

Comment/Commentaire

Models of Public Brokerage: A Reply to Professors Ajzenstat and Lusztiig

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I thank the JOURNAL for this opportunity to continue a dialogue on constitutional paralysis in Canada. The disagreements between myself and Janet Ajzenstat and Michael Lusztiig underline some of the tensions in Canadian political science and have important implications for how we conceive processes of constitutional change¹. Our substantive points of disagreement are: what went wrong during the Charlottetown process and what lessons can be drawn from this? Their own diagnoses focus on public participation in the Charlottetown episode as a threat to the possibility for constitutional change. The lesson that they take from this is that constitutional change is impossible in Canada. I argue that improperly designed venues for public participation created obstacles to success, that alternative procedures could lead to mutual understanding, and that work should be undertaken to elaborate models which include the public in all phases of the process. In this brief response, I address these disagreements and discuss in more detail models of public brokerage. First, however,

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- 1 Matthew Mendelsohn, "Public Brokerage: Constitutional Reform and the Accommodation of Mass Publics," this JOURNAL 33 (2000), 245-72; Janet Ajzenstat, "Two Forms of Democracy: A Response to Mendelsohn's 'Public Brokerage: Constitutional Reform and the Accommodation of Mass Publics,'" this JOURNAL 33 (2000), 589-94; Michael Lusztiig, "A Response to Mendelsohn's 'Public Brokerage: Constitutional Reform and the Accommodation of Mass Publics,'" this JOURNAL 33 (2000), 595-603. Pages cited in this reply refer to our respective articles.

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I must correct the inaccurate representations of my argument presented in the responses.²

Ajzenstat seems to have misunderstood my argument, managing in her short reply to misstate my position on at least seven occasions. I did not write, nor do I believe, that those who disagree with me are not democrats; that the world is becoming "more democratic" (588) that I support models of decision making that "encourage or require unanimity" (589); that she does not understand democracy; that we would be better off without parties; or that we should look for better ways to make constitutions in Canada's original legislative debates on Confederation. Nor did I say (or accuse anyone else of saying) "that there is a political class unable to deliberate and thus naturally fit only to be governed" (588). I explicitly said that the political class is quite good at deliberation but has no institutions to facilitate having the results of those deliberations approved by the public (246, 262). It is increasingly common in small group deliberations to require "mirroring;" that is, before one can attack the position of another, one must first be able to summarize their opponent's position to the satisfaction of that person. Ajzenstat does not come close to accurately summarizing my position, making conversation difficult.

In her response to my article, Ajzenstat contrasts "two forms of democracy," parliamentarism and "anti-partyism," and appropriates the term "liberal democrat" for those who share her view. She believes that "liberal democrats are dubious about allowing [citizen-interest groups] a formal share . . . [of] direct power in drafting and ratifying constitutions" (589). I find this contrast of two watertight models to be reductive and find Ajzenstat's notion that all liberal democrats are dubious of public participation to be inexact. There are many forms of "liberal democracy" which involve varying degrees of public participation. The precise form which liberal democracy takes evolves with changes in political culture and it is inaccurate to suggest that only one of these forms is legitimate, while any other mix of parliamentarism and public participation is "anti-party." I believe that the challenge is to find creative ways to accommodate popular sovereignty with the important organizing functions of parties and parliamentary government,³ and in my article I propose various models that bring members of the political class together with the general public for the purposes of deliberation (264, 266-70). It is unfortunate that Ajzenstat overlooked these passages, choosing instead to categorize me as "anti-

2 A lengthier version of this response can be found at: <http://politics.queensu.ca/~mattmen/papers/cjpsresponse.doc>

3 Matthew Mendelsohn, "Introducing Deliberative Direct Democracy in Canada: Learning from the American Experience," *American Review of Canadian Studies* 26 (1996), 449-68.

party," rather than as someone who is interested in blending Ajzenstat's "two forms of democracy."

Ajzenstat accuses me of having "little respect for parliamentary government and representative institutions" because I state that the *British North America Act* had little interest in popular control over governments. I stand by my contention that Canadian constitutional documents and political institutions lack a tradition of popular sovereignty, and that this has meant that Canadians have had few analytical tools to understand the increased prominence of the popular sovereignty model. Ajzenstat confuses my analysis of the failures of process with a normative commitment to public participation. Whether one respects parliamentary institutions is not the point; the point is that using parliamentary institutions alone is not a feasible way of engaging in major constitutional change in Canada. We must therefore develop better ways of combining these two theoretical forms—parliamentary and popular democracy—in practice. Such efforts must acknowledge a number of facts that Ajzenstat's original article and response ignore: the two ideal types of democracy she discusses exist nowhere in practice; intergovernmentalism, not parliamentary processes, has been the dominant forum for constitutional discussions; and liberal democracy is reinforced (and "mob rule" prevented) by a whole series of civil society organizations and political institutions, not by parliament alone. Whether the public should be offered a formal role in constitutional change is a settled question. What remains unanswered is how. Ajzenstat chooses not to take up my central criticism of her argument: that deliberation and anti-majoritarian decision rules have traditionally been part of executive decision making, that the public is now inevitably involved in constitution making, and that we have no institutions available to the public that can replicate the tradition of accommodation.

Lusztig and I generally agree on what we disagree about, although he has misread my article in a number of places. I do not contend that "public brokerage" involves interests addressing decision makers one by one and engaging in advocacy. I am opposed to such a model, which accurately describes the Charlottetown process, because it does not moderate self-interest. I likewise do not support processes that "determine the public will and act upon it" (600). The assumption throughout my article is that there is no one measurable "public will": what constitutes the public will is an artifact of the device used to measure it, and referenda construct that will in a majoritarian manner. This is a point that should be familiar to Lusztig because it resembles the important finding of those working within the public choice tradition that processes structure decisions and influence preferences.

In my article I underlined that there were a variety of explanations for the defeat of the Charlottetown Accord that Lusztig did not

consider, such as Prime Minister Brian Mulroney's unpopularity and the strong evidence that those provisions that actually went into the Accord to placate particular communities were not widely supported by those communities. Senate reform was a second-order priority for voters in the West, and the 25 per cent seat guarantee of seats for Quebec in the House of Commons was of little interest to most Quebecers. Lusztig asks how these facts concerning an "inverted logroll" constitute a refutation of his argument (597). It seems clear to me that they offer a strong refutation: elites misinterpreted support and opposition for various provisions, which is far less likely to occur during public processes because political leaders will be able to gauge more accurately what is acceptable to the public. First ministers added elements to the Accord that responded to the internal logic of their private strategic bargaining sessions, with no knowledge of whether these provisions were in fact supported. These miscalculations—the inverted logroll—are less likely to occur during more public processes.

It is striking that, despite the fact that many elements of the Accord were not strongly supported, many Canadians were prepared to vote for it anyway, suggesting a deep desire to find accommodation. Many Canadians behaved in ways opposite to what would be expected by Lusztig (and Michael Atkinson): the general public was not majoritarian and did not expect to get everything that it wanted. Lusztig unfortunately does not take up my central point that constitutional elites cling more tenaciously to their mega-constitutional orientations (MCOs) than members of the general public.

Lusztig believes that mega-constitutional reform is impossible without mass legitimation, and that mega-constitutional change cannot succeed in this way. I generally agree with his first contention, though I qualify it by underlying that mass legitimation can take place in ways other than through a referendum.⁴ We disagree on the second point, but this in no way implies that I believe that constitutional change through a more public process would be easy. But the difficulties are a function of the nature of Canada rather than of public participation. Since 1867, Canada has never experienced mega-constitutional change to the satisfaction of all major actors, regardless of the process used.

Lusztig cites my criticism of his argument at length and concludes that his two contentions—that constitutional elites during the Charlottetown episode were prepared to compromise their MCO's and that some mass adherents were not—are "tough to dispute." However, in his summary of my argument he ignores that I used the word

4 Most referenda have little to do with genuine consultations and instead are used strategically by political elites to further their own ends (Matthew Mendelsohn and Andrew Parkin, *Referendum Democracy: Citizens, Elites, and Deliberations in Referendum Campaigns* [London: Palgrave, forthcoming]).

“because” in the passage he cites. My objection here is not picayune and is at the heart of the disagreement: I do not dispute either of his two self-evident contentions, but instead point out that there is no evidence that the Accord failed *because* of them. In summarizing my argument in the way he does, Lusztig continues to avoid the real problem with his analysis: not that any of his propositions are unreasonable, but that he attributes a series of causal relationships to them based on fancy.

Lusztig and I disagree about the feasibility of implementing models of public brokerage. I do not minimize the seriousness of the concern, but both Ajzenstat and Lusztig reason through dichotomies only. Ajzenstat contrasts mob rule and parliamentarism, while Lusztig contrasts the status quo and doomed initiatives. Both ignore that there are practical models, processes and institutions available that have as their objective the inclusion of the public in constitution making in ways beyond the referendum.

A popularly elected constituent assembly that has the power to negotiate and ratify constitutional change would be a form of public brokerage, as would a series of study circles, leading up to a document negotiated by representatives from all of the groups across Canada. A recent proposal out of Quebec suggests an elected constituent assembly charged with drafting a Quebec constitution that would outline the ideal nature of the relationship between Quebec and the rest of Canada that would then serve as a basis for negotiations with other Canadian governments.⁵ To take another issue, there were many calls for a referendum on the Nisga’a Treaty. A referendum on such a treaty is not an ideal method for finding agreements between Aboriginal peoples and other Canadians, yet land claims negotiations have been undertaken with little democratic input from the Canadian population. A process of public brokerage could include a referendum on the process of negotiations that would provide Canadian governments with more legitimacy to proceed and weaken potential criticism at a later stage.⁶ It could also include members of parliament on negotiating teams who would have as one of their mandates reporting back to the Canadian public. Or to look to international practice other than the South African and Australian examples mentioned in my initial article, during the Danish referenda on the European Union in the early 1990s the state provided public funding for anyone who wished to organize public forums and deliberative town halls, provided that representatives from all

5 Denis Monière, Pierre de Bellefeuille, Claude G. Charron, and Gordon Lefebvre. “Il faut convoquer une assemblée constituante.” *Le Devoir*, April 3, 2000, A-7.

6 I owe this suggestion to Peter Russell, who made it at the conference *The Rising Use of Referendums in Liberal Democratic Societies*. Queen’s University, May 1999.

sides were present, encouraging more community-level dialogue. I could go on. My purpose, though, is not to list every possible experimental use of public brokerage, but to show that those who do not understand what a process of public brokerage for constitutional amendment “would look like” (599) have failed to survey the international community adequately and suffer from a lack of imagination.