

“Deliberative Voting”: Realising Constitutional Referendum Democracy

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“Should Scotland be an independent country?”—Proposed referendum question (2014).¹

“Do you agree that Quebec should become sovereign after having made a formal offer to Canada for a new economic and political partnership within the scope of the bill respecting the future of Quebec and of the agreement signed on June 12, 1995?”—Referendum question (October 30, 1995).²

“Don’t know, vote No.”—Australian Republic referendum “no” campaign (1999).³

In 1995, when the Government of Quebec called a referendum on secession from Canada, the question posed to voters was obscure, and deliberately so. To soften its apparent implications, the question’s drafters referred ambiguously to Quebec becoming “sovereign” and to a “new economic and political partnership.”⁴ The text also implied that a vote of Yes/Oui would be only the beginning—just an “offer,” with negotiations to follow. While provincial leaders spoke privately of “independence,” opinion polls showed many Quebec voters believed an affirmative vote would mean “a better deal” within Canada, and would allow them to “continue to use Canadian passports and send MPs to Ottawa.”⁵ For all its verbosity, the question, like the accompanying referendum campaign, detailed very little about what was envisioned for a sovereign Quebec. Indeed, in the course of a referendum campaign, even simple questions—like that proposed for Scottish independence in 2014—risk having their implications widely misrepresented or misunderstood.

Unsurprisingly, voters often refuse to trust what they do not understand. “Don’t know, vote No” is the perennial, international slogan of constitutional referenda. In the Australian Republic referendum of 1999, the Irish referendum on EU treaty accession in 2008, the UK Alternative Vote referendum in 2011, and elsewhere, such rhetoric has helped to derail elaborate and far-reaching plans for constitutional

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¹ Scottish Independence Referendum Bill (2013) s.1(2).

² N. Ford, “Legislative Reports: Quebec” (1995) 18 *Canadian Parliamentary Review* 4.

³ G. Williams and D. Hume, *People Power: The History and Future of the Referendum in Australia* (Sydney: UNSW Press, 2010), 205.

⁴ The question also appears to imply a commitment from Canada to engage in negotiations, though the “agreement” it cites included only leaders from Quebec.

⁵ P. Howe, “Rationality and Sovereignty Support in Quebec” (1998) 31 *Can.J.Pol.Sci.* 1, 34.

reform.⁶ On the one hand, the slogan reflects a regrettable state of public constitutional deliberation; if you don't know, why not become better informed? Yet on the other hand, such rhetoric speaks to the very real and unavoidable difficulty of comprehending constitutional schemes. It also reflects many voter's reluctance to trust complex plans that political leaders either cannot or will not adequately explain.

This is an article about how governments, referenda and voters manage constitutional complexity. It considers how we should understand democratic legitimacy during those rare but important times when citizens engage with the content of a constitution, and with each other, to vote for or against changes to a constitutional text. The notion that popular consent legitimates constitutions originated with early authors,⁷ but now attracts more consistent acceptance, and also more often contemplates direct democratic participation⁸; in recent practice, many more states have called referenda to gauge popular consent for proposed amendments.⁹ Constitutional reform is therefore unlike most other forms of public decision-making, whose democratic requirements are more limited.¹⁰ Yet democratic constitutional reform raises questions about how citizens can cast informed votes to update constitutional texts whose implications are often profoundly complex. Few voters specialise in constitutional law by vocation, and it is unrealistic to expect otherwise.¹¹ Here, then, a distinct gap commonly develops between a voter's elevated democratic responsibilities and her still modest constitutional knowledge.

Identifying a requirement of widespread citizen involvement is therefore only a starting point for thinking about democratically legitimate constitutional change. A subsequent and more vexing question—to which surprisingly few theorists have devoted attention¹²—is what kind of democracy is required. Do referenda alone, if administered according to basic canons of fair voting, provide legitimacy? Alternatively, in light of the special complexity and gravity of a constitution, should additional democratic values also feature in its reform? In particular, must

⁶ G. Williams and D. Hume, *People Power: The History and Future of the Referendum in Australia* (Sydney: UNSW Press, 2010), 205; J. O'Mahony, "Ireland and the European Union: A Less Certain relationship?" in N. Collins and T. Cradden (eds), *Political Issues in Ireland Today*, 3rd edn (Manchester University Press, 2004), 27; "The Alternative Vote Referendum: It's Going to be 'No'" (April 11, 2011) Foreign Press Association. In the Irish referendum, "nearly a third of Irish 'NO' voters told pollsters that they opposed the treaty because they were ignorant of its content": A. Moravcsik, "Don't Know? Vote No!," *Prospect*, (July 2008), 14.

⁷ See, e.g. J.-J. Rousseau, *The Social Contract* (1762/1968) (Penguin Classics), M. Cranston (transl.), 59, 101.

⁸ A number of sources and arguments below will suggest how democratic requirements for constitutional legitimacy derive both from normative reasoning and subjective public expectations.

⁹ On these developments, see R. Levy and W. Barker, "Emerging Global Practices of Democratic Constitutional Reform" (forthcoming). In this parallel work we propose why significant constitutional changes should proceed through referenda. Briefly, one reason is that constitutional reform processes upend the normal relationship between a polity and its elected representatives. In ordinary lawmaking, this relationship is usually one of agency, with elites entrusted to take the lead. Yet during constitutional reform, the impacts on citizen interests are often unusually broad, basic and enduring, and therefore the assumption that citizens trust representatives to act on their behalf—a controversial assumption at any time—is less realistic.

¹⁰ In the normal course of lawmaking, whole polities are seldom involved, and elected representatives and technocratic administrators commonly take the lead.

¹¹ On public constitutional knowledge see, e.g. S. Levinson, "What Should Citizens (As Participants in a Republican Form of Government) Know about the Constitution?" (2009) 50 Wm. & Mary L.R. 1239, 1243; L. McClaren "Public Opinion and the EU" in M. Cini (ed) *European Union Politics* (OUP, 2007), 375–390, 377.

¹² "[C]onstitutional referendums have rarely been subjected to systematic classification or critical analysis by constitutional theorists": S. Tierney, "Constitutional Referendums: A Theoretical Enquiry" (2009) 72(3) M.L.R. 360, 361. Tierney's recent work remains among the rare exceptions beginning to develop constitutional theories of referendum practice. See also S. Tierney, *Constitutional Referendums: The Theory and Practice of Republican Deliberation* (OUP, 2012).

constitutional referenda somehow safeguard the quality of public deliberation in order to count as democratically legitimate?

Simple majoritarian voting, which usually centres around the Yes-No binary of a referendum,¹³ features a familiar set of political pathologies: narrowly partisan opinion leaders often set cues for polarised public discourses, which may fail to inform or deeply engage voters on the constitutional matters at hand. In contrast, the burgeoning literature of deliberative democracy describes public procedures that are well-informed, broadly inclusive, cooperative, reflective and rigorously considered. In this ideal, procedures not only enable the bargaining over and aggregation of democratic preferences, but go further to promote a vigorous “give and take of reasons” between equal citizens.¹⁴ This is thought to improve the democratic legitimacy of public decisions: they may be “more likely to reflect evidence,” “more likely to respond to individuals affected by collective decisions” and “more likely to be accepted by those subject to them.”¹⁵ The deliberative democracy literature analyses the methods and feasibility of achieving such ideals, as well as diverse points of theory both in favour of and critiquing deliberative democratic governance.¹⁶

In the first substantive part below, this article will begin by asking what should count as democratically legitimate constitutional reform. The principal conclusion, based on three distinct arguments about democratic legitimacy, will be that constitutional reform should proceed only through deliberative democratic procedures.¹⁷ This proposition remains markedly at odds with the bulk of current global practice; prevailing constitutional reform methods remain largely free of deliberative safeguards.¹⁸ However, there is some evidence of an incipient standard of deliberative democratic constitutional reform, as states experiment with new referendum models,¹⁹ and as these models attract greater public confidence than traditional approaches.²⁰ By outlining why only deliberatively robust constitutional reform may be legitimate, this part therefore provides conceptual backing for a trend already perhaps underway. And since, as noted, the evolving global standard also requires broadly-based direct public consent, democratically legitimate constitutional reform arguably now presents a uniquely onerous double-requirement: a referendum coupled with robust deliberation.

¹³ In a small number of cases voters choose from among more diverse options: J. Parkinson, *Deliberating in the Real World: Problems of Legitimacy in Deliberative Democracy* (OUP, 2006), 171–172.

¹⁴ M. Warren, “Book Review: Foundations and Frontiers of Deliberative Governance” (2011) 46 *Acta Politica* 428 at 428. See also, e.g. J. Cohen, *Debates in Contemporary Political Philosophy: An Anthology* (London and New York: Routledge, 2003), 342–360, 345. Habermas outlined a version of this ideal early on, describing a situation in which reasons rather than power drive deliberation and “no force except that of the better argument is exercised”: J. Habermas, *The Legitimation Crisis of Late Capitalism* (T. McCarthy transl.). (Boston: Beacon Press, 1975), 108.

¹⁵ Warren, “Book Review: Foundations and Frontiers of Deliberative Governance” (2011) 46 *Acta Politica* 428.

¹⁶ For perspectives critical of deliberative democracy see, e.g. I. M. Young, “Justice, Inclusion and Deliberative Democracy” in S. Macedo (ed), *Deliberative Politics: Essays on Democracy and Disagreement* (OUP, 1999), 151; K. Olson, “Legitimate Speech and Hegemonic Idiom: The Limits of Deliberative Democracy in the Diversity of its Voices” (2011) 59(3) *Political Studies* 527.

¹⁷ We might imagine a more exacting requirement: that constitutional reform be deliberative in practice. Yet it would be unwise to cede to any authority the power to invalidate a vote, after the fact, based on difficult and subjective judgments as to how well voters deliberated. The most workable standards tell only how to design institutions to promote better deliberation.

¹⁸ Levy and Barker, “Emerging Global Practices of Democratic Constitutional Reform” (forthcoming).

¹⁹ Levy and Barker, “Emerging Global Practices of Democratic Constitutional Reform” (forthcoming).

²⁰ R. Levy, “Breaking the Constitutional Deadlock: Lessons from Deliberative Experiments in Constitutional Change” (2010) 34(3) *Melb. U.L.R.* 805, 825–838.

The following part will then consider whether these amount to impossible conditions for constitutional reform. A constitutional theory significantly misaligned with plausible constitutional practice would be neither coherent nor persuasive. The focus of this part will therefore be on the final stage of reform: voting. This stage poses the greatest challenge for deliberation because standard deliberative democratic innovations cannot easily influence the “purely private act of voting.”²¹ At points preceding a referendum vote—such as initiation, drafting and advocacy for and against constitutional reforms—a flexible range of deliberative institutional models have become available. For example, Canada’s “Citizens’ Assemblies” comprised 100+ randomly-selected voters. The Assemblies undertook several months’ intensive learning, debate and public consultation before recommending new provincial electoral systems; referenda later gave all voters a chance to assent to the recommendations.²² Relatively small representative voter assemblies (“micro-publics”) can indeed feature robust deliberation, generally by promoting “inter-personal reasoning [and] the giving, weighing, acceptance or rejection of reasons.”²³ In contrast, voting raises the problem of how to encourage deliberation in the much larger population that will ultimately cast ballots in a referendum.²⁴

Voting and deliberation are thus frequently viewed as dichotomous. Whereas voting is understood as the formal act by which citizens grant or deny consent to governments and laws, deliberation is understood as the preserve of the preliminary stages before a vote: of drafting the text and publicly debating its merits.²⁵ By contrast, this article will suggest that, at least in the special constitutional context, consent itself must be deliberative—even if this presents an onerous institutional design challenge. One possibility is that carefully designed forms of deliberative democracy can alter the act of voting. This part therefore pivots from theory to practice and surveys a selection of new and proposed “deliberative voting” models for constitutional referenda. Referenda with preliminary instruction, “scaled” questions, “values” questions or integrated drafting and voting stages might prompt more extensive voter deliberation. A discussion will evaluate these innovations in light of the preceding theoretical groundwork. Deliberative interventions in the act of voting raise as yet unanswered questions about their impacts on the democratic legitimacy of constitutional referenda.

Deliberative legitimacy in constitutional referendum voting

This part considers what should count as democratically legitimate constitutional reform. It examines not whether but how constitutional amendment should involve citizen participation—that is, by what deliberative standards. As noted, constitutional reform is distinct from other kinds of lawmaking as, in many

²¹ J. Parkinson, “Legitimacy Problems in Deliberative Democracy” (2003) 51 Pol. Stud. 180, 181.

²² British Columbia Citizens’ Assembly on Electoral Reform, *Making Every Vote Count: The Case for Electoral Reform in British Columbia, Final Report* (2004), 11–13; Ontario Citizens’ Assembly Secretariat, *Democracy at Work: The Ontario Citizens’ Assembly on Electoral Reform: a Record of Ontario’s First Citizens’ Assembly Process*, Background Report (2007).

²³ M. E. Warren and H. Pearse (eds), *Designing Deliberative Democracy: The British Columbia Citizens’ Assembly* (CUP, 2008).

²⁴ On problems of scale in deliberation, see R. Goodin, “Democratic Deliberation Within” (2000) 29 *Philosophy and Public Affairs* 81.

²⁵ See, e.g. Tierney, “Constitutional Referendums: A Theoretical Enquiry” (2009) 72(3) M.L.R. 360, 381; J. Habermas, “Constitutional Democracy: A Paradoxical Union of Contradictory Principles?” (2001) 29(6) *Political Theory* 766, 772; S. Chambers, “Deliberative Democracy Theory” (2003) 6 Ann. R.Pol.Sci. 307, 308–309.

democratic states, reform now requires majority public consent by referendum. Some jurisdictions have written this requirement into constitutional texts; others have developed it as an informal convention of political practice. In either case, the expectation of majority consent is now entrenched.²⁶ By contrast, constitutional law and practice have yet to firmly settle upon deliberative requirements for constitutional referenda. Using deliberative democratic theory, this part will contend that only robustly deliberative constitutional reform should be considered democratically legitimate. The overall conclusion will therefore be that democratically legitimate constitutional reform requires that a majority of participating voters, deciding deliberatively, must directly consent to reforms.

In what follows, after first dismissing certain “pragmatic” arguments in favour of robust deliberation over constitutional consent, the discussion will centre on three, stronger arguments from democracy. To be clear, the conclusion will not be that robust deliberation amid constitutional reform is merely desirable, but that it is necessary for legitimacy. However, this strong claim is tempered by the recognition that legitimacy is a matter of degree. The arguments to be canvassed will disclose no determinate threshold after which a process should be understood as “legitimate.” Instead, they will suggest a relation of proportionality between deliberation and legitimacy: better deliberation gives a constitutional reform process more legitimacy. The theme of proportionate legitimacy will recur at several points below.

Arguments from pragmatism

We might argue pragmatically that constitutional change should be deliberative because it deals with matters both complex and important. Indeed, citizens know little about, and have limited time for, the minutiae of public lawmaking. Most lawmaking is both procedurally and substantively elaborate. It turns on social and scientific facts, legal contexts, and balances or accommodations struck among competing societal groups. It also involves future prediction: the effects of lawmaking, intended or unintended, may be wide-ranging and long-lasting. And while complexity and gravity are features of most lawmaking, they are often especially pronounced for constitutional lawmaking. For example, with the drive for secession in Scotland, the country’s potential constitutional and social disentanglement from the United Kingdom clearly raises unusually wide and profound implications. Even more modest constitutional reforms (e.g. new voting methods) can establish norms that occupy a central place in the legal, political and social activity of the state, with only a minimal likelihood of later reversal.²⁷

Pragmatic arguments therefore call for better deliberation when matters are too important to be left to the vagaries of non-deliberative choices in a democracy.²⁸ Yet such arguments easily slide into anti-democratic reasoning based on enduring assumptions that democracy and deliberation are at odds, and that public participation should therefore be limited on matters apparently beyond a public’s

²⁶ Levy and Barker, “Emerging Global Practices of Democratic Constitutional Reform” (forthcoming).

²⁷ M. Tushnet, *Why the Constitution Matters* (Yale University Press, 2010).

²⁸ See, e.g. M. Setaolao, “On the Problems of Responsibility and Accountability in Referendums” (2006) 45 Eur. J. Pol. Res. 699; G. Sartori, *The Theory of Democracy Revisited* (London: Chatham House, 1987), 120.

deliberative competence.²⁹ Pragmatic arguments for better deliberation may therefore become arguments for preserving elite control over constitutional change. Indeed, despite the rise of referenda, and despite some movement toward more participatory processes, elites in government still substantially dominate the drafting of and advocacy for constitutional reform.³⁰ However, the pragmatic position is unpersuasive, as it is unclear whether, or how much, pragmatics should outweigh democratic legitimacy. A more convincing set of arguments instead call for robust deliberation for democratic reasons.

Arguments from democracy

Rather than preserving elite control over reform, robust deliberative processes involving public participation arguably help to realise democracy. Reasoning on these lines appears in the general deliberative democracy scholarship.³¹ Yet a set of more particular deliberative democratic arguments apply to the focus of this article, constitutional voting. As Tierney observes, how constitutional referenda are distinct from “ordinary referenda” is too often overlooked; the former “differ from ordinary politics both in terms of their significance but also in the way they change how ordinary politics is thereafter conducted.”³² Whatever else it may be, a vote in a constitutional referendum is the principal act by which citizens consent (or deny consent) to a new set of norms meant to bind them to each other, under a particular legal, political and social framework, for many years to come.³³ This description applies either uniquely or to the greatest extent to the vote in a constitutional referendum. Elections and non-constitutional referenda often serve other purposes (e.g. choosing parliamentary representatives, and lawmaking on contentious short- or long-term matters such as wartime conscription and the death penalty).³⁴ Even public consultation at earlier stages of constitutional reform does not primarily provide consent, but rather guides the directions of reform, and sometimes establishes authority to begin a reform process. The voting act is distinct as the stage when most adult citizens finally enter into the process, and formally commit the polity to a particular long-term course. For at least three reasons, the democratic legitimacy of this unusual act depends on the robustness of its deliberation.

Intergenerational consent

To be legitimate, constitutional reform should accommodate the views of citizens over several generations. Deliberative democratic theories understand lawmaking as more legitimate if it gains the consent of the whole class of people affected.³⁵ While some such theories do not include future generations in that class,³⁶ this

²⁹ Aristotle, Burke and J. S. Mill, among others, gave this assumption early expression: A. Gutmann and D. Thompson, *Why Deliberative Democracy?* (Princeton U., 2004), 8–9.

³⁰ Levy and Barker, “Emerging Global Practices of Democratic Constitutional Reform” (forthcoming).

³¹ See, e.g. Parkinson, *Deliberating in the Real World: Problems of Legitimacy in Deliberative Democracy* (2006); Warren, “Book Review: Foundations and Frontiers of Deliberative Governance” (2011) 46 *Acta Politica* 428.

³² Tierney, “Constitutional Referendums: A Theoretical Enquiry” (2009) 72(3) *M.L.R.* 360, 361.

³³ Tierney, *Constitutional Referendums* (2012), 14; Tushnet, *Why the Constitution Matters* (2010).

³⁴ On conscription referenda see, e.g. M. Levi, “The Institution of Conscription” (1996) 20(1) *Soc. Sci. Hist.* 133, 148–152.

³⁵ Parkinson, “Legitimacy Problems in Deliberative Democracy” (2003) 51 *Pol. Stud.* 180, 183.

³⁶ See, e.g. D. Beetham, *The Legitimation of Power* (Basingstoke: Macmillan, 1991).

omission would be hard to justify in the case of constitutional lawmaking. Intergenerational conflict presents a democratic legitimacy problem familiar to constitutional scholars. Constitutional norms are usually meant to be long lasting. They solidify norms that appear desirable at their inception, and they are intended to bind present and future citizens to defined public values, policies, and structures and limits on power.³⁷ Constitutional reforms thus affect a polity's various future positions: financial, environmental, infrastructural and so on. Such reforms implicitly rely on future prediction when they regulate taxation, spending and deficits³⁸; investment in regions, industries and infrastructure³⁹; resource use and environmental management⁴⁰; forms of governance and much else.

Some processes of reform make only weak attempts to gauge their own effects on future law and policy-making. For example, the Californian model of constitutional reform by ballot initiative (i.e. a public petition followed by referendum) is largely free of safeguards for robust deliberation, except occasionally after the fact when courts step in.⁴¹ A cautionary history of reforms emerges from the Californian experience. In the well-known case of *Proposition 13* (1978), the state capped property taxes at 1 per cent of the value of real property.⁴² This inflexible constraint, proposed and passed in relatively prosperous times, later severely hamstringing the state's revenue-raising abilities during repeated periods of economic crisis.⁴³ Cases of this kind illustrate how subsequent generations, having had no voice in a constitution's drafting, are nevertheless bound to it and may inherit undesirable effects such as severe burdens of public debt.⁴⁴

Deliberative democratic constitutional reform potentially addresses such problems in two ways. First, it is more likely than non-deliberative lawmaking to take account of subsequent generations. Deliberative democrats tend to observe that robust deliberation includes "making others 'present' in one's own thoughts and words."⁴⁵ As noted, deliberative democratic lawmaking is intended to be relatively well-informed, broadly inclusive, cooperative, reflective and rigorously considered, and therefore, if successful, "to respond to individuals affected by collective decisions".⁴⁶ This ideally includes those bound by the constitution in the future. In practice, some deliberative democratic institutions, such as Citizens' Assemblies, have appeared to base recommendations on robust information and reasoning about the context and likely consequences of reforms. In the British

³⁷ See Tushnet, *Why the Constitution Matters* (Yale University Press, 2010) and accompanying text.

³⁸ See, e.g. art.XIII § 1–6 of the California Constitution (1% cap on property tax).

³⁹ See, e.g. s.36 of the Constitution Act, 1982 (Canada) (federal government commits to "furthering economic development" and inter-regional "equalization" payments).

⁴⁰ See, e.g. s.100 of the Commonwealth of Australia Constitution Act (protecting "reasonable" State and individual use of water resources against federal regulation).

⁴¹ Judicial review of ballot initiatives under constitutional standards such as equality allows judges to reverse some popular initiatives: e.g. *Proposition 8* (2009) (outlawing same-sex marriage) invalidated in *Perry v Brown* (10-16696, 11-16577) 2012 WL 372713.

⁴² California Constitution art.XIII § 1–6.

⁴³ See, e.g. C.H. McCubbins and M. D. McCubbins, "Proposition 13 and the California Fiscal Shell Game" (2010) 2(2) *Calif. J. Politics & Policy* 1.

⁴⁴ Though we cannot isolate a single cause, recent data notably show California's per capita public debt (\$2,362) to be 2nd highest in the US: State Treasurer's Office, *Debt Affordability Report* (October 2010) (Sacramento: Government of the State of California).

⁴⁵ Parkinson, "Legitimacy Problems in Deliberative Democracy" (2003) 51 *Pol. Stud.* 180, 185. See also Goodin above 23; R. Eckersley, "Deliberative Democracy, Ecological Risk, and 'Communities-of-Fate'" in M. Saward (ed.) *Democratic Innovation: Deliberation, Association, and Representation* (London: Routledge, 2000). cf. J. Dryzek, "Legitimacy and economy in deliberative democracy" (2001) 29(5) *Political Theory* 651.

⁴⁶ Warren, "Book Review: Foundations and Frontiers of Deliberative Governance" (2011) 46 *Acta Politica* 428.

Columbia Citizens' Assembly's phases of Learning (two and a half months), Public Hearings (50 hearings held over two months, eliciting 3000 submissions) and Deliberation (three months),⁴⁷ national and international political scientists and local public hearings helped Assembly members widely canvass and reason through anticipated consequences flowing from alternative electoral system reforms.⁴⁸

We might question, however, whether this kind of representation is an adequate answer to intergeneration legitimacy concerns. Are we sufficiently represented by others who have our interests in mind, or must we be involved ourselves in the act of consent?⁴⁹ These questions have an empirical component: are the acts of prediction required inevitably so flawed as to inaccurately or incompletely represent future interests? This question is best answered in degrees. In at least some cases, amendments will have generally predictable long-term consequences. Amendments such as *Proposition 13* bind a polity to constitutional standards whose consequences should be largely unsurprising to a carefully-deliberating decision-maker. More generally, while robust deliberation cannot guarantee accurate prediction, limited deliberation guarantees inaccurate prediction. Deliberatively-derived constitutions may be *more* legitimate, for longer periods, to the extent they account for their own broadly predictable effects.

This set of doubts leads to a second argument for the special legitimacy of deliberative constitutional voting. A contention reappearing from time to time in debates over the democratic legitimacy of constitutions is that, since future generations have the power to revise the constitutions passed down to them, there is diminished risk of being unduly bound by a long-departed "founders generation."⁵⁰ The clearest rejoinder to this position is that many countries (e.g. Canada and Australia) have produced no constitutional changes in longer than a generation, because the practice of reform by referendum has broken down. While constitutional amendment was initially meant to be difficult, it was not intended to be impossible.⁵¹ Yet, parliaments and referenda have been unable to attract the substantial and uniform trust necessary for successful reforms.⁵²

In previous work I showed that deliberative democracy in early reform stages—for example, where Citizens' Assemblies formulate changes—attracts markedly greater trust than traditional approaches, and is therefore likely to increase affirmative votes at referenda. However, no similar empirical study has addressed deliberative voting, and it does not necessarily follow from past studies that deliberative voting would increase trust and lead to more successful referenda. One important reason for the Citizens' Assemblies' greater public trust was the perception that they, more than elected representatives, exercised delegated public power fairly and impartially.⁵³ Deliberative voting raises different concerns: at this

⁴⁷ British Columbia Citizens' Assembly on Electoral Reform, *Making Every Vote Count: The Case for Electoral Reform in British Columbia, Final Report* (2004), 11–13.

⁴⁸ See contributions in Warren and Pearse, *Designing Deliberative Democracy* (2008).

⁴⁹ On a similar debate, see F. Michelman, "Brennan and Democracy: The 1996-97 Brennan Center Symposium Lecture" (1998) 86 Calif. L.R. 399, 423.

⁵⁰ See, e.g. L. Alexander, "Introduction" in Larry Alexander (ed), *Constitutionalism: Philosophical Foundations* (Cambridge University Press, 1998), 1–15.

⁵¹ For historical support of this assertion see, e.g. C. Saunders, "The Parliament as Partner: A Century of Constitutional Review" (Research Paper No 3, Parliamentary Library, Parliament of Australia, 2000), ii.

⁵² Levy, "Breaking the Constitutional Deadlock: Lessons from Deliberative Experiments in Constitutional Change" (2010) 34(3) Melb. U.L.R. 805, 807.

⁵³ See Australian opinion poll results in Levy, "Breaking the Constitutional Deadlock: Lessons from Deliberative Experiments in Constitutional Change" (2010) 34(3) Melb. U.L.R. 805, 836–837.

stage voters exercise power on their own rather than delegating it to assemblies. However, speculatively, deliberative voting might also increase referendum success rates. First, fewer people voting deliberatively are likely to disapprove constitutional proposals out of ignorance of the issues. In addition, data suggest that many voters distrust democratic reform processes partly because they doubt fellow voters' capacities to decide constitutional matters sensibly.⁵⁴ In contrast, voters may trust other *deliberative* voters more; such voting might therefore generate more trust in the reform process overall, prompting more affirmative votes.⁵⁵ Thus, like deliberative democratic innovations at earlier referendum stages, but for unique reasons, deliberative voting may help a polity's current generation re-engage with its constitution by making the latter more amenable to revision.

Informed consent

A second argument from democracy in favour of robust deliberation understands the authority of a constitution as resting on its specially *deliberative* democratic origins. Citizens arguably devote special attention and deliberation to the articulation of constitutional norms. These norms, therefore, should be foundational and prevail over lesser laws passed in the regular course of politics, when citizens pay far less attention to lawmaking. In this view, then, when judges strike legislation down, they invoke a considered popular will against an overreaching legislature.⁵⁶ However, such theories raise questions about the exact nature of the process of democracy envisioned, and about how often their assumptions about deliberation match the realities of referendum practice.

Arguably only informed popular authorship can be a source of constitutional legitimacy. This argument understands the process of constitutional amendment or creation as requiring an express act of will—usually a public vote—by which a polity binds itself to new constitutional norms. Such an act of will is a fiction if the majority of voters in a referendum do not understand the constitutional issues in question. Referendum voting frequently addresses arcane subjects, such as electoral system design and the structures of state power. Even matters as prominent and intuitive as state secession involve legal changes with diverse and complex effects.

In analogous contexts, the requirement of informed consent is well-established. Consent (literally, “feel together”) implies wilful agreement to go along with a planned course of conduct known to the consenter. Usually this straightforwardly means that failing to communicate that course of conduct and its potential consequences, or communicating it partially or misleadingly, vitiates consent. Thus “you cannot consent to a thing unless you have knowledge of it.”⁵⁷ Elsewhere consent in law is interpreted robustly, as “informed consent”⁵⁸; however, this

⁵⁴ R. Levy, “Deliberative Constitutional Change in a Polarised Federation” in P. Kildea, A. Lynch and G. Williams (eds), *Tomorrow's Federation* (Federation Press, 2011), 367.

⁵⁵ Of course, in addition to trust in process, the substance of reform may also dictate outcomes.

⁵⁶ Bruce Ackerman's work is the best developed on these lines: *We the People: Foundations* (Cambridge: Harvard UP, 1993).

⁵⁷ *Caughey Ex p. Ford, Re* (1876) 1 Ch. D. 521 at 528 (Jessell M.R.).

⁵⁸ In negligence, a successful plea of the defence of *volenti non fit injuria* (“to he who is willing, no harm is done”) requires that, when a plaintiff submits to risk voluntarily: (i) he knew the facts constituting the risk or danger; (ii) he appreciated or understood the risk; and (iii) he freely and willingly consented to the danger or risk: e.g. *Scanlon v American Cigarette Co (Overseas) Pty Ltd (No.3)* [1987] V.R. 289. In a medical law context, “a consent is legally

standard is absent for consent amid constitutional reform—a peculiarity given the outsized importance of constitutions. Here, as elsewhere, consent should be no mere legitimising fiction or empty formality granting the appearance of voluntary agreement without the substance. Actual legitimacy therefore depends on consent being deliberative: a majority of voters should understand and feel concrete preferences for or against a constitutional reform.

The strength of such arguments turns on how we conceptualise voting on constitutional reform. There are at least three possibilities: the referendum vote as compact-formation, as interest-gauge and as expression. Only the first two call for robust deliberation. On the first, parties who agree to the new constitutional system consent to enter a compact. In a federation, these are typically thought to be the separate colonies before federation, or states and provinces after federation.⁵⁹ We might equally conceive of individual citizens as parties to the agreement. In either case, on the compact theory of constitutional formation, a clear analogy to the law and theory of private contract formation arises. Voting should be deliberative because parties must contract on terms of equality and full information. A lack of proper understanding and agreement—akin to consent—can void the compact, for example where parties enter the pact in reliance on representations that are material and false.⁶⁰

The second view of constitutional voting also suggests the necessity of deliberation. Here voting prior to constitutional reform is understood as a means to gauge the array of interests in a society. As a matter of fairness, such interests must be properly accounted for in the reformed constitution to the extent possible. This calls less clearly for deliberation: in fact, many authors view “preference aggregation” as the opposite of deliberation.⁶¹ However, even here, for voters to define and express what their interests are amid complex constitutional reform, we may need voters to deliberate about those interests. By contrast, a third and final conception of voting does not call for deliberation. Here the vote is pictured as just another instance of the more general freedom of self-fulfilment through public expression. Since self-fulfilment may be achieved by any kind of expression, it need not be deliberative. However, this third conception of voting may be the poorest fit to constitutional referenda. It would be difficult to justify the elaborate and expensive referendum apparatus if it served no distinct purpose beyond giving citizens an opportunity—among many others—for public expression.⁶² The best understandings of the vote in constitutional referenda are therefore the two deliberative conceptions.

valid to avoid liability for trespass if it is given by a competent patient who understands the general nature of the procedure that is proposed”: J. Devereux, *Australian Medical Law*, 3rd edn (Routledge-Cavendish, 2007) 292.

⁵⁹ See, e.g. L. Henkin, “The Constitution as Compact and as Conscience: Individual Rights Abroad and at our Gates” (1986–1987) 27 Wm. & Mary L.R. 11.

⁶⁰ These are typical conditions for void or voidable contracts: J. Paterson, *Principles of Contract Law* 3rd edn (Lawbook Co, 2009), 475–488.

⁶¹ See, e.g. J. Bohman, “The Coming Age of Deliberative Democracy” (1998) 6(4) J. Pol. Phil. 400, 410.

⁶² cf. Tierney, “Constitutional Referendums: A Theoretical Enquiry” (2009) 72(3) M.L.R. 360, 366, who ascribes a legitimate expressive role to constitutional referenda: “individuals come to identify with one another ... through their shared commitment to this constitution which itself becomes a central component of their collective identity.”

Subjective consent conditions

While compelling, the democratic rationales presented above in favour of robust deliberation in constitutional voting remain to some extent inconclusive. Contrary arguments coalesce around the idea that popular will must be purely majoritarian rather than both majoritarian and deliberative. One variant of these arguments conceives of non-deliberative decision-making as a higher form of public expression, on the assumption that pre-rational, often class- or identity-based sources of reasoning are inevitable.⁶³ Such positions sometimes also suggest that non-deliberative discourse is in some sense democracy's "real" condition. These assumptions understand political process as featuring intractable conflict and exclude "the possibility of agreement."⁶⁴ Such empirical positions may have some basis in reality. Yet they should be recognised both as matters of degree and as subjects for empirical study rather than presupposition.

The strongest arguments in favour of deliberative safeguards for constitutional change are perhaps not those emerging out of theory or empirical speculation, but from a polity's own view of democratic legitimacy. We may call this the "subjective" view of legitimacy, as it is premised on how democratic majorities themselves conceptualise democratic majoritarianism.⁶⁵ The logic of this position is straightforward: to avoid contradiction, standards of democratic legitimacy ought to be at least partly determined by a polity's own views of what counts as legitimate. As Delwit, Kulahci and Pilet note, governments sometimes "paradoxically" introduce voting system innovations without first broadly consulting voters.⁶⁶ More generally, we need democratic consent to establish democratic standards, just as with any other constitutional or basic norm.

Prevailing assumptions view simple (i.e. non-deliberative) majority rule as the key determinant of a polity's positive views of reform processes.⁶⁷ However, the clearest recent empirical clues suggest otherwise. In previous work I showed that, by a significant margin, the foremost public expectation of constitutional change processes is that they should be deliberative. A public opinion telephone poll asked 1100 respondents in Australia to provide views on the importance to constitutional reform of assorted process values. The surprising finding was a greater than 2:1 preference for the deliberative values of "fair and impartial" process (54.0 per cent first preferences), as against a process that "reflects the majority" (24.3 per cent).⁶⁸ Thus while democratic majoritarianism was also important, respondents were markedly more comfortable with democratic processes of constitutional change

⁶³ See, e.g. Walzer above n 15 at 58.

⁶⁴ A. Geddis, "Three Conceptions of the Electoral Moment" (2003) 28 *Aus. J.L.Phil.* 53, 70–71.

⁶⁵ Joseph Weiler describes a similar notion of "social legitimacy" based on "empirically determined, societal acceptance of the [constitutional] system": *The Constitution of Europe* (CUP 1999), 80. See also Parkinson, "Legitimacy Problems in Deliberative Democracy" (2003) 51 *Pol. Stud.* 180, 187. It should be noted that subjective legitimacy arguments become problematic in societies currently without strong liberal-democratic institutions permitting the open expression of social views, and in those riven by deep ethnic or other group cleavages.

⁶⁶ P. Delwit, E. Kulahci and J.-B. Pilet, "Electronic Voting in Belgium: A Legitimised Choice?" (2005) 25(3) *Politics* 153.

⁶⁷ See, e.g. A. Moravcsik, "What Can We Learn from the Collapse of the European Constitutional Project?" (2006) 47 *Politische Vierteljahresschrift* 219 (on unsuccessful efforts to secure constitutional change in Europe through simple majoritarian voting).

⁶⁸ Levy, "Breaking the Constitutional Deadlock: Lessons from Deliberative Experiments in Constitutional Change" (2010) 34(3) *Melb. U.L.R.* 805, 832–837.

that are also fair and impartial—suggesting the importance of rational and inclusive constitutional decision-making.

To be sure, there is some circularity in the subjective argument for deliberation and in empirical proofs offered in line with this argument. In the polling study, a somewhat deliberative process determined that respondents preferred deliberative democracy over basic majoritarian democracy.⁶⁹ Fifteen minutes of preliminary questioning introduced respondents to basic constitutional features and controversies, such that later responses about deliberative democracy were based on knowledge greater than that of the average citizen.⁷⁰ Arguably, the results therefore reveal only that, when people deliberate robustly, they express stronger preferences for robustly deliberative reform. While this is an important result, it does not fully answer critics who presuppose non-deliberative decision-making to be the more authentic democratic form. Yet this critical position would appear to hold, perhaps absurdly, that the only people qualified to judge the value of deliberative democracy are those who do not know what it is.

What is known empirically from results in Canada and Australia remains instructive. Evidence from polling and referenda suggests that non-deliberative constitutional change typically attracts lower public trust than does deliberative constitutional change.⁷¹ In turn, this suggests that, as between deliberative and non-deliberative voters, the latter subjectively understand theirs as the better approach to democracy. Thus while arguments about constitutional legitimacy are often implicitly grounded in speculative empirical claims about voters as by nature or preference non-deliberative, empirical studies challenge these assumptions and bring them to the surface. The results point toward a subjective public expectation that robust deliberation ought to feature in constitutional reform.

In sum, to count as democratically legitimate, constitutional reform should include a robust role for deliberation. Given the well-established requirement that whole voting publics must also be involved, this imposes a double-requirement in the constitutional context: reforms should be at once robustly deliberative and widely democratically inclusive. This may present an impossible set of requirements. It may also suggest that, after the egalitarian turn toward widespread direct public participation, no constitutional reform can be legitimate. Constitutional reforms in a number of jurisdictions may indeed have stalled for this reason, as voters, asked to consent to reforms in non-deliberative votes, doubt the legitimacy of the approach. Yet as will be argued in the next part, deliberative democratic

⁶⁹ More generally, it is arguably circular to consult majorities in order to determine whether and how majorities should be consulted. Yet attempts to identify basic legal norms inevitably engage in this kind of circularity, which does not necessarily disqualify the attempts. See, e.g. H. Kelsen, *Pure Theory of Law* (Max Knight transl.) (U. Calif. P., 1960). A view of democratic legitimacy is unsustainable if it is self-contradictory, in that it holds that the people should have the power to help write all basic norms except those norms that determine how the people decide in the first place. However, if in practice a majority view discounted the importance of majority views, this would raise a difficult paradox.

⁷⁰ A deliberative poll informs respondents about the basic issues in question, or even encourages respondents to consider their own views in depth, before finally asking a featured question: J. Fishkin, *When the People Speak* (OUP, 2009), 17, 25–30. It is a far step from Fishkin's deliberative polling to the wide-scale deliberative voting proposed in this article: 28–29. Fishkin and Bruce Ackerman's intriguing solution is a brief but expensive "Deliberation Day" pre-vote holiday, during which citizens would receive \$150 inducements to attend nation-wide town hall meetings: B. Ackerman, *Deliberation Day* (Yale UP, 2005).

⁷¹ Levy, "Breaking the Constitutional Deadlock: Lessons from Deliberative Experiments in Constitutional Change" (2010) 34(3) *Melb. U.L.R.* 805, 832–837; F. Cutler, "Deliberation, Information, and Trust: The British Columbia Citizens' Assembly as Agenda Setter" in Warren and Pearce, *Designing Deliberative Democracy* (2008), 166.

design may present workable approaches to marrying deliberation and democracy in the constitutional referendum vote.

Institutional translations: the problem of deliberative voting

This part considers whether the referendum vote can be rendered more deliberative. Efforts to develop deliberative constitutional referendum voting appear likely to increase, given their potential to answer the evolving democratic legitimacy requirements outlined above. (Even a relatively cynical government, perhaps uninterested in normative reasons for democratic legitimacy, might still pursue such efforts in order to maximise public support for reform, particularly where referenda are required.⁷²) The part will describe past models and also propose new approaches. While new democratic methods and technologies have burgeoned,⁷³ the question throughout will be which of these, if any, are appropriately tailored to improving deliberation at the voting stage in constitutional referenda. Some past efforts and proposals have been held back by insufficient attention to deliberative democratic criteria specific to the voting context. As a first condition, in their effect deliberative efforts should not deter or exclude significant numbers of people from voting, given the requirement of widespread and direct democratic participation in reform.⁷⁴ Beyond this, voting models should pursue deliberative criteria such as those to be set out in the next section. Against these deliberative benchmarks, a subsequent section will describe and evaluate four emerging and potential models of referendum voting.

Criteria for deliberative voting

As we have seen, deliberative voting faces the significant practical hurdle of encouraging entire voting publics to vote deliberatively in what is, for each voter, an essentially solitary act. The reality of referendum practice is, therefore, unlikely wholly to meet any set of ideal deliberative criteria. However, in light of the noted proportionate view of legitimacy, our aim should be to improve rather than to perfect legitimacy. We should therefore judge alternative deliberative approaches to voting not against absolute standards of legitimacy, but against each other.

No summary of the large deliberative democracy literature can be taken as authoritative. However, six closely interlaced deliberative criteria, distilled from the literature, are relevant at the voting stage of constitutional reform. First, voters must be *well-informed* about the context of a proposed constitutional change (e.g. the state of devolved power in Scotland), about the proposed legal reform (e.g.

⁷² Of course, governments might alternatively hope to see referenda fail, e.g. to deflect blame for inaction on reforms. In referenda on electoral system reforms, which may challenge incumbent power, governments have sometimes underfunded public information programs and required arguably excessively high supermajorities: L. Leduc, "The Failure of Electoral Reform Proposals in Canada" (2009) 61(2) Pol. Sci. 21, 26–40.

⁷³ For a detailed review of the myriad design choices, benefits and challenges of online democratic deliberation, see B. Towne and J. Herbsleb, "Design Considerations for Online Deliberation Systems" (2012) 9(1) J. Info. Tech. & Politics 97–115.

⁷⁴ The requirement raises important subsidiary questions, such as how many voters must participate (e.g. nearly all those eligible, or merely all who choose to participate). However, such debates lie beyond the scope of this article, which focuses on deliberative criteria. For a discussion of these issues, see R. Levy and W. Barker, "Emerging Global Practices of Democratic Constitutional Reform" (forthcoming).

details of a secession plan) and about its key consequences.⁷⁵ Secondly, deliberative lawmaking should ideally account for the *broadest possible range of social interests* affected by the reform. An important hallmark of deliberative democracy is the view that, given the right institutional setting, citizens can be encouraged to consider the effects of lawmaking on individuals and social groups differently situated from themselves. Indeed, individuals should also remain open to reconsidering their own interests, and whether they are distinct from those of other groups.⁷⁶ In turn, according to a third criterion, the broadest possible view in decision-making includes the *long-term view*. This includes accounting for how permanent constitutional reforms will affect those who inherit them in future. Fourthly, voters ought to participate on a basis of *equality* in reform processes. A referendum vote is unlikely to transcend a narrow set of perspectives if some classes of voters are excluded. Thus in constitutional referenda each citizen has the right to a vote of the same value as that of everyone else.⁷⁷

Two final criteria describe deeper forms of deliberation—that is, deliberation as not merely broadly informed, but also aware of how values, social interests, and short- and long-term consequences of reforms relate to and potentially balance against each other. The fifth criterion is therefore that voters, faced with inevitably conflictual values, interests and consequences, must engage in *trading-off* judgments. This is a relatively holistic and realistic form of judgment, in which aims initially expressed as absolutes, such as a desire for national independence, become subject to nuance, balance and accommodation: “independence” may become measured “autonomy,” as ideal values yield to considerations of economic cost (e.g. of a separate military and other institutions) or other realities, and to countervailing values. Sixthly and finally, voters should adopt *purposive* views of the reforms they consider. This means that voters are able explicitly to link constitutional reforms, or the status quo, to a set of underlying rationales and implicated values (e.g. the asserted identitarian, economic and other reasons for national independence or unity).

A key problem facing these ideals of deliberative breadth and depth in the voting context is that at least two standard deliberative democratic institutional tools are not readily available: *facilitation* and *interpersonal dialogue*. Both have been essential for building substantive rigour into past institutional experiments. For example, at the Citizens’ Assemblies, citizen-participants spent several months learning about and debating a discrete matter (electoral system design) under structured guidance. Local and international political scientists led large-group learning sessions, while graduate students led smaller sub-groups. Expert facilitation allowed participants to learn interactively. Experts led questioning, structured debates and prompted participants to place constitutional choices in their informational and purposive contexts, while also making clear how electoral system choices necessitate trading-off.⁷⁸ At the same time participants learnt from each

⁷⁵ See, e.g. J. Uhr, “The Constitutional Convention and Deliberative Democracy” (1998) 21 U.N.S.W. L.J. 875, 879.

⁷⁶ J. Habermas, *The Theory of Communicative Action*, Thomas McCarthy (transl.) (Beacon Press, 1984), Vol. 1, 285–286.

⁷⁷ Equality requirements are standard in deliberative democratic scholarship: e.g. M. Warren, “Deliberative Democracy” in A. Carter and G. Stokes (eds) *Democratic Theory Today* (Cambridge: Polity Press, 2002), 174.

⁷⁸ Arrow’s classic work showed that no single electoral model fulfils all key democratic values: K. J. Arrow, “A Difficulty in the Concept of Social Welfare” (1950) 58 J. Pol. Ec’y 328.

other by discussion during their months together. By design, the Assemblies roughly matched the gender, regional and other demographics of the larger polity. Members also discussed electoral system proposals with several thousand citizens in public hearings.

Facilitated learning and interpersonal exposure to diverse perspectives evidently improved Citizens' Assembly member's breadth and depth of intellectual and affective engagement around a focused constitutional issue. But it is uncertain whether such deliberation can occur at the point of referendum voting. Since standard forms of facilitation are unavailable here, it generally falls to voters themselves to learn and reason about potential reforms. As well, the interpersonal reasoning enabled by past deliberative democratic institutions, which helped deliberators transcend narrow personal perspectives, are generally absent during voting. Fishkin even includes "face to face discussion" in his "working notion of deliberation."⁷⁹ A challenge for institutional design is therefore to achieve some form of voting system-mediated deliberation capable of incorporating or substituting for standard approaches. Whether innovations in constitutional referendum voting might do so is the subject of the next section.

Deliberative voting innovations

At least four types of innovation appear to hold promise as methods of voting system-mediated deliberation. Most are recent, and many are untried; their likely effectiveness remains speculative and contingent on adequate funding, publicity and a host of other practicalities. The descriptions to follow therefore focus not on the precise details of design, but rather on the degree to which each voting option, viewed in outline and in the best light, might aid deliberation and meet criteria for deliberative legitimacy.

Preliminary instruction

A first option is that of constitutional instruction prior to voting. A handful of commentators propose models on these lines, albeit without always exploring normative or practical implications. Proposals often feature an element of mandate: in order to vote, a citizen must first read a booklet, attend a tutorial session or participate in an online tutorial. (The last decade or so has seen the rising use of and confidence in electronic means by which voters may cast "secure and secret official ballot[s] to electoral officials," either "via the Internet"⁸⁰ or by using computers at polling stations.⁸¹)

One variant of preliminary instruction imagines a test that voters must pass to indicate they have both read and understood the outlines of a constitutional proposal. Such tests are untenable in light of the above stipulation that deliberative innovations cannot exclude voters from participating. The equality principle also

⁷⁹ Fishkin, *When the People Speak* (OUP, 2009), 17.

⁸⁰ P. Norris, "E-voting as the Magic Ballot?: The Impact of Internet Voting on Turnout in European Parliamentary Elections" (2002) paper for *Workshop on e-Voting and the European Parliamentary Elections*, Robert Shuman Center for Advanced Studies, Villa La Fonte, Florence at 2.

⁸¹ J.-W. Choi, "Deliberative Democracy, Rational Participation and e-Voting in South Korea" (2006) 14(1) *Asian J. Pol. Sci.* 64, 65. National and local jurisdictions in Belgium, Estonia, France, Germany, Italy, Japan, South Korea, Spain, Switzerland, the UK, the US and elsewhere have trialled e-voting procedures.

provides that voters should not be barred on the basis of differing ability, except in extreme cases of incapacity. Nor should new voting models, any more than current models, disproportionately target certain subsets of voters for greater engagement.⁸² Indeed, many countries' courts are likely to invalidate tests, recalling the discriminatory literacy requirements of the pre-civil rights era United States.⁸³

Nevertheless, the far weaker requirement that voters submit to some form of preliminary instruction, without a test, may be tenable. A recent proposal by the New South Wales Electoral Commission, concerning a binding petition recall process for elected representatives, took tentative steps in this direction. An online registration system would "require the petitioner to acknowledge that they have read the cases for and against the recall of the relevant representative."⁸⁴ Generally, this would only exclude voters who decline all formal opportunities to be exposed to constitutional basics before voting.⁸⁵ Yet the approach is likely to generate at best superficial deliberation. Voters may still decline to devote attention to issues raised. Preliminary instruction can perhaps inform voters well to the extent it illustrates trade-offs (e.g. among values, short- and long-term consequences, social interests, costs and benefits) in clear and simple terms. However, such passive learning procedures would be unlikely to confer the same benefits as facilitation and inter-personal deliberation. To some extent, interactive computerised tutorials may be able to substitute for the facilitation effect of live deliberative assemblies. Yet the willingness of voters to engage with constitutional materials may still diminish with the length and complexity of instruction, or where the matters at issue are not highly intuitive and emotive. Conversely, evocative matters such as national secessionist movements might readily prompt voter engagement.

Scaled referenda

A more consistent way to compel voters to internalise and understand policy trade-offs may be the scaled referendum. Here voters would indicate support for constitutional reform options on a sliding quantitative scale, which would give to voters themselves the task of trading-off values, costs and benefits. To the author's knowledge, this approach has not been attempted in constitutional referenda. In one early non-constitutional example, voters in Victoria, British Columbia, were asked to choose among options for treating municipal waste, with referendum ballots clearly listing three discrete plans along with their likely costs to taxpayers.⁸⁶ This somewhat crude method aimed to encourage voters to view policy options not in isolation, but as products of the interaction of complex factors.

⁸² Internet voting may engage more young, wealthy, white, urban and (interestingly) female voters: See, e.g. F. Bélanger and L. Carter, "The Impacts of the Digital Divide on Citizens' Intentions to Use Internet Voting" (2010) 3(3-4) *Int'l. J. on Advances in Internet Tech.* 203. Yet the "digital divide" is debatable: traditional paper voting also deters some voters, including those who are elderly, disabled, located overseas or members of certain minorities: M. Alvarez and T. Hall, *Point, Click, and Vote: The Future of Internet Voting* (US: Brookings Institution, 2004), 5-7.

⁸³ To be sure, in the US the Voting Rights Act of 1965 (2000) 42 U.S.C. 1973c abolished literacy tests; the Supreme Court, in *Lassiter v Northampton Cty Bd of Ed* (1959) 360 U.S. 45, had allowed the practice to continue in some forms.

⁸⁴ Reported in D. Jackson, E. Thompson and G. Williams, *Recall Elections for New South Wales? Report of the Panel of Constitutional Experts* (2011) N.S.W. Dept. of Premier and Cabinet 95.

⁸⁵ Another concern is public literacy, if voters must read and understand greater quantities of text.

⁸⁶ T. McDaniels, "The Structured Value Referendum: Eliciting Preferences for Environmental Policy Alternatives" (1996) 15(2) *J. Policy Analysis and Management* 227-251 (calling a variant of this approach a "Structured Value Referendum"). McDaniels suggests initially using focus groups to determine which options should go to referendum: 240.

One of the noted hallmarks of broad deliberation is its holistic view, which recognises the inevitability of trade-offs. In this respect, public opinion researchers consistently find public reasoning to be deficient. For example, even as majorities of poll respondents tend to prefer lower taxes, they also favour the expansion of resource-intensive social programs.⁸⁷ Yet deliberative democrats often view such deficiencies as resulting from limited opportunities for voter deliberation.⁸⁸ Indeed, when opportunities for public engagement do not provide the full picture of costs, benefits and values, it is all too easy for voters to favour ideal but unworkable policy and law. Sliding scales therefore aim to improve deliberation by involving voters in judgments about policy trade-offs.

Scaled systems trialled thus far, however, illustrate problems raised by the approach. In Victoria, government planners undermined the effectiveness of their model by listing costs but not benefits for each environmental waste treatment option. The planners perceived a need to avoid deterring or confusing voters with a complex ballot. While concerns about complexity are understandable—if perhaps overestimated in this case—such a partial account of costs and benefits may be little better than no account at all. New scaled approaches should perhaps make use of the rise of electronic voting to improve on the clarity of information on policy trade-offs. As Towne and Herbsleb describe at length, computers present myriad ways of illustrating options in more interactive and clearer pictorial and other forms.⁸⁹

A more significant difficulty of the scaled approach is its potential to give voters inaccurate views of the determinism of policy trade-offs, particularly in the constitutional context. Poll results on independence in Scotland incidentally illustrate the risk that citizens could overvalue the predictive accuracy of numeric guides to decision-making. Presented with various cost figures for independence, respondents far more often favoured independence when shown low per-capita expenses than when shown higher predicted costs.⁹⁰ Even in apparently quantifiable constitutional examples, such as the taxation cap of Californian *Proposition 13*, the long-term effects of different options are not so clear that a sliding scale can illustrate them without considerable simplification. This does not mean that constitutional reforms are wholly unpredictable in their effects, but only that representing their effects numerically is likely to mislead voters. One designer of the Victorian plan suggests that scaled approaches cannot apply to constitutional reforms, because these are more unpredictable than other reforms.⁹¹ While this may sometimes be true, a more consistent difficulty appears to be that of quantifying constitutional acts of trading-off. Many constitutional values (e.g. liberty, dignity) call principally for moral or philosophical judgments and defy easy quantification.

⁸⁷ K. Gregory and D. Hetherington, *Public Attitudes towards Taxation and Government Expenditure* (2010) Per Capita Tax Survey 3–5, 15.

⁸⁸ J. Hartz-Karp and M. K. Briand, “Institutionalising Deliberative Democracy: Theoretical and Practical Challenges” (2009) 24(1) *Australasian Parl. Rev.* 167.

⁸⁹ Towne and Herbsleb, “Design Considerations for Online Deliberation Systems” (2012) 9(1) *J. Info. Tech. & Politics* 104–107.

⁹⁰ “It’ll Cost You” (April 14, 2012) *The Economist* 13 (showing only 21% favour independence given assumed individual costs of £500).

⁹¹ McDaniels, “The Structured Value Referendum: Eliciting Preferences for Environmental Policy Alternatives” (1996) 15(2) *J. Policy Analysis and Management* 227, 230.

Preliminary values questioning

Without expert facilitation, even the most carefully designed tutorial or ballot may be unable to generate significant levels of critical reflection and intellectual involvement. A third deliberative voting innovation would instead modify the process of referendum questioning to add a set of preliminary questions about the underlying values that should underlie any constitutional reform. A hypothetical example of preliminary values questioning can be taken from the secession context. Several introductory questions posed on a referendum ballot can prompt voters to deliberate on the values that should drive decision-making on the matter. Voters might therefore be asked to rank, in order of importance, values such as “building national identity”; “independence”; “cooperation”; “economic security”; “economic fairness”; “economic partnership”; “national security and defence”; etc.⁹² A final set of questions would ask voters about specific institutional options (e.g. “an Independent Scotland,” “continued membership in the United Kingdom” and options in between).⁹³ In more involved designs, an intermediate set of questions would ask voters to rank, on a number scale, the degree to which each institutional option fulfils the values that voters previously ranked.

The goal of preliminary values questioning is firstly to promote more purposive reasoning by ensuring that voters consider which values they believe tie to various constitutional reform options. Notably, because results on values are also themselves “binding,” voters are likely to view them as important and to be guided by their own answers to preliminary values questions in their deliberations. The preliminary questions are binding in the sense that overall sums for each can be publicised. These results would additionally provide guidance to government leaders charged with implementing referendum outcomes. For example, given a vote for secession, the shape of future economic and other international linkages between Scotland and the residual United Kingdom could be driven by support for values such as economic cooperation. Conversely, in the aftermath of an unsuccessful vote for independence, high scores for a values such as Scottish cultural independence would point to ways of renewing the union through further particular acts of devolution.

Integrated referenda

A final option does not attempt to solve the problem of voting system-mediated deliberation, but to evade it. With each method above, voting remains a private act of consent. It is still largely separate from prior referendum stages, where institutional options available to encourage deliberation are more numerous and flexible. A conundrum for democratically legitimate constitutional reform is therefore that, while the drafting stage is comparatively deliberative but involves minimal citizen participation, at the voting stage citizens maximise their participation but minimise deliberation. However, an approach we might call the

⁹² Analogously, McDaniels notes how policy planners sometimes use public polls to elicit value preferences. He does not develop this in detail. However, his suggestion of using focus groups to define the ballot options for scaled referenda can also be applied to preliminary values questioning. McDaniels, “The Structured Value Referendum: Eliciting Preferences for Environmental Policy Alternatives” (1996) 15(2) *J. Policy Analysis and Management* 227, 228, 240.

⁹³ The ballot may also incorporate procedures for preferential (instant-runoff) voting.

“integrated referendum” would partially collapse referendum stages, encouraging the overlap of voting with deliberative drafting. Deliberative democrats occasionally nod toward integrated views of voting and deliberation, if usually more as an analytic conceit than a matter of concrete institutional design.⁹⁴ Few works suggest how integrated deliberative voting might look in practice, in the constitutional or any other context.

A number of recent efforts to rethink referendum design have expanded deliberative public engagement at the constitutional drafting stage. None has seen deliberative participation extend to the referendum vote. For example, in 2011 Iceland conducted an intriguing online (“crowd-sourced”) public constitutional drafting experiment. A 25-member council posted weekly videos and text on leading social networking media, giving interested citizens extensive opportunities to view deliberations, and to comment on and help shape developing constitutional drafts.⁹⁵ However, much like Citizens’ Assemblies and other recent innovations, deliberation and consent remained formally separate: a referendum vote followed only after proceedings in the new participatory fora had concluded. Since citizen participation in and power over constitutional reform reach their apogee during the binding vote, the institutional separation between deliberation and voting strictly limits deliberative public participation in reform.⁹⁶

There has often been a tendency for institutional designers to stimulate short-term public interest through procedural novelty. Thus Icelandic Constitutional Council member Thorvaldur Gylfason described that nation’s experiment as “the first time a constitution [was] drafted basically on the internet,” and as a world-leading innovation.⁹⁷ An integrated referendum should, like previous innovations, permit secure home electronic voting and other forms of wider citizen engagement. However, careful institutional design is required to use electronic and other media to develop a sustainable and specifically *deliberative* model of public engagement.⁹⁸ For example, we might build from the robustly deliberative Citizens’ Assembly model. As noted, the Assemblies featured several months’ learning, discussion and reflection, during which successive constitutional options were considered and rejected. At the conclusion, members voted on a handful of remaining options. As in previous models, integrated referenda could allow public audiences directly to view or hear, by television, radio and web, deliberative proceedings, and interact with them through comments, questions and further readings. Yet in this case a series of binding public votes could also allow citizens themselves to eliminate constitutional options progressively from an initial array (e.g. of electoral systems, or forms of national independence and unity). The integrated referendum model would thus involve voters directly in a series of elimination trials—a popular and compelling dramatic archetype, which modern media particularly

⁹⁴ See, e.g. Chambers, “Deliberative Democracy Theory” (2003) 6 Ann. R.Pol.Sci. 307, 308; Choi, “Deliberative Democracy, Rational Participation and e-Voting in South Korea” (2006) 14(1) Asian J.Pol.Sci. 64, 65.

⁹⁵ P. Blokker, “Grassroots Constitutional Politics in Iceland” (January 2012, work in progress). Available at SSRN at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1990463 [Accessed April 23, 2013].

⁹⁶ Citizens’ Assemblies involve only a tiny, albeit representative, fraction of the voting population, while the Icelandic experiment involved a far larger, but less representative, selection.

⁹⁷ H. Siddique, “Mob rule: Iceland crowd sources its next constitution” The Guardian (June 10, 2011), 24.

⁹⁸ For a review of perspectives criticising e-voting as non-deliberative, see Choi Choi, “Deliberative Democracy, Rational Participation and e-Voting in South Korea” (2006) 14(1) Asian J.Pol.Sci. 64, 69–70.

enable—potentially raising levels of public affective investment and sustained intellectual consideration of constitutional options.

Such proposals markedly depart from past experiments, and are not without risk. Citizens' Assemblies permitted voting only within limited micro-publics of 100–160 citizens. The Assemblies also occasionally met *in camera* to insulate proceedings from partisan influence and protect their deliberative quality. By contrast, integrated referenda would open voting and involvement to whole publics, albeit in a carefully structured way. The gamble is therefore that such a process would help to make public debate more deliberative, rather than the converse: wider public debate might diminish the quality of deliberation in the process of reform. Improving public constitutional deliberation, by this or other means, is likely therefore to remain an intricate challenge best approached through ongoing experimentation.

Conclusions

This article began by considering whether democratic legitimacy entails deliberative requirements in the reform of constitutions. Norms of widespread direct citizen involvement have emerged in the constitutional law and practice of many countries. Yet corresponding standards of deliberation in democratic constitutional reform remain unsettled. Drawing on theories of deliberative democracy, the article has suggested that, to count as democratically legitimate, constitutional reform must safeguard the quality of deliberation. This strong claim was tempered by a view of legitimacy not as absolute, but as a proportionate and comparative concept. Even so, the article pointed toward the emergence of an onerous double-requirement for constitutional legitimacy: that reforms must be at once widely participatory and robustly deliberative.

Based on this theoretical groundwork, the article's second half evaluated a selection of "deliberative voting" innovations. This focus on voting is largely unique in the literature, and may be especially relevant, for it is at the stage of voting that deliberative democratic constitutional reform faces the greatest impediments. Prior to the vote, several new kinds of deliberative fora may be able to enhance deliberation; yet most citizens do not become meaningfully involved in reforms until the final, largely solitary act of voting. The prospects for deliberative democratic constitutional reform may therefore remain limited without new approaches to public constitutional voting. For example, integrated referenda partially redefine voting and deliberation—traditionally conceived as separate—by merging voting with deliberative fora such as Citizens' Assemblies, which have shown promise at earlier stages of reform. Governments, along with deliberative democratic and constitutional scholars, should continue efforts both to identify deliberative requirements in the arena of constitutional reform, and to elaborate and trial novel means of meeting these standards.