventional status and may be unavoidable with packages of amendments as large as Meech or Charlottetown; 4) Claims based upon differentiated equality (Eisenberg) or differentiated solidarity (Young) clashing with the ideals of undifferentiated equality and national integration implicit in referendum democracy. Since this latter point has more salience in some institutional contexts than others—ranging from tolerably low in the case of Charter interpretation provisions to extremely high when it comes to the principle of representation by population in the House of Commons---- successful ratification of differential equality and solidarity claims may be possible if elites who negotiate constitutional texts are sufficiently sensitive to the democratic logics of different institutions. Such sensitivity, it is submitted, is more likely to evolve out of a process of iterative deliberation.

It has been argued that deliberative democracy is more suited to the politics of difference than is either aggregative or plebiscatory democracy, not because it achieves harmony, but because it narrows disagreement to more acceptable levels and encourages

mutual understanding and mutual recognition (Guttman & Thompson 1996, 2004). Of course, this assumption has been contested. There are conditions in which deliberation actually promotes disagreement and enhances conflict, because it makes citizens more aware of differences of interest (Shapiro 1999: 31). Indeed, more radical versions of democratic theory (Dryzek's discursive democracy, Tully's public philosophy, and Young's communicative democracy) are compelling precisely because they serve to delegitimize dominant discourses and encourage a greater multiplicity of conflicting discourses, which could in turn make the attainment of agreement (the prime and urgent objective of the Meech Lake negotiations, for example) even harder to achieve. The evidence is mixed, suggesting that much depends on the institutional design. Cass Sunstein has evidence showing a tendency toward polarization in smaller groups, particularly when those groups are relatively homogeneous and have a shared identity (Sunstein 2000). However, he agrees with James Fishkin (1995) that "deliberative polling"—a procedure he developed for random sampling of citizens to discuss policy positions of competing candidates—tends to be de-polarizing, particularly when care is taken to ensure diversity in the group, an open process, and balanced information to the participants. A more controversial aspect of deliberate polls is that they are also private. Citizens juries and consensus conferences ask participants to come together to craft novel solutions to policy problems, and, according to Graham Smith, are more likely to produce creative solutions to problems (Smith 99-100).

In the light of these considerations, there are at least two basic strategies that can be followed to improve the democratic character of Canadian constitutional politics. One is to make referenda campaigns themselves more deliberative—either by improved media

coverage and better use of both old and new media by governments and civic groups, structured citizen meetings at the local level, or procedures such as citizens' juries and deliberative polling (Warren and Pearse 2008; Fishkin 1995). The other is to avoid referenda wherever possible, focusing direct democracy more at the initiation or agenda-setting stage and otherwise focusing on supplementing and improving existing representative bodies with deliberative devices, such as local popular assemblies, deliberative polling, and other mini-publics, with the ultimate ratification being provided by the legislature(s) (Smith 2009, Dryzek 2011).

The first strategy, while showing both room for improvement and considerable promise, nonetheless has a disappointing track record. The reasons for this have to do with the inherent time and resource limitations of referenda campaigns; the binary nature of referenda questions; the problems of scale which afflict the attempt to extend deliberation to a mass public, and the difficulty of revising either questions or answers as deliberation evolves. Related to these factors is the relative lack of institutional dialogue between citizens' bodies and the parliaments or legislatures. Governments have either been excessively zealous in loading and fixing the constitutional agenda (Charlottetown) or else have been conspicuously absent (electoral reform); in both cases there was no obvious means available of rectifying the flaws in the process. The second strategy values ongoing, open-ended conversation rather than pinning the hopes for legitimacy and success on a single final decision. It provides forums for reiterative and interactive dialogue between citizens and their representatives which, instead of providing an escape from (or for) politicians, gives them a new deliberative role.

Conclusion

A re-examination of the constitutional debates of two decades ago reveals a missed opportunity for deliberative dialogue, a misguided emphasis upon citizen ratification instead of citizen initiative, and a lack of awareness of the conflict between the logics of deep diversity and plebiscitary democracy. The evasion of democratic constitutionalism since 1987 has been characterized alternately by the two polarities of executive dominance and legislative absence, which share in common a desire to achieve durable institutional legitimacy within a context of truncated conversation and debate. Whether the objective has been national reconciliation in a rapidly evolving multi-national and multi-cultural community, or enhanced citizenship through democratic reform, the means have not been coherent with the ends.

This failure of democratic practice has had an unexpected and unwitting ally--- democratic theory. Whether it is liberal constitutionalists placing exclusive faith in procedures; social constructivists placing too much faith on normative conditions designed to counter essentialism in identity formation; advocates of patriotism advocating expressive rules as the key to reconciliation; or radical pluralists' understandable emphasis upon agonism in social practices, it has proven all too easy to overlook the conjunction of two fundamental insights. First, that there is a need to make *decisions* about relatively stable rules, which in turn requires a "realist understanding of deliberation and of constitutional politics, as rule-bound debates defined by conflicts and by the possibility of accommodation" (Noel 2006: 435). Second, that there is a need for an understanding, *pace* Wittgenstein and Cavell, that "we should never refuse bearing *responsibility* for our decisions by invoking the commands of general rules and principles" (Mouffe 2005: 76).

Just as all of the aforementioned strands of democratic theory can fail us, they also can all contribute to a better understanding of how best to proceed. There is by now broad theoretical agreement that attempts to find short cuts to legitimate constitutional settlements are likely to backfire; that there is a need to respect the very different logics that different institutions possess, including the different conceptions of equality that they embody; that it is desirable wherever possible, to move away from the logic of strategic bargaining to the logic of mutual respect and recognition. More needs to be done, however, to establish the basic competencies of our most important democratic institutions. Exactly what questions are best suited for a citizens' assembly to deliberate about as opposed to a legislature? Exactly what questions are best decided by referendum as opposed to legislative vote? These are the crucial questions that the politics of legitimation in Canada has largely avoided. We can begin to answer them by noting that (1) Citizens' Assemblies are well-suited to deliberating about concrete questions of fundamental importance that are not or involving large re-allocations of resources from other policy areas; (2) referenda are good devices for registering approval or disapproval on a one-person-one vote basis, but not for deliberating about complex "polycentric" policy questions; or making decisions where strict majoritarianism is not a consensus value; and (3) representative governments bring responsibility for over-all priority-setting and resource allocation to the democratic dialogue.

One simple, concrete suggestion: *Consider sending citizen deliberative recommendations to politicians for ratification or amendment, instead of directly to the voters in referenda.* Forcing free parliamentary votes on the recommendations of

citizens juries would encourage citizens to deliberate rather than simply "choose", and also place pressure on representatives to actually justify their decisions.

Finally: *Continue the Constitutional Conversation*. If elite accommodation is no longer a sufficiently legitimate mechanism for constitutional change, popular participation is risky and nation-wide ratification elusive, what is to be done? In Canada several commentators have thoughtfully presented the case for a continuing "Canadian conversation" and in various ways have tried to argue that the focus of constitutional discussion should no longer be the imposition of a single fixed or permanent solution to the problems of civic identity and federal arrangements, but instead an ongoing openness to recognitions heretofore lacking, circumscribed only by the willingness to recognize others.

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Endnotes

ⁱ “A great benefit of the country’s exhaustion from dealing with big packages of constitutional reform would be relearning how to do ordinary, one-reform-at-a-time, constitutional politics...Fortunately, there are some encouraging signs that Canadians may be recovering the capacity to accomplish constitutional reform without linking everything together and getting bogged down in the mega constitutional swamp” (Russell 1993: 231).

ⁱⁱ Swinton’s remarks included in a summary of the proceedings of “Symposium on Constitutional Reform: AfterAllaire and Bélanger-Campeau”, (Edmonton, Alberta, May 15-16, 1991), (1991) *Constitutional Forum*, Vol. 3, No. 1, p.17.

ⁱⁱⁱ “Despite its shortcomings[a high order of communicative standards expected of citizens; a question of how best to develop the kinds of civic identity best suited for deliberation], there are good grounds for proposing that deliberative democratic theory offers the greater promise of renovating both the practice of democratic citizenship and democratic institutions.” Geoffrey Stokes, “Democracy and Citizenship” in *Democratic Theory Today* (2002).