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Reviewed work(s):

Source: *Canadian Journal of Political Science / Revue canadienne de science politique*, Vol. 33, No. 2 (Jun., 2000), pp. 245-272

Published by: [Canadian Political Science Association](#) and the [Société québécoise de science politique](#)

Stable URL: <http://www.jstor.org/stable/3232964>

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Public Brokerage: Constitutional Reform and the Accommodation of Mass Publics¹

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It is widely recognized that the traditional institutions and processes of Canadian politics, such as executive federalism, elite accommodation and brokerage parties have fallen into disrepute with large sections of the Canadian public, and political scientists have noted their failure to resolve long-standing conflicts in the area of constitutional politics.² I argue that the reasons why these processes have failed to manage constitutional political conflict have not been properly diagnosed. In particular, Canadian political scientists have not adequately differentiated executive federalism from accommodation and brokerage, often assuming they are contingent on each other (as they are, by definition, in the commonly used expression "elite accommodation"). The pessimism among some Canadian political scientists about Canada's ability to amend the Constitution to the satisfaction of major groups stems in large part from the misplaced assumption that the brokerage and accommodation necessary in Canada require executive federalism. This conventional wisdom suggests³ that since executive federalism is

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- 1 I thank Lawrence Hanson, Janet Hiebert, Andrew Parkin, Leslie Seidle and Michael Stein for taking the time to read and comment on earlier drafts of this article. I also thank the anonymous reviewers of the JOURNAL for their very helpful suggestions. I also gratefully acknowledge the Social Science and Humanities Research Council of Canada for financial support (Post-Doctoral Fellowship #75-93-0409).
 - 2 See Peter Russell, *Constitutional Odyssey: Can Canadians Become a Sovereign People?* (Toronto: University of Toronto Press, 1993); and Alan Cairns, "The Charlottetown Accord: Multinational Canada v. Federalism," in Curtis Cook, ed., *Constitutional Predicament: Canada after the Referendum of 1992* (Montreal: McGill-Queen's University Press, 1994), 25-63.
 - 3 The conventional wisdom is most forcefully put in three articles: Michael Atkinson, "What Kind of Democracy Do Canadians Want?" this JOURNAL 17 (1994),

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Canadian Journal of Political Science / Revue canadienne de science politique
XXXIII:2 (June/juin 2000) 245-272

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discredited and has been replaced by a populist requirement for citizen participation, constitutional change is not possible because citizen participation, usually through referendums, shuns accommodation in favour of a majoritarianism which is unable to deal adequately with the problems of a multinational federation like Canada.

I will agree with the conventional wisdom that executive federalism is no longer a viable method for resolving constitutional disputes, but I will dispute the parallel assumption that the principles underlying accommodation and brokerage have been rejected in favour of a vulgar majoritarianism. I will argue that the resolution of constitutional conflicts would benefit from new models of "public brokerage" that strive not for elite accommodation, but for the accommodation of mass publics, that is, the creation of processes, spaces and institutions where members of the public can engage with elected officials and senior public servants in the forms of deliberation and bargaining that have traditionally been the purview of elites. I will challenge the argument that the Charlottetown Accord of 1992 failed because of public involvement, arguing instead that failure was (partially) due to the fact that compromise was forged at the elite level while ratification took place at the mass level. Difficulties encountered when attempting to integrate the public into constitution making do not stem from "citizen participation" per se, as some have argued, but from a disjunction of roles: the forms of participation open to the public (voting in a referendum or speaking to a parliamentary committee) are majoritarian by nature, while those open to elites (integrative intergovernmental bargaining sessions) are deliberative and promote brokerage. It is not that elites or the public are any more or less capable of accommodation, only that one has institutions and the other does not.

In the first section I briefly review how some Canadian political scientists have assumed that accommodation requires elites. In the second, I examine how the causes of the defeat of the Charlottetown Accord have been misunderstood because of this assumption, laying blame on public participation. The goal of this exercise is not to offer an explanation for the defeat of the Charlottetown Accord, but to revisit the most prevalent explanations and identify what these tell us about the assumptions used by Canadian political scientists in analyzing constitutional processes. The third section reports on various experiments, such as peoples' conventions and deliberative polling, that attempt to find ways to accommodate mass publics. I argue that they represent nascent (if still experimental) attempts to operationalize the-

717-45; Michael Lusztag, "Constitutional Paralysis: Why Canadian Constitutional Initiatives Are Doomed to Fail," this JOURNAL 17 (1994), 748-71; and Janet Ajzenstat, "Constitution Making and the Myth of the People," in Cook, ed., *Constitutional Predicament*, 112-26.

Abstract. This article argues that many Canadian political scientists have not properly understood why executive federalism has failed to secure constitutional change. The author contends that Canadian political scientists have often assumed that accommodation and brokerage require elites. While it is true that executive federalism is no longer a viable method for resolving constitutional disputes, there is no evidence for the parallel assumption that the principles underlying accommodation have been rejected. The resolution of constitutional conflicts would benefit from new models of “public brokerage” that strive not for elite accommodation but for the accommodation of mass publics through the creation of institutions where members of the public can engage in deliberative activities along with elites. The author challenges the argument that constitutional change is not possible because of citizen participation, arguing instead that the Charlottetown Accord failed in 1992 not because of public involvement, but (at least partially) because compromise was forged at the elite level while ratification took place at the mass level. The author suggests that theories of public deliberation provide a more useful paradigm for elaborating models for constitutional change in Canada than do the traditional approaches of executive federalism and consociationalism.

Résumé. Cet article soutient que politologues canadiens ont mal compris pourquoi le fédéralisme exécutif n’a pas permis de modifier la constitution. Les spécialistes de la science politique ont souvent pris pour acquis que la négociation de compromis reposait sur les seules élites. Or, s’il est vrai, soutient-il, que le fédéralisme exécutif n’est plus une méthode viable de résolution des conflits constitutionnels, rien ne permet d’affirmer que les principes qui sous-tendent la négociation de compromis ont été rejetés. La résolution des conflits constitutionnels pourrait être facilitée par le recours à de nouveaux modèles de «négociations publiques», impliquant la création d’institutions qui permettraient aux citoyens de participer aux délibérations conjointement avec les élites. L’auteur rejette la thèse selon laquelle la participation des citoyens entrave la conclusion d’ententes constitutionnelles. Si, prétend-il, l’Accord de Charlottetown a été rejeté en 1992, ce n’est pas en raison de l’implication du public, mais parce qu’il a été négocié par les seules élites, avant d’être soumis au vote de la population. Selon lui, les théories de la négociation publique constituent un paradigme plus utile que les approches traditionnelles du fédéralisme exécutif et du consociationalisme pour l’élaboration de modèles de changements constitutionnels au Canada.

ories of public deliberation⁴ and transform public opinion—understood as “gut reactions” to the public spectacle—into a deeper form of “public judgment.”⁵ I suggest that theories of public deliberation

4 Bernard Manin, *Principes du gouvernement représentatif* (Paris: Calmann-Lévy, 1995); Amy Gutmann and Dennis Thompson, *Democracy and Disagreement* (Cambridge: Harvard University Press, 1996); James Bohman and William Rehg, *Deliberative Democracy: Essays on Reason and Politics* (Boston: MIT Press, 1997); Jane Mansbridge, *Beyond Adversary Democracy* (Chicago: University of Chicago Press, 1983); and Simone Chambers, *Reasonable Democracy* (Ithaca: Cornell University Press, 1996).

5 Daniel Yankelovich, *Coming to Public Judgment: Making Democracy Work in a Complex World* (Syracuse: Syracuse University Press, 1991); and James Fishkin, *Deliberation and Democracy: New Directions for Democratic Reform* (New Haven: Yale University Press, 1991).

provide a more useful paradigm for elaborating workable models of constitutional change in Canada than do the traditional approaches of executive federalism and consociationalism. I conclude that mechanisms for public deliberation have not been recognized as serious attempts to reconcile popular sovereignty with accommodation because the traditional paradigms of Canadian political science are ill-suited to study seriously a role for the public in brokering conflict.

1. Executive Federalism and Accommodation

It is a widespread (though not universal) assumption among Canadian political scientists who study the Constitution and federalism that the compromises necessary for the preservation of healthy democratic life in Canada require the participation of elites and the absence of the public. The most important traditions in the study of Canadian politics have avoided citizens and focused instead on the institutional accommodation of conflict between diverse groups. This concentration is to be expected, as the management of conflict has typically been Canada's most pressing problem. Moreover, because Canadian constitutions (1774, 1791, 1840, 1867) have not been concerned with public participation, it is hardly surprising that Canadian scholars have devoted little attention to the question. Although the public was not absent from pre-Confederation politics⁶ and some of the Fathers of Confederation did argue in favour of popular ratification of the agreements leading to Confederation in 1867,⁷ no such ratification was forthcoming. Those who ended up shaping the *British North America Act* had little interest in increasing democratic control over governments.⁸ Westminster-style

6 See, for example, Allan Greer, *The Patriots and the People: The Rebellion of 1837 in Rural Lower Canada* (Toronto: University of Toronto Press, 1993); and Jeffrey McNairn, "Towards Deliberative Democracy: Parliamentary Intelligence and the Public Sphere in Upper Canada, 1791-1840," *Journal of Canadian Studies* 33 (1998), 39-60.

7 Janet Ajzenstat, Paul Romney, Ian Gentles and William Gairdner, eds., *Canada's Founding Debates* (Toronto: Stoddart, 1999).

8 On this point, and on the debates between John Macdonald and Georges-Etienne Cartier over the required depth of federal arrangements to the detriment of debates on democratic control, see Frank Underhill, *In Search of Canadian Liberalism* (Toronto: Macmillan, 1960), chap. 1; Pierre Trudeau, "Some Obstacles to Democracy in Quebec," *Federalism and the French Canadians* (Toronto: Macmillan, 1968); Lionel Groulx, *La Confédération canadienne, ses origines* (Montreal: Le Devoir, 1918); and Donald Creighton, *The Road to Confederation: The Emergence of Canada: 1863-1867* (Toronto: Macmillan, 1964). Philip Resnick argued that the BNA Act should be seen as the constitution of the counterrevolution in opposition to the liberalism of the rebellions of 1837-1838 (*Parliament vs. People: An Essay on Democracy and Canadian Political Culture* [Vancouver: New Star Books, 1984], 17).

government and executive dominance have also meant that, quite realistically, the study of intergovernmental relations and executive federalism have been more important for understanding Canadian politics than the study of citizens. These observations, of course, are not new:⁹ it is widely recognized that the people are absent from the Canadian Constitution, that Canada has no tradition of popular sovereignty and that Canadians have never constituted themselves as a sovereign people.¹⁰ Nevertheless, it is important to remind ourselves that while the focus on elite accommodation is perfectly understandable, it is inappropriate to apply this tradition holus-bolus to the study of public participation.

Arend Lijphart offered the classic justification for elite accommodation in a country like Canada: "Plural societies may enjoy stable . . . government if . . . leaders engage in coalescent rather than adversarial decision-making. . . . Elites cooperate in spite of the segmental differences dividing them because to do otherwise would . . . call forth the prophesied consequences of the plural character of the society."¹¹ Although there is debate about whether Canadian institutions adequately accommodate conflict (and thus whether they are "consociational"),¹² there has been little debate on Lijphart's assumption that elites are important in preventing the emergence of unmanageable conflict.¹³

9 See Donald Smiley, "An Outsider's Observations of Federal-Provincial Relations Among Consenting Adults," in Richard Simeon, ed., *Confrontation and Collaboration: Intergovernmental Relations in Canada Today* (Toronto: Institute of Public Administration of Canada, 1979), 105-13.

10 Russell, *Constitutional Odyssey*, 1993; Reginald Whitaker, *A Sovereign Idea: Essays on Canada as a Democratic Community: Paradoxes, Achievements and Tragedies of Nationhood* (Montreal: McGill-Queen's University Press, 1996); and Robert Vipond, *Liberty and Community: Canadian Federalism and the Failure of the Constitution* (Buffalo: SUNY Press, 1991), 73-74.

11 Arend Lijphart, *Democracies: Patterns of Majoritarian and Consensus Government in Twenty-one Countries* (New Haven: Yale University Press, 1984), 99-100.

12 Robert Prebster believed that Canada was indeed consociational (*Elite Accommodation in Canadian Politics* [Toronto: Macmillan, 1973], 9-13). On the other hand, Lijphart judged it to be "approximately in between the centrifugal and consociational types" (*Democracies*, 129); and Kenneth McRae concluded that Canada was at most "a very imperfect example of consociational democracy" (*Consociational Democracy: Political Accommodation in Segmented Societies* [Toronto: McClelland and Stewart, 1974], 300). Canadian institutions, it must be remembered, were not explicitly designed for promoting consensual decision making. Institutions designed for this end would combine parliamentary government and proportional representation (see Juan Linz, "The Virtues of Parliamentarism," *Journal of Democracy* 1 [1990], 84-92).

13 For example, how elites from different regions manage conflict has been an important tradition in the study of Canadian politics (John Porter, *The Vertical Mosaic* [Toronto: University of Toronto Press, 1965]), and it is often assumed that contact among citizens provokes conflict (S. J. R. Noel, "Consociational

Those writing about the Constitution in particular have tended to see elitist democracy and accommodation as inseparable. For example, Kenneth McRoberts argued that the reaction against "closed-door meetings" pervading English-speaking Canada in the 1990s was a reaction against attempts to accommodate dualism, assuming that reactions against such meetings (executive federalism) are *simultaneously* a reaction against attempts to accommodate Quebec.¹⁴ And Samuel LaSelva has argued that Canadian scholars will inevitably look to elites to hold the country together because the country is conceived in terms of "solitudes."¹⁵ My purpose is not to review thoroughly the Canadian political science literature, but to underline two relatively uncontroversial points: Canadian political science (1) has not seriously studied citizens and (2) has tended to assume that the management of regional and linguistic conflict requires elites.

This is not to suggest that no Canadian political scientist has ever been interested in popular sovereignty or direct democracy. C. D. Macpherson has underlined the shallow nature of elitist liberal democracy, Philip Resnick offered up an elaborate model and theoretical justification for direct democracy to counteract the undemocratic nature of parliamentary life (though his later work is more reticent about participatory democracy), and Charles Taylor and Reginald Whitaker have examined the question of how one operationalizes popular sovereignty in Canada.¹⁶ Yet the important work of these theorists

Democracy and Canadian Federalism," this JOURNAL 4 [1971], 15-18). Furthermore, it is widely argued that parties and cabinet are sites for the accommodation of regional and linguistic conflicts (S. J. R. Noel, "Political Parties and Elite Accommodation: Interpretations of Canadian Federalism," in J. P. Meekison, ed., *Canadian Federalism: Myth or Reality* [3rd ed.; Toronto: Methuen, 1971], 64-83), a view widely taught in Canadian textbooks (see J. R. Mallory, *The Structure of Canadian Government* [rev. ed.; Toronto: Gage, 1984], 459).

14 Kenneth McRoberts, *Misconceiving Canada: The Struggle for National Unity* (Oxford: Oxford University Press, 1977), 251-52.

15 Samuel LaSelva, *The Moral Foundations of Canadian Federalism: Paradoxes, Achievements, and Tragedies of Nationhood* (Montreal: McGill-Queen's University Press, 1996), 11. Other scholars have also assumed that brokerage (Jane Jenson, "Beyond Brokerage Politics: Towards the Democracy Round," in Duncan Cameron and Miriam Smith, eds., *Constitutional Politics: The Canadian Forum on the Federal Constitutional Proposals* [Toronto: James Lorimer, 1992], 212) and accommodation (David Hawkes and Bradford Morse, "Alternative Methods for Aboriginal Participation in Processes of Constitutional Reform," in Ronald Watts and Douglas Brown, *Options for a New Canada* [Toronto: University of Toronto Press, 1991], 171) are elite-level activities, an assumption accepted by many in public life. (Former Ontario Liberal cabinet member Sean Conway remarked that "brokerage politics, elite-driven, has been discredited" [Ian Urquhart, "Blowing them Down," *The Toronto Star*, June 6, 1998, C-1]).

16 C. B. Macpherson, *The Life and Times of Liberal Democracy* (Oxford: Oxford University Press, 1977); Philip Resnick, *Parliament vs. People*, and *Twenty-First*

speaks to universal debates within political theory and is not generally the product of those whose primary interest lies in the study of Canadian politics. It is not an exaggeration to say that few who study the institutions, processes and Constitution in Canada have addressed the question of how citizens can more fully exercise their sovereignty.

This lacuna is especially problematic because the reconciliation of popular sovereignty with intergovernmental bargaining has become a practical necessity. Such a reconciliation is admittedly awkward: constitutional negotiations often require ongoing conversations over lengthy periods of time on technical matters between those trained to deal with legal and political questions, activities for which members of the public have not been trained and have little time. Yet public participation in the constitutional process is unavoidable. The change in political culture across Western democracies, including a decline in confidence in political elites and a rise in cognitive mobilization,¹⁷ has eliminated the condition necessary for workable elite accommodation, namely, deferential mass publics. Furthermore, the adoption of the Canadian Charter of Rights and Freedoms in 1982 initiated a change in Canadian politics, with many groups expecting to be consulted during the process of constitutional change and organizing to this end.¹⁸ As well, previous consultations have created precedents, and several provinces require referendums before constitutional amendments.¹⁹ While these facts are widely recognized, their implications for constitutional reform have not been assimilated, as many continue to apply theories emerging from the study of executive federalism to problems related to public participation.

2. Citizen Participation and the Charlottetown Accord

The referendum on the Charlottetown Accord has become a key reference point for those worried about using direct democracy to deal with constitutional issues in Canada. Direct democracy has a long, if spo-

Century Democracy (Montreal: McGill-Queen's University Press, 1997); Charles Taylor, *Reconciling the Solitudes: Essays on Canadian Federalism and Nationalism* (Montreal: McGill-Queen's University Press, 1993), particularly "Alternative Futures: Legitimacy, Identity, and Alienation in Late-Twentieth-Century Canada"; and Whitaker, *A Sovereign Idea*.

17 Neil Nevitte, *The Decline of Deference* (Toronto: Broadview Press, 1996).

18 Alan Cairns, *Charter versus Federalism: The Dilemmas of Constitutional Reform* (Montreal: McGill-Queen's University Press, 1992).

19 See, for example, José Woehrling, "Fonctionnement et dysfonctionnement de la procédure de modification constitutionnelle au Canada," in Gérard Beaudoin et al., eds., *Le fédéralisme de demain: réformes essentielles* (Montreal: Wilson & Lafleur, 1998, 325-43).

radic, history in Canada,²⁰ with referendums having been used to resolve constitutional issues, such as Quebec sovereignty and Newfoundland's entry into Confederation, and deeply divisive issues, like conscription. However, the Charlottetown process was unique in that it attempted to integrate public participation into mega-constitutional change involving all national and regional communities. Elite accommodation has been the operative process for dealing with Canada's major existential challenges—the places of Quebec, regions and Aboriginal peoples within Canada—and continues to be strongly preferred by governments as a process for dealing with these challenges, as evidenced by the deep resistance of governments to subject Nisga'a negotiations to meaningful participation by the public at large. The Charlottetown process, and analyses thereof, demand attention because it attempted to deal with Canada's perennial challenges without using Canada's perennial processes. It opened a new chapter both in participatory and constitutional politics by subjecting the results of integrative bargaining sessions to public ratification.

A widespread assumption emerged following the rejection of the Charlottetown Accord that citizens refused to accept the compromises inherent to the Accord, with the rejection of elitist democracy interpreted as a rejection of the spirit of accommodation. Tom Courchene publicly synthesized this conventional wisdom by writing that the rejection of the Accord signaled the demise of both executive federalism and a willingness to accommodate Quebec²¹ and Ronald Watts articulated this view to an international audience.²² This view was widely accepted by the English-language media, which portrayed a No vote as simultaneously anti-elite and prejudiced toward Quebec.²³

This conventional wisdom was picked up by Canadian political scientists. I will focus on three. Michael Luszti argued that "critical to the failure of the Charlottetown Accord was that while constitutional elites were prepared to compromise, mass proponents . . . were not" and concluded that further constitutional initiatives were doomed.²⁴

20 See Patrick Boyer, *Direct Democracy in Canada: The History and Future of Referendums* (Toronto: Dundurn Press, 1992). Prime Minister Pierre Trudeau of course mused aloud about the use of a strategic referendum in 1981 on his constitutional package.

21 "Referendum 1992: What Does It Mean?" *Globe and Mail* (Toronto), October 27, 1992, A1.

22 Ronald Watts, "Canada: Three Decades of Periodic Federal Crises," *International Political Science Review* 17 (1996), 360, 365-66.

23 Alain Noël, "Deliberating a Constitution: The Meaning of the Canadian Referendum of 1992," in Cook, ed., *Constitutional Predicament*, 65.

24 Luszti, "Constitutional Paralysis," 764, 770.

Michael Atkinson contributed to this theme by suggesting that: "By the end of the Charlottetown episode aggregative processes [that is, public participation], had overwhelmed the spirit of mutual education that characterized earlier stages" because Canadians prefer aggregative/majoritarian processes to integrative/consensual ones, producing a constitutional stalemate and impasse.²⁵ Janet Ajzenstat added that public participation in constitutional negotiations is "hastening the country's breakup."²⁶ The first two of these were published side-by-side in the Canadian political science journal of record, one from an institutional perspective and one from a public choice perspective, while the third added a perspective animated by the study of constitutional history and ideas. Despite their differences in approach, they agree on three points: accommodation in a democratic regime can be conducted by elites only, public participation renders democratic constitutional change impossible, and that such participation was responsible for the failure of the Charlottetown Accord. Yet they provide no evidence for their assertion that public participation was to blame for the rejection of the Accord, other than the self-evident recognition that the Accord was rejected through a form of public participation. The fact that the Accord was rejected cannot be presented as evidence to explain why.

Atkinson's Argument

Michael Atkinson argues that Canadian institutions have traditionally emphasized integrative processes but recently have injected aggregative/majoritarian ones.²⁷ He argues that the failure of the Charlottetown Accord demonstrates that public participation in constitutional matters fits "much better with aggregative than integrative ideals,"²⁸ and that public participation produces majoritarian outcomes. The argument is tautological because Atkinson explicitly defines public participation in terms of aggregative processes, such as referendums. It is not true that "public participation fits much better with aggregative ideals"; it is only true that referendums are aggregative. Atkinson examines an example of aggregative public participation and comes to the unremarkable conclusion that public participation is aggregative. It is surprising that neo-institutionalists, Atkinson among them, have been quite astute at identifying how institutions structure outcomes,²⁹ yet fail to recognize that they also shape

25 Atkinson, "What Kind of Democracy," 737, 744-45, 718, 745.

26 Ajzenstat, "Constitutional Making," 112.

27 Atkinson, "What Kind of Democracy," 718.

28 Ibid., 735-36.

29 Michael Atkinson, *Governing Canada: Institutions and Public Policy* (Toronto: Harcourt, Brace Jovanovich, 1993).

citizens' behaviour. Elites have historically engaged in integrative behaviour because of their access to institutions which provide for deliberation, while citizens have had no such access.³⁰

Atkinson also argues that Canadians want a democracy based on aggregation. He answers the rhetorical question in the title of his article by claiming that Canadians' "preference for aggregative processes has produced constitutional deadlock."³¹ To support the contention that Canadians prefer majoritarianism, Atkinson provides data from two survey items. One found that 68 per cent of Canadians would rather leave constitutional change to "the people in a referendum" and only 26 per cent would prefer to leave it to "our elected representatives at the federal and provincial level." The other showed that 74 per cent of Canadians believe national problems could be solved "if decisions were brought back to people at the grass roots." Both questions asked respondents to choose between elites and the citizenry and, not surprisingly, the public rejects elitist democracy. However, neither question addresses the issue of accommodation versus aggregation. Atkinson concludes that, "Canadians have opted to sacrifice integrative processes for aggregative processes,"³² based on evidence which is silent on the question. The fact that he reads into the survey items a non-existent rejection of accommodation underlines that he assumes the public's rejection of elitist democracy must also be a rejection of integrative processes.

Lusztig's Argument

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.³³ No evidence is provided for

30 In one paragraph towards the end of the article, Atkinson states, "public participation need not take place via aggregative mechanisms exclusively" (737), but this afterthought is out of place with the rest of the article which draws a tight parallel between aggregation and public participation.

31 Atkinson, "What Kind of Democracy," 745.

32 Ibid., 745.

33 Lusztig, "Constitutional Paralysis," 764. The observation that MCOs may be virtually irreconcilable is made elsewhere. François Rocher and Miriam Smith identify equality of the provinces, duality, pan-Canadian nationalism and rights-based citizenship as a difficult fit in "Four Dimensions of the Canadian Constitutional Debate" in François Rocher and Miriam Smith, eds., *New Trends in Canadian Federalism* (Peterborough: Broadview, 1995), 45-67. See also Alan Cairns, "Constitutional Change and the Three Equalities," in Ronald Watts, ed., *Options for a New Canada* (Toronto: University of Toronto Press, 1991), 77-100. From a quite different perspective, Denis Monière sees the constitutional principles espoused in English-speaking Canada and Quebec as irreconcilable (*L'indépendance* [Montreal: Québec/Amérique, 1992]).

this assertion, other than the fact that, *prima facie*, the MCOs are in conflict and some citizens mobilized against the Accord. Lusztig's analysis shares a flaw with much public choice scholarship: he articulates a reasonable proposition ("mutually exclusive MCOs") 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.³⁴ 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: "Explanations that focus on particularistic factors, such as wording of the Accord, or poor strategic choices by the Yes campaign, risk missing the underlying lesson of Charlottetown: that mass/input legitimization is incompatible with successful constitution making in deeply divided societies."³⁵ Lusztig does not provide evidence that his explanation is more compelling than possible alternatives, for which there is often credible evidence.³⁶

The lesson of the Charlottetown process, for Lusztig, is that the compromises between elites necessary to secure constitutional change cannot withstand public input because citizens and "mass proponents" will be unwilling to accept what they see as "too much" compromise.³⁷ Yet a different lesson could be extracted: those with no voice in the final document—whether members of the public or "elites"—may be unwilling to endorse it enthusiastically. The Charlottetown Accord did not fail because "mass input/legitimization . . . [ensures that] consociational constitutionalism will not succeed";³⁸ it

34 Donald Green and Ian Shapiro admirably identify this tendency in some public choice scholarship in *Pathologies of Rational Choice Theory: A Critique of Applications in Political Science* (New Haven: Yale University Press, 1994).

35 Lusztig, "Constitutional Paralysis," 770.

36 Lawrence LeDuc and Jon Pammett show that Mulroney's very low standing played a significant role in the Accord's defeat ("Referendum Voting: Attitudes and Behaviour in the 1992 Constitutional Referendum," this JOURNAL 28 [1995], 3-35). Furthermore, a primary reason why many citizens voted against the Accord was that it was an "inverted logroll"; that is, citizens were asked to give up something important in exchange for something of little value (Richard Johnston, "An Inverted Logroll: The Charlottetown Accord and the Referendum," *PS* 26 [1993], 43-48).

37 Lusztig, "Constitutional Paralysis," 752.

38 *Ibid.*, 771.

failed, in part, because mass publics lacked sites for integrative bargaining, which permitted opposition to be more easily mobilized because the public sensed no ownership of the document. Moreover, the MCOs which Lusztig describes are elite-level constructs which, as I will argue later, are not shared by mass publics with the same intensity as they are by political elites. Lusztig argues that because these four MCOs are axiomatically incompatible, no set of compromises can acquire public support through mass input. However, Lusztig provides no data to the effect that the public shares these orientations and, if they do, that they are unprepared to compromise them. One must also note that “maximizing utility” for constitutional elites often includes exploiting conflict, whereas members of the public, while not selfless actors, rarely have a self-interest in exacerbating differences.

Ajzenstat's Argument

Ajzenstat argues that “demands for a still more participatory process are exacerbating political contestation to the point where it can barely be accommodated.”³⁹ She bases this conclusion on her reading of liberal democratic theory which, she contends, frowns on public participation in constitution making because the constitution is part of higher law. Because of this, the Constitution should not be changed with haste and should not be open to the political manipulation that will occur if the public is involved.⁴⁰ One could offer a different reading of liberal democratic theory: because the Constitution defines the relationship between citizens and their governments, it must only be modified with the public's consent.⁴¹ One could also suggest that the risk highlighted by Ajzenstat (hasty constitutional change) is a less pressing concern in Canada than the difficulty in actually securing needed changes. More importantly, Ajzenstat's argument presumes the existence of parliamentary custodians of a higher law who are immune from political manipulation, when, in fact, it is often political actors and not the public who have the greatest interest in strategic manipulation for alternative ends.

Ajzenstat believes that “[it is taken] . . . for granted that because liberal democracies facilitate popular participation in day-to-day politics, they must . . . promote popular participation in constitution making.”⁴²

39 Ajzenstat, “Constitution Making,” 122.

40 Ibid., 112-13.

41 Cairns has underlined the contradiction between a Charter that protects citizens against governments and the reality that governments can amend the Constitution without the consent of the public (Cairns, *Charter versus Federalism*, 76).

42 Ajzenstat, “Constitution Making,” 122, 112.

However, those involved in the Meech Lake and Charlottetown processes readily admit that a major objective was to limit citizen involvement as much as possible without losing legitimacy, turning to public participation “only as a last resort,”⁴³ not “out of genuine conviction.”⁴⁴ This does not suggest that elites have “taken it for granted” that they should give up control or facilitate popular participation in day-to-day politics. This grudging acceptance of public participation as a practical necessity thus contained no normative commitment. Accompanying such a motivation is unlikely to be a genuine effort to find ways to integrate deeply the public into decision making. It is not surprising that what emerged was narrow, majoritarian participation. Even during the referendum itself, only about one third of Canadians felt that the referendum was a genuine consultation, while far more considered it an exercise in legitimation,⁴⁵ highlighting that many citizens have in mind some sort of deeper consultation process than a referendum.

Ajzenstat challenges the most prominent alternative process, the constituent assembly.⁴⁶ She contends that seeking consensus in a constituent assembly is akin to living in a Soviet-style “people’s democracy.” She asks: “Is this . . . enthusiasm for consensus and the general will . . . merely a romantic indulgence. . . . [These proposals lead us away] from the traditions of liberal democracy . . . [and are] utterly incompatible with anything in the Canadian experience.”⁴⁷ Consensual

43 David Milne, “Innovative Constitutional Processes: Renewal of Canada Conferences, January-March 1992,” in Douglas Brown and Robert Young, eds., *Canada: The State of the Federation 1992* (Kingston: Institute of Intergovernmental Relations, Queen’s University, 1993), 28.

44 Leslie Pal and F. Leslie Seidle, “Constitutional Politics, 1990-92: The Paradox of Participation,” in Susan Phillips, ed., *How Ottawa Spends, 1993-94* (Ottawa: Carleton University Press, 1993), 144 (n. 44).

45 “Do you feel this referendum is a genuine attempt on the part of our governments to consult the people of Canada on their future, or have the politicians really just been trying to push their views on people?”—34 per cent responded that it was genuine, 61 per cent said it was not and 5 per cent were undecided (Angus Reid, October 1992, N = 3,477).

46 Ajzenstat rightly distinguishes calls for a constituent assembly from demands to increase the number and diversity of groups at the constitutional bargaining table. The latter merely redefines certain groups as elites without necessarily expanding popular involvement or the democratic legitimacy of the process. I agree with Ajzenstat’s argument that increasing the number of groups at the table debases constitutional politics by submerging it in the realm of normal politics, encourages a variety of interest groups to entrench their own ideological positions into the Higher Law, and does indeed render constitutional change much more difficult.

47 Ajzenstat, “Constitution Making,” 124-25.

decision making undertaken in a public forum is, according to Ajzenstat, synonymous with tyranny. In order to discredit citizen participation, Ajzenstat argues that the whole idea of consensual decision making is merely pollyannaish, and suggests that constitutions must be made through the system of parliamentarism. Yet constitutional change has not resulted from parliamentarism, but from intergovernmental negotiations—negotiations which explicitly rely on consensual measures. Brokerage parties, meetings of first ministers and cabinet solidarity are mechanisms for accommodation and conflict resolution with nonmajoritarian elements that are compatible with democratic governance and Canadian liberal democratic traditions. Calls for constituent assemblies are not “tyrannical,” but seek to apply ordinary principles of governance used by elites to the public. Calls for public participation are not reflections of a naive belief that one can wish away conflict, but a recognition that new public sites for managing the inevitable conflicts of interest and values are necessary in an era when citizens refuse to defer to elites on constitutional questions.

Looking for a New Process

The defeat of the Charlottetown Accord unleashed a flurry of articles by thoughtful political scientists, who, relying on analyses of Canadian institutions, interests and constitutional history, concluded that citizens are incapable of constitutional participation and that public participation was responsible for the defeat of the Charlottetown Accord.⁴⁸ Yet these scholars took the state of public opinion as immutable, without recognizing that a different kind of integrative public process could have mobilized opinion in a different way. The fact that the first attempt to secure mega-constitutional change using public participation failed hardly constitutes evidence that public participation dooms any initiative. Traditional elite accommodation processes have been no more successful at securing enduring constitutional change to the satisfaction of all major partners in the Canadian federation. The fact that the Charlottetown episode led to such intense condemnation of public participation, rather than serious debate on how new processes could help citizens accommodate conflict, highlights a prejudice against the public.

Whether citizens or elites are more capable of finding principled compromise among competing conceptions of justice cannot be an-

48 This view became fixed, moreover, despite the fact that Alan Cairns had warned that the reconciliation of popular sovereignty with constitution making would be difficult (“Citizens [Outsiders] and Governments [Insiders] in Constitution-Making: The Case of Meech Lake,” in *Disruptions: Constitutional Struggles, from the Charter to Meech Lake* [Toronto: McClelland and Stewart, 1991], 137).

swered at this stage because the public has never been offered institutionalized sites for public brokerage. However, some data are available that directly challenge the conventional wisdom. Lusztig's claim that Canadians see the MCOs as incompatible is regularly refuted during public opinion surveys. For example, 69 per cent of Quebecers said they believed it was possible to reform the Canadian federation on the basis of both the principles of equality of the provinces and the recognition of Quebec's unique character, while 67 per cent of Canadians outside Quebec said that their conception of equality of the provinces was compatible with different provinces exercising different powers.⁴⁹ These data do not represent a rigorous demonstration that Canadians are prepared to compromise their visions of the country; they may reflect the inability of a survey instrument to measure the subtleties of thought on constitutional issues or the intensity of opinion that would be mobilized at the time of an actual decision. But it is equally, if not more, plausible that mass publics have less interest and less attachment to MCOs than elites, and are therefore more likely to find compromises between competing constitutional values. Such a conclusion seconds the argument of Paul Sniderman and his colleagues who found that the notion that elites are the bulwark of democracy through superior democratic sensibilities and willingness to accommodate minorities "is so partial as to be seriously misleading."⁵⁰ They argued instead that competition for power and ideological rigidity often compel elites to engage in strategic activities that attempt to polarize populations, a view which is consistent with three decades of public opinion research showing that elites are more ideological than mass publics.

Some scholars recognize that the Charlottetown referendum was not an ideal form of public participation. Alain Noël and James Tully see the entire Charlottetown *process* as an opportunity for some deliberation, but see the *referendum itself* as an inadequate mechanism because full deliberation cannot take place without institutions designed

49 Agree/Disagree: "Je crois qu'il est possible de réformer la fédération canadienne sur la base de ces deux principes, soit, l'égalité des provinces et la reconnaissance du caractère unique de la société québécoise" (Angus Reid, February 1998). "Sometimes people talk about 'equality of the provinces.' Some people think that this means all provinces have to have exactly the same powers otherwise we don't have real equality. Others say that while all provinces are equal, they should each have the right to be different to meet their own particular circumstances. This might mean special powers for Quebec over the French language. Which is closer to your own opinion?" (Insight Research, October 1996).

50 Paul Sniderman, Joseph Fletcher, Peter Russell and Phillip Tetlock, *The Clash of Rights: Liberty, Equality, and Legitimacy in Pluralist Democracy* (New Haven: Yale University Press, 1997).

for this purpose.⁵¹ Kathy Brock, too, argues that a variety of participatory mechanisms were grafted onto a structure of executive federalism, which made executive federalism unworkable and participation hollow.⁵² Michael Stein skilfully recognizes the shortcomings of the Charlottetown and Meech Lake processes by identifying three phases—agenda setting, negotiations and ratification—and argues that the public and elites must be involved in all three, with the public's absence during the second phase of the Charlottetown process contributing to its failure.⁵³ Stein urges the development of a process in which both elite- and citizen-oriented structures operate during all phases, yet, by arguing that closed-door bargaining sessions between government officials are still necessary during the negotiations phase, his proposal can be interpreted as one which recommends only a weak form of public brokerage.

Janice Gross Stein and her colleagues also move us towards a model of public brokerage, arguing that: "Canadians [have] little opportunity to engage in a . . . process of working through their conflicts . . . , adjusting their preliminary beliefs . . . , and arriving at . . . judgments about matters of common concern." They recommend that "one should start with unofficial processes of interactive conflict resolution in which citizens can . . . learn about the . . . values of others."⁵⁴ They persuasively demonstrate that it is necessary to engage civil society so as to build social capital and mutual trust.⁵⁵ However, because they argue that "citizens [cannot] become decision makers and directly fashion solutions," and advocate the creation of sites to engage the public in dialogue without the creation of sites for decision making,⁵⁶ they leave unaddressed citizens' lack of power. Strong models of public brokerage require citizens to be a formalized part of official processes.

All liberal democracies are grappling with the question of how to deal with new participatory values. The question is more complicated

51 Noël, "Deliberating a Constitution," 66, 78; James Tully, "Diversity's Gambit Declined," in Cook, ed., *Constitutional Predicament*, 152-54.

52 Kathy Brock, "Learning from Failure: Lessons from Charlottetown," *Constitutional Forum* 4 (1993), 31.

53 Michael Stein, "Improving the Process of Constitutional Reform in Canada: Lessons from the Meech Lake and Charlottetown Constitutional Rounds," this JOURNAL 30 (1997), 307-38. This article builds on his earlier work: "Tensions in the Canadian Constitutional Process: Elite Negotiations, Referendums, and Interest Group Consultations, 1980-1992," in Ronald Watts and Douglas Brown, eds., *Canada: The State of the Federation, 1993* (Kingston: Institute of Intergovernmental Relations, Queen's University, 1993).

54 Janice Gross Stein, David Cameron and Richard Simeon with Alan Alexandroff, *Citizen Engagement in Conflict Resolution: Lessons for Canada in International Experience* (Toronto: C. D. Howe Institute, 1997), 10, 3.

55 Ibid., 6.

56 Ibid., 15-16; 25.

in multinational federations due to the historic role played by elite accommodation in avoiding majoritarian decision rules. Yet it is rare for Canadian political scientists to think about a marriage between mass publics and deliberation, with one of the most thoughtful works on the Charlottetown referendum quickly dismissing deliberation as inapplicable to decision making by mass publics.⁵⁷ Unfortunately, many only see two models: elitist and integrative on one hand (brokerage parties, executive federalism and intergovernmental negotiations) and participatory and aggregative on the other (referendums). This dichotomy denies the possibility of constructing new models that create sites for face-to-face deliberation that are both popular (non-elitist) and nonmajoritarian (integrative). While many calls for broadening public participation tend towards the aggregative (calls for initiatives, for example),⁵⁸ integrative and deliberative options are offered up by others.

3. Public Brokerage

The literature on consociationalism, elite accommodation and executive federalism has historically presented a useful framework for understanding Canadian politics. This literature identified the bargaining that takes place between elites within institutions that do their work largely in private, and provided an explanation for stability and the sometimes successful accommodation of conflict. The literature continues to be relevant for issues of normal politics that have no official constitutional dimension. Many of the assumptions on which consociationalism is based remain true: elites are likely to be more familiar with “the other,” and have more experience in seeking accommodation with a diversity of communities. Yet on those issues which touch directly the core of the Constitution and deal with national identity and other constitutive issues,⁵⁹ theories of consociationalism and executive federal-

57 Richard Johnston, André Blais, Neil Nevitte and Elisabeth Gidengil, *The Challenge of Direct Democracy: The 1992 Canadian Referendum* (Montreal: McGill-Queen's University Press, 1996), 18.

58 On the dangers of majoritarianism in Canada, see Whitaker, *A Sovereign Idea* (esp. 192-94). On the majoritarian quality of referendums, see Matthew Mendelsohn, “Introducing Deliberative Direct Democracy in Canada: Learning from the American Experience,” *American Review of Canadian Studies* 26 (1996), 449-68.

59 Consociationalism and executive federalism continue to be useful frameworks through which one can interpret many of the issues addressed through the ordinary policy-making process. See Bruce Ackerman, *We the People: Foundations* (Cambridge: Harvard University Press, 1991) for an account of “dualist democracy” and the fundamental differences between normal politics conducted by politicians and the constitutional politics of “higher lawmaking” conducted by the People.

ism are no longer adequate. This deficiency is not because elites are no longer good negotiators, but because the *sine qua non* of consociationalism—a deferential public—is no longer operative, thus implying either that constitutional changes “are doomed,” or that one must elaborate new theories and, subsequently, new models, for the accommodation of constitutional conflict.

Two bodies of scholarship are more appropriate for analyzing the question of popular sovereignty and the constitutional process. The first is concerned with theories of deliberation, often referred to as deliberative or discursive democracy. The second, more practical and grounded in the experience of public consultation at the local level, is concerned with what is sometimes referred to as “citizen engagement.” Taken together, I suggest this work highlights the need for a public sphere where political figures and the public discuss constitutional issues and influence decisions together.

Deliberation theorists 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.⁶⁰ Deliberative democracy involves reciprocity, publicity and accountability, with the goal of reaching deliberative agreement through discursive rather than strategic conversation. Although conflict in any society is inevitable, public deliberation among citizens with the aim of justifying collective decisions to one another may help alleviate conflict. While deliberation is an inherent part of many public institutions—juries and the Supreme Court, for example—those who advocate deliberative democracy seek to expand its presence. Deliberation theorists recognize a variety of practical constraints in implementing their agenda, such as limits of public attention, asymmetries of competence, the rationalized and managerial nature of much decision making, and deep social complexity. Nonetheless, most believe that the expansion of institutions of deliberation is not only possible, but currently underway, and identify real-world approximations.⁶¹

There are disputes over many questions among theorists. First, many see the goal of “uncoerced consensus” as an unrealistic goal in practice, and instead argue for “deliberative majorities.”⁶² Second,

60 John Dryzek, *Discursive Democracy: Politics, Policy, and Political Science* (Cambridge: Cambridge University Press, 1990), 14; and Gutmann and Thompson, *Democracy and Disagreement*, 3, 12, 25-27.

61 Dryzek, *Discursive Democracy*, 40-56, chap. 6.

62 For a more elaborate discussion of this point, see Bernard Manin, “On Legitimacy and Political Deliberation,” *Political Theory* 15 (1987), 338-68; Jon Elster, *Sour Grapes: Studies in the Subversion of Rationality* (Cambridge: Cambridge

though deliberation may encourage citizens to favour the public good over private interests because the public nature of participatory politics compels citizens to offer reasons framed in a manner that can be claimed by others,⁶³ when examining real-world deliberative institutions one notices that citizens use a variety of arguments framed in terms of both the public good and the private interest.⁶⁴ Third, some argue that a public sphere separate from the state must exist in order to avoid co-optation,⁶⁵ though others worry that too strong a separation of sites for public deliberation and formal decision making can render deliberation ineffective.⁶⁶ And, fourth, some suggest that once one moves beyond small communities, one is inevitably faced with adversarial rather than deliberative democracy,⁶⁷ while others contend that theories of deliberation can only be judged successful if they are used to resolve deep conflict in divided societies, not merely conflicts in small, relatively homogeneous, communities.⁶⁸ What is significant about this discussion for the elaboration of processes of constitutional change is that many contend that deliberative institutions can be used successfully as a formal part of the decision-making process even in deeply divided societies, where unanimity is unlikely, and where individuals will not focus exclusively on the public good.⁶⁹

University Press, 1983), 38; and James Bohman, *Public Deliberation: Pluralism, Complexity, and Democracy* (Cambridge: MIT Press, 1996), 182-85.

63 Benjamin Barber, *Strong Democracy: Participatory Politics for a New Age* (Berkeley: University of California Press 1984), 135; and Simone Chambers, "Contract or Conversation? Theoretical Lessons from the Canadian Constitutional Crisis," *Politics & Society* 26 (1998), 143-72.

64 I do not find the argument made by some (for example, Gutmann and Thompson, *Democracy and Disagreement*, 126-27; Jenson, "Beyond Brokerage Politics," 204-15) that deliberation and bargaining are separate activities to be persuasive. Though the two should be distinguished theoretically, in the real world of political discourse the two overlap in messy ways (Dryzek, *Discursive Democracy*, 20). For example, elite accommodation worked because those involved in the process recognized that they must accept the demands of other communities even if they did not share their viewpoint—bargain—but often came to appreciate better the position of others and recognize it as just—deliberate toward the public good.

65 Dryzek, *Discursive Democracy*, 43; and John Keane, *Public Life and Late Capitalism: Toward a Socialist Theory of Democracy* (Cambridge: Cambridge University Press, 1984), 255-59.

66 Bohman, *Public Deliberation*, 182.

67 Mansbridge, *Beyond Adversary Democracy*.

68 Dryzek, *Discursive Democracy*, 124-32; and Bohman, *Public Deliberation*, 89-93.

69 Some theorists are skeptical of deliberation, arguing that it is inherently elitist because the material prerequisites for its fair implementation are unevenly distributed. This means that well-educated, wealthier individuals with social standing in the community will appear more persuasive and will be more likely to be

At the municipal level, public participation that includes two-way communications and the ability for the public to influence policy decisions is increasingly recognized as a necessary component of decision making. These exercises are distinguished from the two previous models of consultation, which involved public meetings during which officials listened to the public's views, but then retired to make decisions amongst themselves, or during which public officials provided information and/or justification for decisions. In both the "public venting" and "tell and sell" models, tight control was placed upon the process, options other than those previously agreed to by government were excluded, officials were interested in legitimizing prior decisions and interests were encouraged to engage in advocacy and address decision makers rather than communicate with one another.

Mechanisms such as these were at work during the Charlottetown episode, whereby early in the process citizens and groups were provided with numerous forums to raise grievances and engage in advocacy, while later in the process government officials attempted to persuade Canadians to endorse the final package. What distinguishes new experiments from these earlier models is their iterative, ongoing, open-ended, co-decisional nature. At the local level in Canada, issues as wide-ranging as economic development strategies, land-use and budgeting have been subject to new forms of citizen engagement.⁷⁰ Those who have studied the processes point to the inclusion of politicians, public servants and the public at all stages of a transparent policy-making process as being crucial to success. The literature underlines that citizens require psychological and procedural satisfaction from decision making, not only good policy; that institutional structures should encourage collaborative decision making based on a real array of choices; and that mutual trust is accentuated

listened to, regardless of the quality of their arguments (Lynn Sanders, "Against Deliberation" *Political Theory* 25 [1997], 347-76). I do not disagree with Sanders. In fact, I would go further and argue that even those critical proposals which go beyond deliberation and attempt to rescue some of its assumptions—such as hooks's argument concerning "testimony" instead of deliberation (bel hooks, *Yearning: Race, Gender and Cultural Politics* [Toronto: Between the Lines, 1990]) for which Sanders has some sympathy—cannot fully escape the problem of differential social standing. But one must recall that my purpose is different: I am not seeking to evaluate whether proposed "ideal speech situations" are in fact that; rather, I am proposing a framework for thinking about improvements to the constitutional process. I recognize that any Canadian process will fall short of an ideal speech situation and exist within a context of social inequality and differences in citizens' abilities, though this should not prevent us from attempting to diagnose the reasons for Canada's difficulty in achieving constitutional change and suggesting alternative approaches.

70 Katherine Graham and Susan Phillips, eds., *Citizen Engagement: Lessons in Participation from Local Government* (Toronto: Institute of Public Administration of Canada, 1998).

ated through interpersonal contact and social interaction.⁷¹ The design of deeper processes of consultation has been heavily influenced by the conflict resolution literature,⁷² which shows how mediation and “problem solving approaches” expose individuals to alternative viewpoints and often produce satisfactory, principled outcomes.

Whether these examples of public participation at the municipal level are relevant to the issues addressed here remains an open question; moving from the local to the federal level introduces a series of more complicated questions. Nonetheless, I contend that these practices are relevant to the study of constitutional processes because they identify how institutions shape outcomes and how individuals’ decisions become more accommodating following dialogue.⁷³ They underline that by changing the institutional arrangements of decision making one also restructures social interaction and the range of discourse.⁷⁴ While theories of deliberation provide a grounding for public brokerage and an explanation for why we might expect mutually acceptable solutions to be more likely to emerge following dialogue, citizen engagement at the local level provides a practical framework of experience with emerging models of nonmajoritarian participation. These bodies of scholarship highlight the dearth of

71 Many international scholars also look to the work by Thomas Berger, first on the MacKenzie Valley Pipeline Inquiry and later on the Alaska Native Review Commission, and his provision of educational materials prior to public hearings. See Thomas Berger, *Northern Frontier, Northern Homeland: Report of the MacKenzie Valley Pipeline Inquiry* (Toronto: James Lorimer, 1977); and *Village Journey: The Report of the Alaska Native Review Commission* (New York: Hill and Wang, 1985).

72 See Ronald Fisher, *Interactive Conflict Resolution* (Syracuse: Syracuse University Press, 1977); Stephen Worchel and Jeffrey A. Simpson, eds., *Conflict between People and Groups* (Chicago: Nelson-Hall, 1993); Jacob Bercovitch, ed., *Resolving International Conflicts: The Theory and Practice of Mediation* (Boulder: Lynne Reiner, 1996); Herbert Kelman, “Creating the Conditions for Israeli-Palestinian Negotiations,” *Journal of Conflict Resolution* 26 (1982), 39-76; and Douglas Amy, “Environmental Mediation: An Alternative Approach to Policy Stalemates,” *Policy Sciences* 15 (1983), 345-65.

73 See Yankelovich, *Coming to Public Judgment*; Fishkin, *Democracy and Deliberation*. They argue that individuals hold conflicting considerations simultaneously, which does not reflect a lack of consistency but a reasonable response to a complex world and imperfect cues (John Zaller, *Nature and Origins of Mass Opinion* [Cambridge: Cambridge University Press, 1992]). Which underlying consideration—“I’m fed up with Quebec” or “let’s find a solution”—influences the ultimate decision is to some extent influenced by the context surrounding the decision.

74 On the applications of deliberation and critical theory to public consultations at the local level, the work of John Forester has been groundbreaking. In particular, John Forester *Critical Theory, Public Policy, and Planning Practice: Toward a Critical Pragmatism* (Albany: SUNY Press, 1993).

institutions which permit conversations between citizens, politicians and public servants on constitutional issues. They recognize, at least implicitly, that the news media do not provide an adequate public sphere, in that they are unable to discuss thoroughly complex issues or facilitate conversations between different communities or between the public and elites. They therefore seek out alternative spheres for conversation and for decision making.⁷⁵

Models of Public Brokerage

Although the *Constitution Act, 1982* provides Canada with a formula for amending the Constitution, it is silent on the process through which one should secure consent from governments for constitutional change. Whether one engages in the Meech Lake or Charlottetown process, or some alternative, is decided on an ad hoc basis by governments. Alan Cairns's question—"Who should participate . . . in formal constitutional amendment?"⁷⁶—remains unanswered. Few Canadian proposals designed to answer the question have advocated publicly brokered models of constitutional change. One model of public brokerage with which Canadian political scientists are familiar is the constituent assembly, although it has been little studied in Canada. Those descriptive studies that have been conducted have not placed constituent assemblies within a broader theory of how the citizen and state interact, nor identified them as potentially key instruments in the management of conflict within multinational societies.⁷⁷ Even those political scientists who have advocated them have suggested using elected officials rather than members of the public,⁷⁸ hence proposing an alternative form of elite accommodation. Although the federal government's Spicer Commission and the parliamentary Beaudoin-Dobbie Committee both recommended the use of constituent assemblies,⁷⁹ they have

75 For a more complete discussion of the media, deliberation and the public sphere, see Peter Dahlgren and Colin Sparks, eds., *Communication and Citizenship: Journalism and the Public Sphere in the New Media Age* (New York: Routledge, 1991); and, from a different perspective Benjamin Page, *Who Deliberates? Mass Media in Modern Democracy* (Chicago: University of Chicago Press, 1996).

76 Cairns, *Charter versus Federalism*, 93.

77 See Patrick Fafard and Darrel Reid, *Constituent Assemblies: A Comparative Survey*, research paper no. 30 (Kingston: Institute of Intergovernmental Relations, Queen's University, 1991).

78 Peter Russell, "Towards a New Constitutional Process," in Ronald Watts and Douglas Brown, eds., *Options for New Canada* (Toronto: University of Toronto Press, 1991), 151.

79 Government discussion papers have also occasionally advocated using constituent assemblies instead of existing processes (see *Amending the Constitution of Canada* [Ottawa: Federal-Provincial Relations Office, 1990], 18-20).

been largely ignored by Canadian political scientists because they have not been recognized as sites to marry public participation and the management of conflict.⁸⁰

As part of the Beaudoin-Dobbie process leading up to the Charlottetown Accord, five public conferences were held during which citizens discussed constitutional options. The conferences have been highly praised,⁸¹ yet what is it about these conferences that such a diverse group of scholars found so edifying? I suggest it was the embryonic attempt at public brokerage, the attempt to find an alternative para-public sphere for accommodating mass publics and representing "the sovereign people," an entity which exists only in abstract, and is currently represented only indirectly through parliamentary institutions and interest group pluralism. These conferences would have satisfied many of the conditions for public deliberation and therefore public brokerage if they had been a formal part of the process with decision-making power. Institutions of this type are currently being used in a variety of settings, and demonstrate individuals' capacity to reason, consider the public good and accommodate competing principles of justice.

Canadian governments are beginning to experiment with models of public brokerage beyond the local level on nonconstitutional issues. The National Forum on Health combined into its decision-making process community-based discussion groups, a stakeholder conference and a national conference that brought together members of the public, interest groups and professional facilitators. In these deliberative forums, decision makers and the general public worked through issues together, and although conflicts inevitably persisted, the process produced a consensus on many recommendations, several of which were reflected in the 1997 federal budget.⁸² The National Forum on Health

80 One needs to return to Resnick (*Parliament vs. People*) to find a theoretical justification for their use.

81 Pal and Seidle, "Constitutional Politics"; Russell, *Constitutional Odyssey*, 177; Tully, "Diversity's Gambit Declined," 153; Milne, "Innovative Constitutional Processes"; Noël, "Deliberating a Constitution"; Chambers, "Contract or Conversation?"; Peter Harrison, "The Constitutional Conferences Secretariat: A Unique Response to a Public Management Challenge," Canadian Centre for Management Development, 1992, mimeo; and, to a lesser extent, Stein et al., "Citizen Engagement in Conflict Resolution," 12. See also Arthur Kroeger, "The Constitutional Conferences of January-March 1992: A View from Within," speech to Institute of Public Administration of Canada, University of Victoria, April 1992.

82 Rhonda Ferderber, Marie Fortier and Janice Hopkins, "Let's Talk about Health and Health Care" and "The Report on Dialogue with Canadians," Government of Canada, mimeo. A similar model has also been used by the Canadian Policy Research Network to discuss the principles that should underpin the social union (*The Society We Want: A Public Dialogue* [Ottawa: CPRN, 1996]).

is used as a reference point by many federal government departments in their attempt to operationalize the Social Union Framework's commitment to include the public more fully in decision making on social policy.⁸³ The impact of such processes would be greater if governments embraced them as a formal part of the process, ensuring media coverage and a more sustained linkage in the public mind between deliberations and policy outputs.

Experimental Models

A deliberative poll brings together a random representative cross-section of the population and engages them in debate and discussion with one another, as well as with experts, usually to deal with one clearly defined issue. After this process of collective deliberation, opinions are measured through a survey. Deliberative polls seek to measure what the public *would think* if it had time to find out about the issues, talk with others in the community and interact with political leaders; what emerges is one reflection of "the public will."⁸⁴ Televising such deliberations brings a larger number of citizens into the process and, with commitments from government to treat the results of the process seriously, such forums become credible surrogate publics. Deliberative polls have been used by media organizations and public policy organizations,⁸⁵ and are gradually becoming part of the formal decision-making process. For example, in Texas, the Public Utility Commission uses them to fulfill its legal requirement to consult the public.⁸⁶

Citizen juries invite small groups of people (sometimes randomly selected, sometimes appointed) to read material on one issue, call experts, deliberate and issue recommendations. They have been used at the local level in the United States since 1974.⁸⁷ In Canada, several members of the Order of Canada have been selected by Environment Canada to sit on a citizen jury on global warming. Study circles resemble citizen juries in their reliance on small group deliberative

83 On this commitment, see Harvey Lazar, "The Social Union and Fiscal Federalism," presented to Fiscal Federalism: Are We in an Era of Decentralization? Institute of Intergovernmental Relations, Queen's University, April 1999.

84 See Fishkin, *Deliberation and Democracy*.

85 The Canada West Foundation brought together a randomly selected group of 18- to 29-year-old Canadians to discuss national unity with experts and facilitators, and concluded that participants' opinions became more prone to accommodation following the experience ("Deliberative Democracy," Canada West Foundation, April 1997; and "Futures Canada Assembly 96," Canada West Foundation, March 1997).

86 "Democracy in Texas: The Frontier Spirit," *The Economist*, May 16, 1998, 31.

87 Patricia Benn and Ned Crosby, *Citizens' Jury: America's Tough Choices. Report on Federal Budget Panel* (Washington: The Jefferson Center, 1993).

exercises, though they often involve hundreds of citizens broken into small groups.⁸⁸ Like citizen juries, they have been used throughout the United States to encourage citizen engagement with local issues. Public (or civic) journalism can also be understood as a model of public brokerage,⁸⁹ as it attempts to integrate journalists into the communities they serve by providing citizens with public forums to discuss issues, following which the media report on the meetings. By bringing together members of the public with decision makers and the media—who then communicate the outcome of these deliberations to a wider public—all these processes can, in theory, revitalize the public sphere.

Some see these processes as “gimmicks” designed to pass off entertainment as political decision making, legitimize prior decisions, or as nothing more than interesting academic exercises with no public policy implications. Although these are in fact accurate descriptions of some endeavours, many experiments oftentimes do represent serious attempts to grapple with the question of how one facilitates deliberation and avoids producing majoritarian outcomes when public participation is required. The principles (if not the precise institutional arrangements) underlying these experiments—ongoing social interaction with the goal of achieving deliberative majorities and solutions to public problems—can be applied to the constitutional realm.

Deliberative Constitutional Processes Outside Canada

The discursive principles underlying the experiments discussed above have been innovatively applied to constitutional processes elsewhere. The South African process, undertaken between January 1995 and April 1996, involved a constituent assembly charged with the task of drafting a new constitution.⁹⁰ The Assembly was integrated into an elaborate process of public brokerage, with its 490 delegates engaging in a process of ongoing interaction with the public. It began with six conferences, followed by intensive negotiations among members of the Assembly. Throughout the process interim reports were released that highlighted issues that remained unresolved, where various parties stood on these questions and potential options, and then provided the

88 Martha McCoy, Phyllis Emigh, Matt Leighninger and Molly Barrett, *Planning Community-wide Study Circle Programs: A Step-by-Step Guide* (Connecticut: Topsoil Foundation, 1996).

89 Jan Schaffer and Edward Miller, *Civic Journalism: Six Case Studies* (Washington: The Pew Center for Civic Journalism and the Poynter Institute for Media Studies, 1995); Arthur Charity, *Doing Public Journalism* (New York: Guildford Press, 1995); and David Merritt, *Public Journalism and Public Life: Why Telling the News Is Not Enough* (Hillsdale, New Jersey: Erlbaum, 1995).

90 For more information, see *The Constitutional Assembly, Annual Report 1996*, Government of South Africa.

public with opportunities to offer feedback on the unresolved issues. The objective was to allow the public and the Assembly to be brought simultaneously to the same general conclusions concerning the content of the South African Constitution.

Australia has experimented with a model of public brokerage to deal with a more narrowly defined constitutional issue. In 1998, a people's convention, followed by a referendum in November 1999, was held on the question of whether Australia should become a republic. This began with the appointment and election of delegates, many of whom came from outside traditional elite circles. The participation of members of the public and of the government provided both with an opportunity to deliberate simultaneously, and although the process became enmeshed in ordinary partisan politics,⁹¹ it did provide evidence that the public and elected officials could participate together in consensus building.⁹²

Application in Canada to the Constitutional Sphere

The cursory outline presented above is not a thorough analysis of all experiments with public brokerage, nor a recommendation of any one ready-made model as the *deus ex machina* of Canadian constitutional politics. Rather, it summarizes a range of experiments that show that even in the constitutional realm one can marry popular sovereignty with integrative decision making using theories of deliberation and evolving from experience with citizen engagement at the local level, without being reduced to tyranny. It underlines that these may be more useful frameworks for thinking about constitutional change in Canada than traditional models of executive federalism and consociationalism.

The comparative models discussed above can be used in the constitutional realm to permit members of the public (some randomly selected, others representing important interests) to deliberate and negotiate with public officials in places where power can be exercised, and can be designed so as not to conflict with the supremacy of parliament or the executive's prerogatives. If the government were committed to treating these processes seriously, media coverage of these bodies would be intense, and they could act as a surrogate public with more legitimacy than elected officials acting alone, and could help broker (but not guarantee) constitutional settlements. These models do

91 Brian Galligan, "The Constitutional Convention I: The Republic Model," *Quadrant* 42 (1998), 17-21.

92 Such a consensus in a deliberative forum does not guarantee that the referendum will pass, and the aftermath of the convention demonstrated that the referendum device remains a blunt instrument. My purpose though, is not to review the politics surrounding the Republican debate in Australia but to identify possible experimental processes and their increasing use.

not deny the realities of power and competing interests, or simply wish them away; constitutions define the relationship between institutions, and between institutions and citizens, and are therefore, inevitably, about competition, power and conflicting principles of justice. However, these models recognize that the power to ratify constitutional change in Canada has shifted from elites to the public with no accompanying institutions in which to exercise this power wisely.

4. Conclusion

I have shown that many Canadian political scientists presume that democratic accommodation must take place at an elite level, and have demonstrated that this is mistaken through an overview of deliberative and integrative models that involve the public. I have identified these processes as nascent attempts to develop new institutions of public brokerage, and have argued that they deserve to be treated as such by political scientists. Sites for the accommodation of mass publics along with elites are now required because the public has, indeed, rejected executive federalism as a process to deal with the Constitution, but the management of conflict in Canada remains essential. I have suggested that the theory of public deliberation is more appropriate than consociationalism or executive federalism for thinking through how one achieves constitutional change.

Consequently, I disagree with those who have argued that the failure of the only attempt at popular participation in mega-constitutional change in Canada, the Charlottetown Accord, means that any process involving the public is doomed. Instead, we should think of attempts at constitutional reform having failed because we have yet to elaborate an appropriate process for the inclusion of the public in a nonmajoritarian manner, and have not yet fully accepted that the requirement of citizen participation must go beyond ratification in a referendum. The process of constitutional reform is flawed because the negotiation process relies on elites and brokerage, while the ratification process is public and majoritarian, with public participation grafted onto institutions that remain essentially unchanged in their requirement of executive leadership. More broadly, I have argued that: (1) Canadian political institutions evolved to accommodate conflict, not ensure popular control of governments; however, (2) political culture now requires public involvement when seeking constitutional change; (3) this does not mean that the imperative to accommodate conflict has disappeared; rather, (4) political scientists must identify ways to institutionalize mechanisms which marry the accommodation of conflict with popular sovereignty.

While most political scientists have accepted Peter Russell's argument that the people are the ultimate proprietors of their constitu-

tion, it is not yet clear how the public actually exercises this ownership. The consensus that sovereignty lies with the people does not answer the difficult question of how one operationalizes popular sovereignty. Despite the fact that the questions that confront Canada are about the nature of democracy, not of federalism,⁹³ the traditional areas of study in Canadian political science provide little guidance in answering questions about public participation. Even the interest in the study of the Charter provides no answers, as this scholarship is concerned with rights and identity rather than democratic control. Although this article has only hinted at answers, I have suggested that these questions need to be tackled through the lens of deliberation theory.

The current process is deeply dysfunctional because nobody—neither elected officials, public servants, nor the public—has any control over the process. In the past, we have referred to some as “constitutional insiders” and citizens as “outsiders.”⁹⁴ However, “insider” implies empowerment, while Canadian constitutional experience at the end of the twentieth century has been marked by an all-encompassing impotence. Traditional insiders feel like outsiders, watching the public mood ebb and flow, threatening to veto even the most benign of proposals, while the public still has no method of initiating or negotiating constitutional change. It is true that the public had no genuine control over the final Charlottetown package because they were not involved in its negotiation; and it is likewise true that governments had no real ability to pass constitutional change because popular ratification was necessary. The sense of powerlessness is therefore widespread, and it is understandable that some see constitutional change as impossible. Yet such pessimism could be unwarranted, were we to apply a different theoretical framework and a different set of assumptions to the question.

93 Russell, *Constitutional Odyssey*, chap. 1.

94 Cairns, “Citizens (Outsiders) and Governments (Insiders),” 109.