

Comment/Commentaire

A Response to Mendelsohn's "Public Brokerage: Constitutional Reform and the Accommodation of Mass Publics"¹

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Matthew Mendelsohn's "Public Brokerage: Constitutional Reform and the Accommodation of Mass Publics"² offers an alternative to what he calls the "conventional wisdom" surrounding Canada's intractable constitutional quagmire. Unlike most analysts of the Canadian constitutional process, Mendelsohn advocates greater public input into constitution making. Indeed, he suggests that the principal problem lies with elites, not mass publics. Limiting the role of "elites" in "accommodation," he argues, allows for the possibility of constitutional reconciliation. Mendelsohn, then, provides a service by infusing some fresh ideas into Canada's constitutional debate.

This, of course, assumes that the constitutional process *needs* the infusion of fresh ideas. It can be argued that there have already been too many ideas infused into the constitutional process. Most new ideas, as Alan Cairns has pointed out, have created the institutional niches for special interests to seek the redistribution of constitutional resources towards their own narrow ends.³ Thus, when I claim that

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- 1 The author thanks Ian Brodie, Christine Carberry and Dennis Simon for their helpful comments.
 - 2 Matthew Mendelsohn, "Public Brokerage: Constitutional Reform and the Accommodation of Mass Publics," this JOURNAL 33 (2000), 245-72.
 - 3 Alan C. Cairns, "Constitutional Minoritarianism in Canada," in Ronald L. Watts

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Canadian constitutional initiatives are doomed to fail,⁴ I am not engaged in what Mendelsohn calls "pessimism." Rather, I am optimistic that the constitution remains immune from further social engineering, at least at the level of formal constitutional amendment.

On the other hand, I recognize that the constitutional debate is an important one; constitutional paralysis, it could be argued, threatens the future of the country. Therefore I readily concede both that my optimism might be misplaced, and that articles such as Mendelsohn's play a potentially vital role in keeping constitutional options open.

My purpose in this comment is twofold. First, I seek to defend the "conventional wisdom," as articulated in the works of Janet Ajzenstat, Michael Atkinson and myself.⁵ Since Ajzenstat and Atkinson are more than capable of defending their own works, I will concentrate exclusively on my contribution to the "conventional wisdom." Second, I critique Mendelsohn's argument.

Defending the "Conventional Wisdom"

Mendelsohn levels four criticisms at my article. All are explicit in the following:

Lusztig's analysis shares a flaw with much public choice scholarship: he articulates a reasonable proposition ("mutually exclusive MCOs" [mega-constitutional orientations]) and identifies an outcome which is consistent with the proposition (the defeat of the Charlottetown Accord), but then goes on to deduce a post hoc explanation that A must have caused B, without considering alternative explanations, without offering a way to falsify the argument, nor by subjecting it to any empirical test. In fact, Lusztig admits that there are other plausible explanations for the Accord's narrow defeat—the Yes side's campaign was insulting, Prime Minister Brian Mulroney was despised, new elements were added to the Accord without prior consultation—but dismisses them out of hand without submitting them as alternative hypotheses for testing. (255)

In sum, the criticisms are: (1) that my argument is inductively derived; (2) that it is tautological; (3) that it is not empirically supported; and

and Douglas M. Brown, eds., *Canada: The State of the Federation 1990* (Kingston: Institute of Intergovernmental Relations, 1990), 71-96.

4 Michael Lusztig, "Constitutional Paralysis: Why Canadian Constitutional Initiatives are Doomed to Fail," this JOURNAL 27 (1994), 747-71.

5 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 Press, 1994), 112-26; Michael Atkinson, "What Kind of Democracy Do Canadians Want?" this JOURNAL 27 (1994), 717-45; and Lusztig, "Constitutional Paralysis."

(4) that it was not tested against alternative hypotheses. I will address these in turn.

Mendelsohn is correct that the argument is inductively derived. Many hypotheses are, of course, although optimally one seeks to construct a model that can be deductively applied. Our quibble here appears to reduce to a fairly minor methodological one. I subscribe to the view of normal science that any incremental addition to knowledge is beneficial. That is, having introduced a plausible hypothesis, it may be left to future work to seek a broader, deductive application. This is precisely what I have done in subsequent, albeit theoretically modified, work co-authored with Colin Knox and Christopher Manfredi, respectively.⁶ Mendelsohn obviously disagrees with this approach, which is certainly his prerogative. Reasonable people can disagree.

That said, I am not sure how much room there is for disagreement on the falsifiability issue. An argument is tautological, or unfalsifiable, if there is no means by which it can be demonstrated to be incorrect. Unfalsifiable arguments have the property of "heads I win, tails I win." My article is based on two fundamental predictions. First, that the process that led to the Charlottetown Accord sets a procedural precedent that no future mega-constitutional amendment will be possible without mass input and mass legitimization (the latter is operationalized as informal ratification through referendum.) In other words, this prediction is that the old-style elite accommodation model of constitution making in Canada is obsolete. The second prediction, based upon the first, is that Canadian constitutional initiatives are doomed to fail.

Can these predictions be falsified? Of course they can. A mega-constitutional amendment that is not informally ratified through referendum would falsify my argument. Similarly, a successful mega-constitutional amendment, even if informally ratified by referendum, would also constitute falsification.

I am not a crusader on the falsifiability issue. Certain interesting propositions can be made on assumption. Many would argue that rational choice theory is an example. However, I do find it interesting that having chosen to hoist the banner of falsifiability, Mendelsohn himself fails to provide a falsifiable argument. Specifically, his thesis is "that theories of public deliberation provide a more useful paradigm for elaborating workable models of constitutional change in Canada than do the traditional approaches of executive federalism and conso-

6 See Michael Lusztig and Colin Knox, "Good Things and Small Packages: Lessons from Canada for the Northern Irish Constitutional Settlement," *Nations and Nationalism* 5 (1999), 543-63; and Christopher P. Manfredi and Michael Lusztig, "Why Do Formal Amendments Fail? An Institutional Design Analysis," *World Politics* 50 (1998), 377-400.

ciationalism" (247-48). His ultimate sentence claims that "pessimism [with respect to the impossibility of constitutional change] could be unwarranted, were we to apply a different theoretical framework and a different set of assumptions to the question" (272). Translated into more direct language, his argument reduces to the proposition that greater mass input into the constitutional process could well generate a successful outcome. Falsifying this argument, however, entails attempting to prove a negative. One cannot prove that greater mass input into the constitutional process will *not* yield a successful outcome; if it does not happen today, it might occur tomorrow, or the day after that, or the day after that. Certainly mass input leading to successful constitutional change is possible. As the saying goes, *anything* is possible. However, that trite expression, like Mendelsohn's argument, suffers from the property of nonfalsifiability.

Mendelsohn's next complaint is that my argument is not empirically tested. He claims, for example, that "Lusztig underlines the conflicts between four mega-constitutional orientations (MCOs) and argues that the Charlottetown Accord was defeated because constitutional elites were prepared to compromise their MCOs but public opinion was not. No evidence is provided for this assertion, other than the fact that, *prima facie*, the MCOs are in conflict and some citizens mobilized against the Accord" (244-45). Somebody has been sloppy here. Admittedly I am biased, but I do not think I am the culprit. Implicit in the quotation above are the following points: (A) constitutional elites were prepared to compromise; (B) mass adherents of the four MCOs were not; (C) I provide no evidence in support of A and B.

Point A is tough to dispute. The Charlottetown Accord was agreed to by proponents of the various MCOs. On pages 761-64 I spell out the process, identifying elite proponents of each MCO, and outline the provisions of the Accord that satisfied each. Point B is equally clear, I believe. Pages 764-70 are dedicated to the reaction from mass adherents of each MCO. I cite numerous opinion polls, as well as reactions from opinion leaders from within each MCO, that illustrate quite clearly that mass adherents of the various MCOs were not willing to be as accommodating as were their elite representatives at the Charlottetown bargaining table. In sum, then, Mendelsohn may not be convinced by my evidence, but even a cursory glance at pages 761-70 obviates the bald assertion that my argument is not supported.

Mendelsohn's final criticism is that I fail to identify, and subsequently test, alternative hypotheses. Again, this seems to take us back to differing methodological preferences. One possible research design would have been to construct a critical experiment, whereby competing hypotheses are pitted against one another in a fashion that demonstrates the explanatory or predictive superiority of one hypothesis over the others. However, this hardly constitutes the universe of appropriate

research designs. The fact that Mendelsohn prefers a different research design begs the question of why he did not construct a critical experiment himself in critiquing my article. The logical answer is that he chose to pursue other avenues of investigation. I respect his prerogative as an author and ask only that he be equally broad-minded.

Along the same lines, Mendelsohn takes me to task for failing to consider "credible evidence" that supports possible alternative explanations to my own (255). He then goes on to cite in a footnote works that I should have considered. One, by Richard Johnston, makes the claim, in Mendelsohn's words, that Charlottetown failed because "citizens were asked to give up something important in exchange for something of little value" (255, n. 36). Had I cited Johnston's work, which in retrospect I would have, it would only have served to support my position. Indeed, Johnston's point that Charlottetown constituted an "inverted logroll" whereby elites "may have overestimated how much each group wanted what it got and how intensely some groups opposed key concessions to others,"⁷ hardly serves to contradict my own argument. Another work he claims I should have cited, by Lawrence LeDuc and Jon Pammett,⁸ was published *after* my article. This raises once again the issue of sloppy scholarship; surely Mendelsohn is not accusing me of failing to be prescient. Moreover, since this work *was* published prior to Mendelsohn's article, it is reasonable to question why he himself failed to show how it undermines my argument.

Contra Mendelsohn

I have two specific criticisms of Mendelsohn's article, one conceptual, one logical. I will recapitulate his thesis, as I understand it, as a means of highlighting its conceptual weaknesses before moving on to my second criticism.

Mendelsohn's argument comes into conflict with the "conventional wisdom" over the issue of public input into the constitutional process. Given that Canada is a liberal democracy, the import of public input is not to be dismissed lightly. Mendelsohn might be correct to chastise the "conventional wisdom" for a rather blithe dismissal of the vox populi. Our disagreement is intensified by the fact that the "conventional wisdom" is grounded in the understanding that human nature is self-interested, whereas Mendelsohn seems to suggest that

7 Richard Johnston, "An Inverted Logroll: The Charlottetown Accord and the Referendum," *PS: Political Science and Politics* 26 (1993), 43.

8 Lawrence LeDuc and Jon Pammett, "Referendum Voting: Attitudes and Behaviour in the 1992 Constitutional Referendum," this JOURNAL 28 (1995). 3-35.

human nature can rise above narrow self-interest. Without agreement on the foundational characteristics of human nature, it is understandable that our arguments lead to different assumptions and outcomes.

Mendelsohn's argument is that a combination of discursive (or deliberative) democracy and citizen engagement—what he calls public brokerage—could well hold the key to successful constitutional reconciliation in Canada. These terms require some unpacking. Discursive democracy is based on the premise that it is possible to

seek to resurrect reasonable public discourse and to identify ideal procedures for democratic deliberation and collective will formation. Scholars contend that in situations of disagreement, one should try to accommodate the moral convictions of others to the greatest extent possible without compromising one's own. Deliberative democracy involves reciprocity, publicity and accountability, with the goal of reaching deliberative agreement through discursive rather than strategic conversation. (262)

Citizen engagement, as far as I can determine, is a concession that narrow private interests may well intervene in the deliberative process, and as such constitutes a weaker condition—specifying only that the public have sufficient input into the policy process to have an impact on the outcome. However, the relationship between citizen engagement and discursive democracy is never made clear. Sometimes it appears that citizen engagement is a subset of discursive democracy; at other times Mendelsohn implies that citizen engagement supplies prescriptive purchase beyond that of discursive democracy.

Either way, as noted, discursive democracy and citizen engagement produce what Mendelsohn calls public brokerage. Like its conceptual ancestors, however, public brokerage is not well defined. Instead, the reader is left to piece together what public brokerage entails from examples that Mendelsohn uses to illustrate its potential.

Thus, Mendelsohn submits, albeit tentatively, that because public brokerage models have worked for municipal policy making, they may well work at the constitutional level in Canada as well. At the local level, “issues as wide-ranging as economic development strategies, land-use and budgeting have been subject to new forms of citizen engagement” (264). Apparently this worked quite well. The reader has to take Mendelsohn's word for it, however, because no concrete details are provided (although he does supply numerous citations). The question becomes, though, is this model applicable to constitutional amendments?

Mendelsohn concedes that “whether these examples of public participation at the municipal level are relevant to the issues addressed [in his article] remains an open question” (265). I would be tempted to phrase this more forcefully. There are enormous qualitative differences between the stakes in the constitutional arena and the municipal one.

The former is the foundation for state-society relations. The latter is not. Thus it is far easier to accommodate the "moral convictions of others to the greatest extent possible without compromising one's own" when deciding whose neighbourhood gets the Monday morning trash pick-up than in determining, for example, the constitutional parameters of Aboriginal self-government. The point is not to minimize the importance of local government. Rather, it is merely that municipal policies tend to have salience for far fewer people, and to be considerably more reversible.

More importantly, I fail to understand how public brokerage at the local level, whereby interested citizens are provided a forum to speak to (by definition elite) decision makers, differs from what we saw at Charlottetown. A series of commissions, forums and fact-finding missions traversed the country in the early 1990s seeking citizen input into the constitutional process. This conforms perfectly, it seems to me, to Mendelsohn's definition of public brokerage at the municipal level, whereby "public participation . . . includes two-way communications and the ability for the public to influence policy decisions. . . ." Charlottetown's failure, then, would appear to invalidate the applicability of this form of public brokerage. Mendelsohn disagrees, suggesting that the processes differed in that the successful model was "iterative, on-going, open-ended [and] co-decisional in nature" (264). I know what these words mean, but I confess to not understanding what an "iterative, on-going, open-ended" constitutional amendment process would look like.

At least one of Mendelsohn's other examples also suffers from conceptual imprecision. The fact that Australia held a people's convention antecedent to its referendum on republicanism is held up to "provide evidence that the public and elected officials could participate together in consensus building" (270). This despite the fact that, in Mendelsohn's own words, the "process became enmeshed in ordinary partisan politics" (270) and that the referendum ultimately was defeated. Insofar as the putative purpose of the article is to demonstrate the superiority of public brokerage to elite accommodation, such conceptual fuzziness is confusing.

In short, the best that can be said of Mendelsohn's evidence is that it is tenuous, and tenable only by virtue of a generous interpretation of poorly operationalized concepts. The worst that can be said is that it is utopian political theory disguised as political science. I lean towards the latter position.

My second criticism of Mendelsohn's argument is based on logic. One gets only a vague sense of how public brokerage would operate in Canada. In part, this is understandable. I do not believe that Mendelsohn is obliged to provide a blueprint of the end product of constitutional change effected through a public brokerage model. However,

assuming that a non-Charlottetown model of public brokerage is used, let us explore just one dimension of the process—ease of amendment. In part, the deliberative aspect of Mendelsohn's argument suggests a constitution that will be easy to amend; determine the public will and act upon it. On the other hand, the practical (citizen engagement) component suggests that the process will be more difficult. For simplicity's sake, imagine a dichotomous procedural outcome along the dimension I just specified: difficult-to-amend or easy-to-amend. Either one, it seems to me, is fraught with insuperable difficulties that leaves the argument logically untenable.

The difficult-to-amend outcome, that is, the one most compatible with the status quo, and (given the remote prospects of determining a collective will) the most likely outcome of constitutional change born of public brokerage, creates enormous difficulties for the public brokerage model. Unless we concede that private interests can be wholly subordinated to the collective good (an assumption that Mendelsohn is not willing to make) difficult-to-amend is, in basic game-theoretic terms, analogous to an *n*-person, single-play Prisoners' Dilemma. The dominant strategy for all players in such a game is defection. Substantively, this outcome would mean that no group or individual would risk agreeing to the demands of others for fears that their own demands ultimately would fail to be satisfied. To get around this problem, the framers of the Charlottetown Accord sought to alter groups' incentive structures by seeking to gratify the demands of all groups arbitrarily deemed legitimate. However, as Johnston's inverted logroll suggests, forcing people to give up a lot to get a little tends to be a losing proposition. Difficult-to-amend, then, seems to militate against the logic of public brokerage.

Easy-to-amend fares little better. A constitution that is easy to amend and which features numerous points of popular access is little more than an alternative legislative forum. Legislatures are the province of changing public opinion; constitutions reflect bedrock values. If they did not, there would be no point in getting worked up about constitutional change, and there would have been no controversy surrounding the Meech Lake and Charlottetown accords. Similarly, easy-to-amend implies the construction of general consensus, no doubt through the deliberative process. But if consensus can be reached through public brokerage, surely this obviates the need for constitutional entrenchment. After all, constitutional entrenchment is little more than a hedge against changing social attitudes. We would be constructing (as if the courts did not already provide this service) an alternative to the legislative processes that already exist in Canada. Easy-to-amend, then, while far more consistent with a public brokerage model, sacrifices the very *raison d'être* of a constitution.

Conclusion

Despite the deep flaws, both conceptual and logical, in his argument, Mendelsohn's article provides an alternative viewpoint in Canada's constitutional marathon. For this he deserves some credit. However, he is too quick to give the back of his hand to the "conventional wisdom" and too superficial in his treatment of the alternatives. Failing to identify the conceptual boundaries of the public brokerage model, Mendelsohn is free to suggest that some processes—such as Charlotte-town—fail to conform to public brokerage, whereas others, equally elite-driven, are consistent with the model. With this rather ill-defined roadmap as our guide, political scientists are exhorted to "identify ways to institutionalize mechanisms which marry the accommodation of conflict with popular sovereignty" (271). The objective is laudable, if somewhat obvious. The tough part is how to get there. Mendelsohn provides few clues.