

Comment/Commentaire

Two Forms of Democracy: A Response to Mendelsohn's "Public Brokerage: Constitutional Reform and the Accommodation of Mass Publics"

JANET AJZENSTAT *McMaster University*

Underlying Matthew Mendelsohn's plea for popular participation in constitution making¹ is a tradition of democratic thought that Jennifer Smith calls "anti-partyism."² This is not the place to describe types of anti-partyism, or trace its roots in Rousseau; I will say only that in Canadian history, and still today, anti-partyism is critical of parliamentary government. In the mid-nineteenth century its proponents argued for the rule of the *demos*, "the many"; they called their philosophy, "democracy." They were not calling merely for an extension of the franchise; they criticized the very idea of representative and responsible institutions, contending that responsible parliamentary government empowered "the few" at the expense of "the many." Today, most scholars regard parliamentary government as a form of democ-

1 Matthew Mendelsohn, "Public Brokerage: Constitutional Reform and the Accommodation of Mass Publics," this JOURNAL 33 (2000), 245-72.

2 Jennifer Smith, "Responsible Government and Democracy," in F. Leslie Seidle and Louis Massicotte, eds., *Taking Stock of 150 Years of Responsible Government in Canada* (Ottawa: Canadian Study of Parliament Group, 1999), 19-49. Smith shows how flexible the parliamentary system can be in response to anti-partyism, while remaining at bottom ultimately antithetical. For a view more sympathetic to anti-partyism, yet not incompatible with Jennifer Smith's, see Peter J. Smith on civic republicanism, in Janet Ajzenstat and Peter J. Smith, eds., *Canada's Origins, Liberal, Tory, or Republican?* (Ottawa: Carleton University Press, 1995), 47-78.

Janet Ajzenstat, Department of Political Science, McMaster University, Hamilton, Ontario, L8S 4M4; ajzens@mcmaster.ca

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racy, and usually remember that "democracy" has more than one definition. In his article, Mendelsohn unfortunately uses "democracy" to describe only views inclining to anti-partyism.

At the heart of his argument is the suggestion that Michael Atkinson, Michael Luszti³ and this author³ have not seen that the world is becoming more democratic; if we understood democracy we would realize that citizen-participation in constitution making has become inevitable. But we are not lacking in our understanding of democracy; we are democrats of a different kind, liberal democrats. We argue that parliamentary liberal democracy is the best vehicle for popular participation, while Mendelsohn is making a case, or at least a half-hearted one, for "anti-party" democracy.

There are a number of passages in which he very obviously misrepresents our views. He suggests that Ajzenstat, Atkinson and Luszti do not favour the direct participation of citizens in drafting and ratifying constitutions because we do not believe citizens can "broker" political interests. We supposedly believe elites can "broker," but not citizens. In effect, we are accused of saying that there is a political class unable to deliberate and thus naturally fit only to be governed. Such an assertion is deeply offensive to liberal democracy. It is Mendelsohn who flirts with classism. He draws such a sharp distinction between "elites" and "citizens" that he seems to be saying that members of parliament and the provincial legislatures, government officials and so on, are not citizens, and that private citizens are not free under the constitution to run for office, and bid for places in the public service. However, he is not entirely consistent. In the end, he puts his faith in institutions rather than class, recommending political arrangements to draw elites and "citizens" together, and in this respect he comes closer to the liberal democratic view. The important question becomes this: what institutions allow effective participation? The most interesting parts of his article are those in which he proposes the introduction of "new brokerage models."

In the real world of politics, these "brokerage models" (stakeholders' conferences, citizen juries, deliberative polls, people's conventions) have usually been associated with local politics and with mediation of differences among citizen groups. They are advisory bodies, designed to pull together a range of opinions and to offer advice to parties, town councils and legislative assemblies. They do not

3 Michael Atkinson, "What Kind of Democracy Do Canadians Want," this JOURNAL 27 (1994), 717-45; Michael Luszti, "Constitutional Paralysis: Why Canadian Constitutional Initiatives Are Doomed to Fail," this JOURNAL 27 (1994), 747-71; and Janet Ajzenstat, "Constitution Making and the Myth of the People," in Curtis Cook, ed., *Constitutional Predicament: Canada after the Referendum of 1992* (Montreal: McGill-Queen's University Press, 1994), 112-26; 266-74.

themselves have law-making powers; they do not ratify statutes, or constitutional amendments. In the course of arguing for the “new models,” Mendelsohn sometimes implies that Ajzenstat and company are doubtful about all participation of interest groups, in any political arena. Not so; liberal democracy, of course, favours the mobilization of people to discuss public affairs and constitutional reform. It applauds attempts to influence elected representatives. If professional facilitators and innovative “brokerage” arrangements help people take a broader and more informed view of what is at stake—all the better. The issue between us turns on Mendelsohn’s proposal to give citizen groups a formal share of law-making power at the constitutional level.

In brief, both liberal democracy and the anti-partyism Mendelsohn represents place considerable confidence in political institutions, and both welcome citizen-interest groups. But liberal democrats are dubious about allowing those groups a formal share in the legislative power, and are dubious, especially, about allowing them direct power in drafting and ratifying constitutions. Why? At least part of the answer emerges when we look at the conceptions of political deliberation that attach to each kind of democracy.

Anti-partyism strives for consensus. Mendelsohn admires the “brokerage” models because they are “anti-majoritarian”; they militate against majority decisions and encourage or require unanimity. He is doubtful about majoritarian institutions (like parliaments) because they arrive at decisions over the objections of the political minority, or minorities. In short, he takes failure to agree as evidence of a failure to deliberate.

Liberal democracy, in contrast, expects disagreement, encourages it, honours it and flourishes because of it. I do not mean that parliamentary debate cannot proceed toward unanimity. Good arguments persuade. John A. Macdonald puts it this way:

Why, sir, for what do we come to this house if it is not because we are supposed to be convinced by argument, if it is not that we are to sit down together and compare notes and discuss the questions that may come before us, and to be convinced according to the force of the reasons that may be advanced for or against them?⁴

Nevertheless, unanimity is not required and, in the ordinary way of things, not expected. There is no expectation that all political points of view and all political goods can be wrapped up in one package. When it is statute law that is being deliberated and decisions must be made, debate pauses, the vote is held, and if the majority approves, the measure passes and the power of the state is invoked to enforce compliance with the new policy. But deliberation may resume. New coalitions

4 Province of Canada, Legislative Assembly, *Debates*, March 13, 1865.

tions are built; minority arguments resurface. In parliamentary systems, there is always the possibility that a new government, a new parliamentary majority, will alter or revoke previous decisions.

Thus, for liberal democrats, the presence of political majorities and minorities is proof that the system allows and encourages effective participation. In a short comment I cannot make the case for excluding the direct participation of citizen groups in the legislature. The gist of the argument is that direct participation of groups, or delegates instructed by groups, stifles deliberation and rides roughshod over political minorities.⁵ A similar argument could be made about the unanimity requirement. What we must consider is whether participation of citizen groups is appropriate in the case of constitutional law. Mendelsohn is arguing, above all, that these groups be allocated a role in ratifying constitutional amendments.

Precisely because the liberal democratic constitution sets out the procedures for dissent and deliberation, the liberal democrat sees a special problem with constitution making. There is an argument for preferring consensus in constitutional law, in contrast to statute law. There should be consensus about the constitutional rules for preserving debate in day-to-day politics. Moreover, there is the strong expectation that constitutional law will be irrevocable, or at least highly resistant to revision. A minority that loses in the constitutional arena may have lost for ever. There is the further problem that the constitutional reforms one party sees as merely procedural, others will regard as a bid to bias the course of public debate and thus change the substance of public policy.

At its strongest, anti-partyism tries to subject both constitutional law and ordinary legislation to the continuing process of public debate.⁶ It attributes little to the distinction between constitutional law and statute law. Making constitutions should be a matter for the *demos*, just as making laws is a matter for the *demos*. It is only liberal democracy with its categories of statute law and "higher" constitutional law that makes such heavy weather about admitting political groups and political interests to the constitutional bargaining table.

I think the general feeling among Canadians is that constitutional meddling on the scale experienced during discussions that led to the ultimately abortive Charlottetown Accord of 1992 is dangerous, and I respect that feeling. Making new constitutions *is* dangerous. Yet there might be better and worse ways to do it. Mendelsohn suggests we look

5 Edmund Burke is the classic source.

6 See Robert Hollinger, *The Dark Side of Democracy: Elitism vs. Democracy* (Westport: Praeger, 1996), xi-xx, 3-12.

for clues in Canada's original legislative debates on Confederation.⁷ It is a good idea; but unfortunately his anti-partyism biases his reading of those debates.

Only someone with little respect for parliamentary government and representative institutions would make the bald claim, as he does, that Confederation was nowhere ratified by the people. Between 1865 and 1873, in the seven colonies of British North America, there were lively parliamentary and extra-parliamentary debates on union and on the new constitution. Most colonies held general elections on the issue. In the end, five of the seven legislatures had reason to be satisfied that their decision reflected majority opinion in the province. (In Newfoundland, of course, the decision went against union. The two exceptional colonies were Red River and Nova Scotia: Red River was annexed by the Dominion; in Nova Scotia union was ratified by a stale parliament.)

The bias against liberal democracy shows again in Mendelsohn's contention that "Those who ended up shaping the *British North America Act* had little interest in increasing democratic control over governments" (248). He is not alone in this belief; it has become the accepted view. But it holds only from the perspective of anti-party democracy. It is true only if you accept anti-partyism as the sole definition of democracy, only if you reject parliamentary responsible government as a form of democracy. All the Fathers of Confederation (the men who drafted the *British North America Act*), and most of the legislators in the provincial parliaments, whether confederates or anti-confederates, Liberals or Conservatives, endorsed responsible government. They described responsible government as the system by which the government-of-the-day is controlled by the people's elected representatives in the popular house and, through those representatives, controlled by the electorate. Some of the legislators explicitly contrasted responsible government with the ideology they called "democracy," the mid-nineteenth century anti-partyism, and gave their reasons for preferring responsible government to democracy in this sense.

In every legislature, speakers discussed obligations to constituency, conscience and party. They discussed the merits of an extended franchise, the value of an elective upper chamber, and the effects of direct popular democracy, in the form of referendum or single-issue general election, on parliamentary debate. An important question for

7 Mendelsohn's examples are drawn from Janet Ajzenstat, "Political Sovereignty and Constitution Making in the Confederation Debates: Who Represents the People?" paper presented at the annual meeting of the Canadian Political Science Association, Sherbrooke, 1999. The debates he refers to can now be found in Janet Ajzenstat, Paul Romney, Ian Gentles and William D. Gairdner, eds., *Canada's Founding Debates* (Toronto: Stoddart, 1999), part 5.

the anti-confederates was whether they could bear to see local popular control of government under parliamentary institutions diluted by federalism. Mendelsohn is wrong to argue that Canada's founders had "little interest in increasing democratic control over governments" (248). Democratic control of government was perhaps their major concern.