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DELIBERATIVE CONSTITUTIONAL REFERENDUMS IN DEEPLY DIVIDED SOCIETIES

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INTRODUCTION

While all societies are divided to one extent or another, the prefix “deeply” typically denotes a divided society in which national, ethnic, religious, linguistic, or other divisions are severe enough to threaten the very nature or existence of the state. Clearly, this standard definition is extremely broad. Since it covers vastly different cases, it is normally refined for research purposes. In practice, scholars more or less consciously narrow the definition in ways that help them to identify and illuminate a specific class of cases.¹

The most common approach is to focus on cases where the main divisions in society are ethnic in kind and where those divisions engender civil violence.² By contrast, our concern in this article is with societies that are seeking to manage their divisions by *democratic* means but where the *consent* of at least one major group or segment is still in question. While our approach also differs methodologically in that it is normative rather than comparative, cases that illustrate our core concerns include Colombia, Cyprus, Northern Ireland, and South Africa. Cases that do not involve a

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¹ For a discussion, see Adrian Guelke, *Politics in Deeply Divided Societies* (Cambridge: Polity Press, 2012) at 13–32.

² See e.g. Donald L Horowitz, *Ethnic Groups in Conflict* (Berkeley: University of California Press, 1985) [Horowitz, *Ethnic Groups*].

serious attempt to manage their divisions by democratic means and that therefore do not fall (at least for now) within our focus include Kashmir, Mindanao, Syria, and Yemen.

In theory, the links between democracy and consent are obvious enough; democracy is rule by the people. But since the sheer scale of most modern democracies is such that the people cannot rule themselves directly, there must be a set of fundamental rules or a constitutional settlement by which representatives govern on their behalf. The caveat is that a new constitutional settlement will be regarded as democratically legitimate only insofar as it has the consent of the people.

At a general level, we take it that there is nothing particularly controversial about this understanding of the relationship between democracy and consent. Yet, since democracy and consent can take very different forms in practice, scholars need to argue for their preferred conceptions. In this article, we contend that people should signal their consent for a new constitutional settlement through a plebiscite or referendum—that is, through a vote of the entire electorate intended to register the balance of support for the settlement.³

Granted, referendums in deeply divided societies have a mixed track record. One can certainly point to relatively successful cases: the 1992 referendum on ending apartheid in South Africa or the 1998 referendum on power-sharing in Northern Ireland. Yet one can also think of failures: the rejection of the UN-sponsored 2004 Annan Plan for reunifying Cyprus or, more recently, the rejection of a peace deal between the Colombian government and the Revolutionary Armed Forces of Columbia (FARC) guerrillas in 2016.⁴ It is not always easy to say what makes the difference

³ In Canada, plebiscites are generally non-binding on governments, while referendums are; however, this terminological distinction is not followed in all countries. Moreover, the terms are sometimes used interchangeably (partly in view of the occasional ambiguity as to whether a public vote is effectively binding). There is also tremendous further diversity in the forms and contexts of referendums—such as mandate, citizen-initiated, mutual-veto, secession, accession, and withdrawal referendums. Most of these referendum variations are not directly germane to this article.

⁴ See e.g. Neophytos Loizides, “Negotiated Settlements and Peace Referendums” (2014) 53:2 *European J Political Research* 234 at 234 (South Africa); Thomas Hennessey, *The*

from case to case or, indeed, to predict what might happen next. However, the assumption on which this article rests is that the quality of the deliberation that occurs during the course of the referendum is likely to have an important bearing on the referendum's chances of success—that is, its prospects of generating democratic consent for a new constitutional settlement.

Deliberation is a feature of all conceptions of democracy, including competitive party models.⁵ Yet the conception of democracy that informs our thinking in this article is “deliberative democracy”.⁶ As the name suggests, deliberative democracy is a conception of democracy that reserves a central place for public reasoning about important matters of law and public policy. Importantly, the members of such a democracy do not seek to impose their competing views on one another through, for example, the strategic force of numbers or simple brute force. Rather, each side seeks to convince the other that the better arguments are on its side. They do so because, from a deliberative view, “outcomes are democratically legitimate if and only if they could be the object of a free and reasoned agreement among equals.”⁷

There are many reasons to value deliberative democracy.⁸ Yet in the sorts of deeply divided societies with which we are concerned in this article, one reason stands out as especially pressing: constitutional settlements usually

Northern Ireland Peace Process (Dublin: Gill & Macmillan, 2000) at 18 (Northern Ireland); Viola Drath, “The Cyprus Referendum: An Island Divided by Mutual Distrust” (2004) 26:4 *American Foreign Policy Interests* 341 at 341–52; Aila M Matanock & Miguel García-Sánchez, “The Colombian Paradox: Peace Processes, Elite Divisions & Popular Plebiscites,” (2017) 146:4 *Daedalus* 152 at 159.

⁵ See e.g. Albert Weale, *Democracy* (Basingstoke: Palgrave MacMillan, 1999) at 37.

⁶ See generally Amy Gutmann & Dennis Thompson, *Why Deliberative Democracy?* (Princeton: Princeton University Press, 2004) at 1–63.

⁷ Joshua Cohen, “Deliberation and Democratic Legitimacy” in Alan Hamlin & Philip Pettit, eds, *The Good Polity: Normative Analysis of the State* (Oxford: Blackwell, 1989) 17 at 22.

⁸ For a list of goods that deliberation is thought to secure, see Jonathan W Kuyper, “The Instrumental Value of Deliberative Democracy—Or, Do We Have Good Reasons to be Deliberative Democrats?” (2018) 14:1 *J Public Deliberation* 1 at 3–4.

require major compromises—generally speaking, each side will have to make painful concessions to the other’s constitutional vision of the state. For example, the majority may have to accept that power will be shared, while, for its part, the minority may have to give up its claim to independent statehood. As a consequence, constitutional settlements usually require considerable forbearance—typically, each party to the compromise will have to patiently endure the criticisms others level at it for making concessions. More precisely, in deeply divided societies, the moderates who negotiate a settlement must endure the criticisms levelled at them from the extremes. Yet insofar as moderates are able to explain to voters during the course of the referendum why they acted as they did—why moderation served their purposes better than extremism—the settlement that they reach may have a better chance of taking root and enduring.

Of course, moderation is a long-established theme in the literature on deeply divided societies. For example, Donald Horowitz argues that the alternative vote electoral system, and in particular the high threshold for election and preferential nature of its ballot, may encourage political parties from one group or segment to look for votes from another. Since lower-order preferences may make all the difference between winning and losing seats, parties have a real incentive to moderate their claims in the hope of broadening their appeal.⁹ Yet while we agree that electoral systems can be designed to encourage moderation, what is novel or distinctive about our approach is its emphasis on deliberation. With specific reference to the referendum, we favour not just electoral engineering, but deliberative electoral engineering.

Admittedly, the idea of a deliberative referendum—a referendum purposefully designed with deliberative principles in mind—is not new.¹⁰

⁹ See e.g. Horowitz, *Ethnic Groups*, supra note 2; Donald L Horowitz, *A Democratic South Africa? Constitutional Engineering in a Divided Society* (Berkeley: University of California Press, 1991) at 188–90 [Horowitz, *A Democratic South Africa*].

¹⁰ See e.g. Stephen Tierney, “Using Electoral Law to Construct a Deliberative Referendum: Moving Beyond the Democratic Paradox” (2013) 12:4 Election LJ 508.

Nor is the idea of applying deliberative democracy to divided societies.¹¹ Yet to date, very little has been written on the application of the notion of a deliberative referendum to deeply divided societies.¹² Even less—if anything at all—has been written about the idea of using the deliberative referendum as a driver of moderation in the context of generating popular consent for a new constitutional settlement.

Before proceeding with this argument, one obvious practical objection needs to be confronted. On the face of it, deeply divided societies would seem to be infertile grounds for deliberation. In deliberation, as noted, each party seeks to convince the other that the better arguments are on its side. To that end, they invoke considerations and exchange reasons in an endeavour to arrive at an agreed judgment or a shared view.¹³ Yet in a deeply divided society, it may be difficult even to get people on opposing sides in the same room. And if they do meet, they may not really deliberate: they may fail to listen to one another with an open mind or reflect seriously on what others have to say. Since trust is likely to be low, they may simply regard one another's reasons as insincere cover for sectional interests. As Brendan O'Leary pointedly remarks, "those who embrace a politics of deliberative democracy as the prescription for conflict need reminding that deliberation takes place in languages, dialects, accents, and ethnically toned voices and that it is not possible to create 'ideal speech situations.'"¹⁴ There

¹¹ See generally Ian O'Flynn & Didier Caluwaerts, "Deliberation in Deeply Divided Societies," in André Bächtiger et al, eds, *The Oxford Handbook of Deliberative Democracy* (Oxford: Oxford University Press, 2018) 728 at 742–54.

¹² Two of the few examples are Ron Levy et al, "Designing Referendums for Peacemaking: The Case of Bougainville" (2018) 33:1 *Australasian Parliamentary Rev* 6; Ron Levy, "Shotgun Referendums: Popular Deliberation and Constitutional Settlement in Conflict Societies" (2018) 41:3 *Melbourne UL Rev* 1237.

¹³ See e.g. David Miller, "Deliberative Democracy and Social Choice" (1992) 40:1 (supp) *Political Studies* 54 at 55; Michael A Neblo, *Deliberative Democracy Between Theory and Practice* (New York: Cambridge University Press, 2015) at 92.

¹⁴ Brendan O'Leary, "Debating Consociational Politics: Normative and Explanatory Arguments" in Sid Noel, ed, *From Power Sharing to Democracy: Post-Conflict Institutions in Ethnically Divided Societies* (Montreal: McGill-Queen's University Press, 2005) 3 at 10.

may, for instance, be “enclave deliberation” in which most of the discussion occurs among people on the same side.¹⁵ Enclave deliberation is likely only to deepen the lines of division, as Cass Sunstein’s work on polarization suggests.¹⁶

For analysts such as O’Leary, democracy in deeply divided societies is best handled by political leaders or other elites¹⁷ who are both willing to take tough decisions and strong enough to bring their supporters along with

¹⁵ Sunstein actually uses the term “deliberating enclaves” rather than “enclave deliberation”: Cass R Sunstein, *Going to Extremes: How Like Minds Unite and Divide* (Oxford: Oxford University Press, 2009) at 149 [Sunstein, *Going to Extremes*]. However, “enclave deliberation” is now fairly standard in the literature on deliberative democracy. See e.g. Kimmo Grönlund, Herne Kaisa & Maija Setälä, “Does Enclave Deliberation Polarize Opinions?” (2015) 37:4 *Political Behavior* 995; Nicole Curato et al, “Twelve Key Findings in Deliberative Democracy Research” (2017) 146:3 *Daedalus* 28 at 33.

¹⁶ Cass R Sunstein, “The Law of Group Polarization” (2002) 10:2 *J Political Philosophy* 175. See also Sunstein, *Going to Extremes*, *supra* note 15. In conflict societies, concerns about security will typically drive people to live within their own communities, to marry within their own traditions, to send their children to segregated schools, and so forth. From within these enclaves, stereotyping assumptions and prejudicial social comparisons—based on distinctions both real and imagined, and both large and trivial—often flourish. See Michael Billig & Henri Tajfel, “Social Categorization and Similarity in Intergroup Behaviour” (1973) 3:1 *European J Soc Psychology* 27. Ordinary people are frequently prevented from knowing or understanding the salience of others’ histories and values, and hence from developing any sense of empathy for them. See Michael E Morrell, *Empathy and Democracy: Feeling, Thinking, and Deliberation* (University Park, PA: Pennsylvania State University Press, 2010) at 101–05. For instance, the existence of separate linguistic, educational, religious, and media institutions and norms in Lebanon meant that “powerful internal social barriers impeded contact between the communities”: John Coakley, “Ethnic Conflict Resolution: Routes Towards Settlement” (2009) 15:34 *Nationalism & Ethnic Politics* 462 at 467.

¹⁷ See O’Leary, *supra* note 14. See generally Arend Lijphart, *The Politics of Accommodation: Pluralism and Democracy in the Netherlands* (Berkeley: University of California Press, 1975) [Lijphart, *Politics of Accommodation*]. On our definition, these leaders or elites might include governmental insiders (elected or appointed legislative, executive, and judicial members) or social elites (media commentators and organizations, business leaders, and influential voices purporting to speak for religious, ethnic, tribal, or other identity groups).

them in implementing those decisions.¹⁸ Yet if political leaders, who also speak “in languages, dialects, accents, and ethnically toned voices,”¹⁹ can negotiate within appropriately structured institutions, why can’t ordinary people deliberate, also within appropriately structured institutions?

As we indicated above, the assumption on which this paper rests is that deliberation matters to a referendum’s chances of success. More specifically, a peace referendum designed with deliberative principles in mind may stand a better chance than one that does not generate popular consent for a new constitutional settlement. Crucially, however, this implies that the quality of the deliberation that takes place during the course of a referendum campaign will itself be affected by the design of the referendum. Put another way, while deliberative democracy may guide the design of the referendum, the referendum should in turn make meaningful deliberation possible. It will provide an institutional framework within which deliberation can occur. As Joshua Cohen puts it, the members of a deliberative democracy share “a commitment to co-ordinating their activities within institutions that make deliberation possible and according to norms that they arrive at through their deliberation.”²⁰ Theory and practice should be seen as mutually implicating.

To explore these considerations in greater detail, we proceed as follows. In the first section, we offer three interrelated arguments in support of the use of referendums in deeply divided societies. First, since constitutional settlements have far-reaching implications—implications that may extend to almost every corner of daily life—it seems only right and just to give ordinary people a direct say. Secondly, in principle, referendums encourage

¹⁸ That elected or appointed elites are best positioned to lead successful processes of peacemaking is a common assumption in the literature. See e.g. Lijphart, *Politics of Accommodation*, *supra* note 17 at 71–77; O’Leary, *supra* note 14. As will become clear, we think this assumption is not always correct. Elites may, for instance, have greater difficulty than non-elites at engaging in flexible, non-partisan deliberation, or in using new information to challenge (rather than reconfirm) presuppositions. See e.g. Dan M Kahan, “Ideology, Motivated Reasoning, and Cognitive Reflection” (2013) 8:4 *Judgment & Decision Making* 407 at 416–18.

¹⁹ O’Leary, *supra* note 14 at 10.

²⁰ Cohen, *supra* note 7 at 21.

ordinary people to take a broader or more all-encompassing view of political life. They may therefore encourage people to focus less on what divides them and more on what they share. Thirdly, insofar as referendums change the character of politics in this way, they may make it easier for moderates to make compromises across deep divides.

In the second section, we then make the claim that referendums will produce desirable consequences of this sort only if the quality of deliberation that takes place during the course of the referendum campaign is sufficiently high. As already indicated, we acknowledge that the quality of deliberation will itself be affected by the way in which the referendum is designed or conducted. Moreover, we accept that a comprehensive analysis would need to focus on a broad range of background social, cultural, and institutional variables. However, for the purposes of illustration, we focus in this second section on two main ways in which referendums in deeply divided societies may undermine deliberation, namely the *majoritarian* problem and the *inflexibility* problem.

In the third and final section, we consider how a referendum might be organized so as to increase the prospects for deliberation and thereby improve the referendum's chances of success. In particular, we consider three overlapping themes or issues: (1) timing, (2) inclusion, and (3) preference voting. Insofar as these issues can be successfully addressed, we will have strong—or at least stronger—grounds for thinking that referendums can have a positive role to play in generating consent for a new democratic constitutional settlement.

I. WHY HOLD REFERENDUMS IN DEEPLY DIVIDED SOCIETIES?

In a democracy, the people are the ultimate source of political authority.²¹ As such, governments merely hold that authority in trust and depend for their legitimacy on the consent of the governed. This democratic understanding of the idea of political legitimacy has been defended by

²¹ See Joshua Cohen, "Procedure and Substance in Deliberative Democracy" in Seyla Benhabib, ed, *Democracy and Difference: Contesting the Boundaries of the Political* (Princeton: Princeton University Press, 1996) 96.

major figures in the history of political thought such as Locke and Rousseau.²² Yet what is easy to overlook is that this understanding can apply as much to deeply divided societies as it does to more mature democratic systems. Indeed, one could plausibly argue that it applies even more. In an effective democracy, the consent of the governed can be largely taken for granted.²³ Yet in a deeply divided society that is seeking to manage its divisions through democratic means, the consent of the governed cannot simply be assumed. On the contrary, the experience of deep division is often such that at least one major group or segment of the society is likely to have withdrawn its consent and will therefore need to be persuaded to grant its consent anew to any future constitutional settlement.

There are different institutional means of asking ordinary people for their consent. Traditionally, the approach favoured by comparative scholars has been to hold a general election or an election to a constitutional convention. Once elected, the leaders of the different groups or segments can then be charged both with agreeing to a new democratic settlement and with convincing their supporters to accept it.²⁴ As we indicated in our introductory remarks, this approach is essentially elitist: while the consent

²² See John Locke, *Two Treatises of Government*, ed by Peter Laslett (Cambridge: Cambridge University Press, 1988); Jean-Jacques Rousseau, *The Social Contract and the Discourses*, revised by JH Brumfitt, JC Hall & PD Jimack, translated by GDH Cole (London: Everyman's Library, 1993).

²³ See John Petrov Plamenatz, *Consent, Freedom and Political Obligation*, 2nd ed (London: Oxford University Press, 1968) at 7. Cf Anthony Harold Birch, *Representation* (New York: Praeger, 1972) at 33.

²⁴ See e.g. Lijphart, *Politics of Accommodation*, *supra* note 17; Arend Lijphart, *Democracy in Plural Societies: A Comparative Exploration* (New Haven: Yale University Press, 1977) [Lijphart, *Democracy in Plural Societies*]; Arend Lijphart, "Constitutional Design for Divided Societies" (2004) 15:2 *J Democracy* 96; Horowitz, *Ethnic Groups*, *supra* note 2; Donald L Horowitz, "Electoral Systems: A Primer for Decision Makers" (2003) 14:4 *J Democracy* 115 [Horowitz, "Electoral Systems"]; O'Leary, *supra* note 14; Ben Reilly, "Democratic Validation" in John Darby & Roger Mac Ginty, eds, *Contemporary Peacemaking: Conflict, Violence and Peace Processes* (Basingstoke: Palgrave Macmillan, 2002) 174. Cf Joanne McEvoy, "Letting 'the People(s)' Decide: Peace Referendums and Power-Sharing Settlements" (2018) 25:5 *Democratization* 864.

of ordinary people has to be secured, less is more.²⁵ Ordinary people should be asked for their consent, but the real business of agreeing to a new constitutional settlement and ensuring that it beds down should be left to their elected leaders. If, over the course of time, ordinary people are unhappy with how their leaders have performed, they can always vote them out of office at the next election.

A different approach to asking ordinary people for their consent is the referendum. Indeed, as an empirical matter, referendums are on the rise around the world, including in deeply divided societies.²⁶ Those who favour the traditional approach that we have just described tend to be extremely wary of referendums. For example, Ben Reilly argues that referendums “should not be used in divided societies which are being asked to make stark choices about their future. In such cases, where a bare majority ‘50 per cent plus one’ is the threshold for victory or defeat, the plebiscite is a zero-sum game that . . . will often play into the hands of hardliners”.²⁷ We think that this is an important objection—one that is firmly grounded in the realities of deep division. Yet before we confront this and other related objections, we first present three theoretical reasons in support of using referendums.

A. THE REACH OF PEACE AGREEMENTS

Constitutional settlements typically cover many issues besides the fundamental rules of government—for example, land rights, the use of minority languages, the return of refugees, amnesties for former paramilitaries, the allocation of natural resources, education, health, employment opportunities, and so forth. The reach and gravity of these

²⁵ The obvious theoretical touchstone for elitist views of this sort is Joseph Schumpeter, *Capitalism, Socialism, and Democracy* (New York: Harper and Brothers, 1942).

²⁶ For a typology and global overview of ethno-national referendums, see Matt Qvortrup, “The History of Ethno-National Referendums 1791–2011” (2012) 18:1 *Nationalism & Ethnic Politics* 129. See also Matt Qvortrup, *Referendums and Ethnic Conflict* (Philadelphia: University of Pennsylvania Press, 2014). For a typology and global overview of sovereignty referendums, see Fernando Mendez & Micha Germann, “Contested Sovereignty: Mapping Referendums on Sovereignty over Time and Space” (2018) 48:1 *British J Political Science* 141 at 165.

²⁷ Reilly, *supra* note 24 at 183.

matters suggest that, as a matter of basic political principle, ordinary people should have their say over them directly. Otherwise, a contradiction arises if the effort to manage deep divisions democratically occurs without appreciable democratic participation.²⁸ Of course, this assumes that ordinary people will cast their vote wisely—that they will reflect seriously on the issues and strive to offer a considered view—which brings us to a second broad reason for thinking that referendums are a commendable vehicle of popular participation in deeply divided societies.

B. THE DEVELOPMENT OF A MORE ALL-ENCOMPASSING POINT OF VIEW

It is often said that the nature of democracy is such that it requires members to develop a more mature sense of responsibility for their actions, including a greater willingness to reflect on and take into account the consequences of those actions for others.²⁹ As part of that, members must be willing to carry their fair share of the burdens of democratic life, rather than simply seeking to reap its rewards for themselves. Most obviously, they must pay their taxes honestly and, more generally, they must observe the law. They must also find it within themselves to be civil to one another, particularly when they disagree.³⁰ In less prosaic terms, they must be motivated to do for themselves what a philosopher king (or at least a benevolent dictator) might do on their behalf and trust that others will be similarly motivated.

There are potentially many ways in which this sort of disposition might be cultivated and enlarged. But political theorists have long argued that

²⁸ See also Robert Post, “Democracy, Popular Sovereignty, and Judicial Review” (1998) 86:3 Cal L Rev 429. For a discussion on popular *deliberative capacity* as an essential component of democratization processes, see John S Dryzek, “Democratization as Deliberative Capacity Building” (2009) 42:11 Comparative Political Studies 1379.

²⁹ See Albert Weale, *Democratic Citizenship and the European Union* (Manchester: Manchester University Press, 2005) at 26.

³⁰ See Brian Barry, “Self-Government Revisited” in David Miller & Larry Siedentop, eds, *The Nature of Political Theory* (Oxford: Oxford University Press, 1983) 121 at 141–42; Charles Taylor, “The Dynamics of Democratic Exclusion” (1998) 9:4 J Democracy 143 at 144.

participation has a crucial role to play. Famously, John Stuart Mill argued that when an ordinary person participates in political life, he (or she) is:

called upon, while so engaged, to weigh interests not his own; to be guided, in case of conflicting claims, by another rule than his private partialities; to apply, at every turn, principles and maxims which have for their reason of existence the common good: and he usually finds associated with him in the same work minds more familiarized than his own with these ideas and operations, whose study it will be to supply reasons to his understanding, and stimulation to his feeling for the general interest. He is made to feel himself one of the public, and whatever is for their benefit to be for his benefit.³¹

So described, political participation obliges us to take a broader or more encompassing view of public issues. The psychological mechanism at work here is publicity: in a public forum, naked appeals to one's own special interests may well prove socially unacceptable. Hence, participants have a real incentive to dilute their stated position. But, having made that move, they will then be subject to a "consistency constraint": if they deviate from the position when it ceases to be to their advantage, they will be viewed as opportunistic.³² On the face of it, this might be taken to suggest that political participation is little more than an exercise in duplicity or hypocrisy. Yet over time, the hope is that political participation may perceptibly change our underlying motivations and shift them in a more public-spirited direction.

The implications for deeply divided societies seeking to manage their divisions by democratic means must be obvious. If a new democratic settlement is to take hold and deepen, the different segments of society must learn to divide less and share more. Insofar as political participation educates the mind and changes political dispositions, it may help their respective members to gain a more rounded appreciation of the various

³¹ John Stuart Mill, "Considerations on Representative Government" in John Gray, ed, *John Stuart Mill: On Liberty and Other Essays* (Oxford: Oxford University Press, 1998) 203 at 255.

³² Jon Elster, "Deliberation and Constitution Making" in Jon Elster, ed, *Deliberative Democracy* (Cambridge: Cambridge University Press, 1998) 97 at 104.

ways in which their lives are intertwined. The thinking here is clearly aspirational. But aspirations can often make all the difference in societies struggling to overcome deep divisions. It should not be forgotten that many societies—such as those that above we called “effective,” but that in the past were still developing or divided—have met these aspirations. An open question remains: what processes or other factors can most assist them to do so?

Again, while popular participation can take many forms, there is reason to think that referendums may have a signal role to play in this particular respect. In theory, they can empower ordinary people by giving them a direct say on important political decisions, which may in turn encourage them to pay greater attention to the arguments of others. In this vein, Albert Venn Dicey, another famous British constitutional theorist, argued that the political education gained from participating in a referendum surpasses the education gained from participating in a general election—since elections offer only an indirect opportunity to influence important matters of law and public policy, the incentive to debate with others is lower than in a referendum where the debate concludes in a decisive vote.³³ Dicey did not think that every issue could or should be decided by referendum or that, more generally, direct democracy could supplant representative government. But he did think that, when used to decide a major constitutional issue, referendums could provide ordinary people with a real incentive to learn about the issues and hence to cast a more informed vote.

C. FOSTERING MODERATION, FACILITATING COMPROMISE

The idea that referendums can have an educative, perspective-broadening role overlaps with a third reason for thinking that referendums have something valuable to contribute. While there is little doubt that some form of elite role in constitutional negotiations will be required, there is a

³³ Albert Venn Dicey, “The Referendum and Its Critics” (1910) 212 Q Rev 538 at 546–48. See generally Matt Qvortrup, *A Comparative Study of Referendums: Government by the People*, 2nd ed (Manchester: Manchester University Press, 2005) at 54–55.

great deal of doubt about what to do with the many practical—or “real world”—problems that such roles bring. Of those problems, one seems especially relevant in the present context: intragroup outbidding, a ubiquitous problem in the sorts of society with which we are concerned.³⁴

In deeply divided societies that hold democratic votes, voting typically breaks down along group lines.³⁵ However, the fact that each group votes for its own political parties makes it difficult for moderates to compromise across group lines. Doing so may leave them open to charges of betrayal and hence to being electorally undercut by hardline rivals from within their own group. Knowing this to be the case, moderates are themselves forced to present their views and policies in more extreme terms. But having publicly done so, it can be very difficult for them to take a more conciliatory approach later on, once they have been returned to power.³⁶

The “outbidding thesis” holds that as a result of these electoral dynamics, a society as a whole will become increasingly polarised or divided. Yet what often goes unsaid (or perhaps unnoticed) is that outbidding can occur only if ordinary people are susceptible to charges of betrayal. More precisely, outbidding can happen only if ordinary people generally like their politics as extreme as possible (e.g. because they think that others will be more fearful of them and hence more likely to capitulate) or because they are so fearful of what others might do to them that hardliners or extremists can easily tap into their insecurities (e.g. because they are in a minority and feel that they might be overrun). Either way, the prospects for managing their divisions democratically can be seriously undermined.

³⁴ See Brian Barry, “Review Article: Political Accommodation and Consociational Democracy” (1975) 5:4 *British J Political Science* 477 at 505.

³⁵ See John Garry, “Consociationalism and Its Critics: Evidence From the Historic Northern Ireland Assembly Election 2007” (2009) 28:3 *Electoral Studies* 458.

³⁶ See Horowitz, *A Democratic South Africa*, *supra* note 9 at 177–96; Cathy Gormley-Heenan & Roger Mac Ginty, “Ethnic Outbidding and Party Modernization: Understanding the Democratic Unionist Party’s Electoral Success in the Post-Agreement Environment” (2008) 7:1 *Ethnopolitics* 43. Cf Paul Mitchell, Geoffrey Evans & Brendan O’Leary, “Extremist Outbidding in Ethnic Party Systems Is Not Inevitable: Tribune Parties in Northern Ireland” (2009) 57:2 *Political Studies* 397.

Crucially, insofar as referendums encourage ordinary people to learn more and think deeper about the issues—to take a more all-encompassing view, as we put it above—referendums may make it harder for hardliners or extremists to play on the fears and insecurities of group members. That is, they may reduce the space or scope for outbidding. This is not as fanciful as it seems. On the contrary, there is empirical evidence to suggest that referendums may reduce the significance of long-standing divisions, with different social and political cleavages coming to the fore.³⁷ Insofar as this is the case, referendums can give some advantage to moderates, by enabling them to do something for which they ordinarily get punished at the polls, that is, compromise across ethnic lines.³⁸ Naturally, much will depend on how frequently referendums are held, the type of question that is put to the vote, and a myriad of other variables. But the point remains that, in principle, referendums can have an important role to play in building peace and fostering democracy in deeply divided societies.

II. TWO BIG PROBLEMS WITH REFERENDUMS

There is, therefore, reason to think that referendums can have a number of desirable consequences: they may encourage ordinary people to adopt a broader view and they may make it easier for elites to compromise across deep divides. As such, referendums can serve as an instrument of *democracy*.

At the same time, however, much will depend on how the referendum is conducted and, in particular, on the quality of the deliberation that occurs during the course of the referendum campaign. Deliberation requires people to give reasons for their arguments. It also requires them to assess their own and others' reasons with an open mind and to weigh them on their merits. Yet while deliberative democracy is obviously demanding, in

³⁷ See Hanspeter Kriesi & Alexander H Trechsel, *The Politics of Switzerland: Continuity and Change in a Consensus Democracy* (Cambridge: Cambridge University Press, 2008) at 62–63.

³⁸ Cf Arthur Lupia & Richard Johnston, “Are Voters to Blame? Voter Competence and Elite Maneuvers in Referendums” in Matthew Mendelsohn & Andrew Parkin, eds, *Referendum Democracy: Citizens, Elites and Deliberation in Referendum Campaigns* (Basingstoke: Palgrave Macmillan, 2001) 191 at 203–07.

its absence it would be hard to see how a more all-encompassing point of view might emerge or how conditions for moderation might be fostered and sustained. In the absence of moderation, one or more segment of society is likely to withhold its *consent*.

At the same time, it is also reasonable to assume that ordinary people will not deliberate well unless the referendum process is itself consciously designed to encourage them to do so. As Cohen notes:

Institutions in a deliberative democracy do not serve simply to implement the results of deliberation, as though free deliberation could proceed in the absence of appropriate institutions. Neither the commitment to nor the capacity for arriving at deliberative decisions is something that we can simply assume to obtain independent from the proper ordering of institutions.³⁹

Indeed, given the propensity for outbidding characteristic of deeply divided societies, it is entirely plausible that referendums conducted without institutional support for deliberation might only perpetuate or intensify divisions, and stymie the prospects for democratic settlement.

That means, of course, that a deliberative peace referendum will be a highly complex institutional entity. What is more, the referendum will itself be affected by the broader institutional setting in which it is located, as well as by the broader culture against which it takes place. Given the enormous number of possible variables at play here, there is always going to be plenty of room for disagreement. For example, John Parkinson argues that it would be wrong to think that referendums in Switzerland lead to compromise and consensus, since those consequences are actually caused by other features of the Swiss political system.⁴⁰ As he explains, the Swiss political system is such that the federal government is effectively forced “to work with the different parties, cantons and officially recognised pressure groups (the *Verbände*) to mould actions that already have broad support,

³⁹ Cohen, *supra* note 7 at 26.

⁴⁰ See John Parkinson, “Deliberative Democracy and Referendums” in Keith Dowding, James Hughes & Helen Margetts, eds, *Challenges to Democracy: Ideas, Involvement and Institutions* (Basingstoke: Palgrave Macmillan, 2001) 131 at 136–37.

often deliberately to head off initiative action.”⁴¹ Very often, that is, the referendum question is addressed even before it can be put to the test. By contrast, Hanspeter Kriesi and Alexander Trechsel argue that the referendum is “a truly system-formative device”;⁴² shaping almost every other aspect of the Swiss political system. For example, they argue that the optional referendum in particular “hangs like a sword of Damocles over the whole legislative process, potentially ruining entire bills. Consequently, institutional mechanisms have developed, both formally and informally, to reduce this risk, transforming Swiss democracy into a *negotiation democracy*.”⁴³

Whatever one might make of this sort of disagreement, the basic lesson should be clear: if we want the referendum to play its part in generating consent for a new democratic settlement, then it has to be matched by an extensive range of complementary institutions. Naturally, this is an enormous challenge that would need to be addressed from multiple angles and at multiple levels: macro, meso, and micro. Yet for present purposes, it will suffice to narrow the scope of investigation, beginning with some reflections on the ways in which referendums can inhibit the very deliberation upon which they depend for their success. Once we understand the ways in which things can go wrong, we can then, in the final section of this article, look at ways in which referendums might be instituted so that they produce higher-quality deliberation and hence, potentially, better quality results.

In what follows, we discuss two main ways in which referendums in deeply divided societies may undermine deliberation, namely the *majoritarian* problem and the *inflexibility* problem.

⁴¹ *Ibid* at 136.

⁴² Kriesi & Trechsel, *supra* note 37 at 49.

⁴³ *Ibid* at 58 [emphasis in original]. See also Adrian Vatter, “Consensus and Direct Democracy: Conceptual and Empirical Linkages” (2000) 38:2 *European J Political Research* 171 at 185.

A. THE MAJORITARIAN PROBLEM

In a referendum, voters are usually asked a single question to which they are invited to answer “yes” or “no”. Whichever side gets the most votes wins. That may be perfectly fine for societies with lots of floating voters: those in the majority today may find themselves in the minority tomorrow (and vice versa). But in deeply divided societies, the fact that people typically vote along group lines means that shifting majorities and shifting minorities are more the exception than the rule.⁴⁴ Under such conditions, the larger groups in society may have no particular incentive to deliberate with the smaller, just as the smaller groups in society may feel that their views and opinions count for little or nothing in the decision that results—leading at least one prominent deliberative theorist to conclude that, so construed, referendums are “antithetical to the spirit of deliberation.”⁴⁵

Of course, the exact point at which a majority threshold is set may make a significant difference. For example, in a deeply divided society in which group *A* comprises 60 percent of the population and group *B* comprises 40 percent of the population, simple majority rule may mean that deliberation will occur only if the majority chooses to engage as a matter of goodwill. However, if the majority threshold is instead set at 70 percent, group *A* may have a real incentive to deliberate with group *B* in the hope of agreeing to a workable compromise proposal. Changing the threshold may therefore encourage deliberation. Yet even here, group *A* may need only to appeal to, or deliberate with, a small segment of group *B* to win an overall majority. Worryingly, the views and opinions of that small segment may not be

⁴⁴ See Reilly, *supra* note 24 at 180. See also Donald L Horowitz, “Ethnic Power Sharing: Three Big Problems” (2014) 25:2 *J Democracy* 5 at 5 (on the idea that people typically vote along group lines); Peter Jones, “Political Equality and Majority Rule”, in David Miller & Larry Siedentop, eds, *The Nature of Political Theory* (Oxford: Clarendon Press, 1983) 155 at 180 (on the idea of permanent majorities and permanent minorities). In slightly more technical language, since group cleavages tend to “coincide” rather than “cross-cut,” the risk of permanent majorities and permanent majorities is ever present (that is, in the absence of institutional adjustments and accommodations).

⁴⁵ Simone Chambers, “Constitutional Referendums and Democratic Deliberation” in Mendelsohn & Parkin, *supra* note 38, 231 at 242.

terribly representative of group *B* as a whole, if indeed they are representative at all.⁴⁶

Any institutional mechanism that simply condemned a group to the status of a permanent minority would surely do little to advance the cause of democracy or consent. Rather than encouraging deliberation, referendums might instead encourage larger groups to ignore or discount the views of smaller groups and continue doing so once the referendum has returned its verdict. That would be undemocratic. After all, the political equality of democracy “supposes that the weaker members of a political community are entitled to the same concern and respect of their government as the more powerful members have secured for themselves”.⁴⁷ A minority group that felt its views were simply discounted, irrespective of merit, would almost certainly withhold its consent. In the worst scenario, it might resort to violence (though, of course, one can never be sure how any given group might react).

Clearly, then, there is a real danger that referendums will undermine deliberation. As Simone Chambers puts it, referendums “invest so much in numbers rather than in arguments that it is hard for the losing side not to read the outcome as ‘might makes right.’”⁴⁸ Insofar as referendums really do raise the spectre of majority tyranny, the prospects for deliberation will be correspondingly reduced—as will the chances of generating popular consent for a new constitutional settlement, of changing or channelling the attitudes and dispositions of ordinary people in a more public-spirited direction, and of making it easier for political elites to compromise across the group lines.

Against this background, it is perhaps unsurprising that many prominent comparative scholars have concluded that the referendum is a

⁴⁶ See David Russell & Nadim Shehadi, “Power Sharing and National Reconciliation: The Case of Lebanon” in Ian O’Flynn & David Russell, eds, *Power Sharing: New Challenges for Divided Societies* (London: Pluto Press, 2005) 138 at 141.

⁴⁷ Ronald Dworkin, “Taking Rights Seriously” in Robert E Goodin & Philip Pettit, eds, *Contemporary Political Philosophy: An Anthology* (Oxford: Blackwell, 1997) 328 at 336.

⁴⁸ Chambers, *supra* note 45 at 243–44.

deeply problematic means of building peace or of advancing democracy,⁴⁹ preferring instead to focus their attentions on the question of how best to arrange for power-sharing between political elites from rival groups.⁵⁰ As Reilly argues, unlike ordinary elections, in which an issue may be debated and reconsidered every few years, decisions made by referendum can be very hard to change—with referendums, there “are no second chances, no face-saving ways to sugar-coat the pill and no creative options such as power-sharing arrangements that build in some voice for the losers. Losers, in such circumstances, often perceive themselves to be losers for ever.”⁵¹

B. THE INFLEXIBILITY PROBLEM

There would be little point in thinking about the relationship between referendums and deliberation in deeply divided societies unless there were a real chance that deliberation might make a positive difference. In the deliberative literature, the point is often made that deliberation can, among other things, promote mutual understanding, encourage civic mindedness, and foster faith in the democratic process.⁵² In other words, deliberation can promote precisely the sort of all-encompassing point of view that democratization is said to require.

The idea of promoting a more encompassing point of view sits best with a constructivist view of group identity.⁵³ On such a view, the fact that our identities are socially constructed means that they can be questioned,

⁴⁹ See e.g. Giovanni Sartori, *Comparative Constitutional Engineering: An Inquiry into Structures, Incentives and Outcomes*, 2nd ed (Basingstoke: Palgrave Macmillan, 1997) at 165.

⁵⁰ See e.g. Lijphart, *Democracy in Plural Societies*, *supra* note 24.

⁵¹ Reilly, *supra* note 24 at 180.

⁵² See Kuyper, *supra* note 8 at 2–4.

⁵³ See Kanchan Chandra, “What is Ethnic Identify and What Does It Matter?” (2006) 9:1 Annual Rev Political Science 397; Kanchan Chandra, “Cumulative Findings in the Study of Ethnic Politics” (2001) 12:1 Newsletter of the Organized Section in Comparative Politics of the American Political Science Association 7, online (pdf): <comparativenewsletter.com/files/archived_newsletters/2001_winter.pdf>. Cf Horowitz, “Electoral Systems”, *supra* note 24 at 115.

reaffirmed, revised, or even changed. It also means that they can be more or less politically salient, depending on the circumstances, including our relationships with others.⁵⁴ For instance, on a constructivist view, the term “Serb” refers not to a single entity but to a range of associations and institutions—including the Orthodox Church, political parties, women’s group, sporting associations, and so forth. These different institutions offer a range of definitions of what being “Serbian” means, and act in a range of ways to pursue those definitions, often in competition with one another. How this competition plays itself out will depend on institutional and other contexts—Kosovo Serbs, for example, are not the same as Serbs in the remainder of Serbia. But whatever the context, group identity is not a property or a set of essential attributes that all Serbs must inevitably possess, but a relationship that Serbs establish and re-establish among themselves and between themselves and others over the course of time.

Constructivists recognize that under some circumstances, especially those marked by deep social and political divisions, group identities can become extremely durable: once crystallized, they can be very hard to reconstruct.⁵⁵ Nevertheless, the fact that group or segmental identities are never simply “given” means that in principle, change is always possible. With this latter thought in mind, many scholars argue that a judiciously designed set of political institutions can shift how people perceive their identities in more benign directions—for instance, by shifting them from “antagonism” to “agonism”, in Chantal Mouffe’s phrase.⁵⁶

However, even if one were to accept that institutions can potentially alter the ways in which people perceive their identities, one might nevertheless think that referendums are simply far too blunt or reductive an instrument for this purpose. Roger Mac Ginty advances a sustained argument of this latter sort, focusing in particular on the possibility of a constitutional referendum on whether Northern Ireland should remain part

⁵⁴ See Michael R James, “The Political Ontology of Race” (2012) 44:1 *Polity* 106.

⁵⁵ See Henry E Hale, “Explaining Ethnicity” (2004) 37:4 *Comparative Political Studies* 458 at 460.

⁵⁶ Chantal Mouffe, “Deliberative Democracy or Agonistic Pluralism?” (1999) 66:3 *Social Research* 745 at 755.

of the United Kingdom (UK) or become part of a reunited Ireland.⁵⁷ According to Mac Ginty, in-or-out referendums of this sort reduce complex constitutional issues to a crude binary choice.⁵⁸ Importantly, while the majoritarian objection discussed above turns on the fact that, when faced with a choice between voting “yes” or voting “no”, minorities may persistently find themselves on the losing side, the objection here turns on the claim that minorities are not the only potential losers—as a matter of fact, everyone in society stands to lose.⁵⁹

⁵⁷ See Roger Mac Ginty, “Constitutional Referendums and Ethnonational Conflict: The Case of Northern Ireland” (2003) 9:2 *Nationalism & Ethnic Politics* 1 at 3. Under Paragraph 1 of the *Northern Ireland Act* (1998), the UK Parliament guaranteed in law that if a referendum on the constitutional status of Northern Ireland returned a result in favour of a united Ireland, the Secretary of State for Northern Ireland would be required to bring proposals to Parliament to give effect to that wish. Under Schedule 1, Paragraph 2, the Secretary of State may call such a referendum “if at any time it appears likely to him [or her] that a majority of those voting would express a wish that Northern Ireland should cease to be part of the UK and form part of a united Ireland”: *Northern Ireland Act* (UK), 1998, c 47.

⁵⁸ See Mac Ginty, *supra* note 57.

⁵⁹ See *ibid.* In a recent paper on referendums in deeply divided societies, McEvoy argues that simple majority rule need not be a hindrance to peace and democracy if the agreement on which people are being asked to vote already has majority support within each of the main conflicting groups. See McEvoy, *supra* note 24. However, for that argument to hold, the agreement has to be widely viewed as win-win. In the language of negotiation theory, it has to be an “integrative” rather than a “distributive” solution. Not all questions admit of integrative solutions, especially binary questions of the sort that Mac Ginty is concerned with. It is also the case that integrative solutions are notoriously difficult to achieve in deeply divided societies; among other things, they require a level of trust or credible commitment that is all too often lacking. See David A Lake & Donald Rothchild, “Containing Fear: The Origins and Management of Ethnic Conflict” (1996) 21:2 *International Security* 41. However, one way to think about the argument of this paper is in terms of the idea that, where a constitutional settlement can in principle be framed as an integrative solution, deliberation might prove decisive—it might be the catalyst for a better agreement. See Mark E Warren & Jane Mansbridge, “Deliberative Negotiation” in Jane Mansbridge & Cathie Jo Martin, eds, *Negotiating Agreement in Politics* (Washington, DC: American Political Science Association, 2013) 86.

Mac Ginty claims that information from the Northern Ireland Life and Times survey “suggests pluralities rather than majorities in constitutional preferences, and so points towards the inability of a constitutional referendum to produce a definitive outcome.”⁶⁰ The latest version of the survey confirms Mac Ginty’s claim.⁶¹

In Northern Ireland, Protestants make up 48 percent of the population while Catholics make up 45 percent.⁶² Traditionally, “Protestant” is treated as shorthand for British unionist and “Catholic” as shorthand for Irish nationalist. However, when asked, “Generally speaking, do you think of yourself as a unionist, a nationalist or neither?”, 32 percent responded “unionist”, 21 percent responded “nationalist”, while 45 percent responded “neither”.⁶³ Just as interestingly, when asked about Northern Ireland’s long-term constitutional status, 14 percent said that they thought it should remain part of the UK with direct rule, 47 percent with devolved government, 20 percent said that they thought it should re-unify with the rest of Ireland, while 3 percent thought it should be an independent state.⁶⁴ However, when asked how they would vote in a referendum “about whether Northern Ireland should leave the UK and unite with the Republic of Ireland”, 55 percent said they would vote for Northern Ireland to remain part of the UK, and 22 percent said that they would vote for Northern Ireland to unite with the Republic of Ireland.⁶⁵ Of the 55 percent who said

⁶⁰ Mac Ginty, *supra* note 57 at 2.

⁶¹ See ARK, “Northern Ireland Life and Times Survey 2017” (last modified 13 March 2019), online: *Northern Ireland Life and Times* <www.ark.ac.uk/nilt/2017>.

⁶² The last census was held in 2011 (the next is due in 2021). See “2011 Census—Key Statistics for Northern Ireland” (11 December 2012), online: *Northern Ireland Statistics and Research Agency* <www.nisra.gov.uk/publications/2011-census-key-statistics-northern-ireland>.

⁶³ ARK, *supra* note 61. A further 2 percent opted for the “don’t know” option.

⁶⁴ See *ibid.* A further 2 percent stated “other”.

⁶⁵ See *ibid.* A further 12 percent ticked “wouldn’t vote” and 10 percent answered “don’t know”.

they would vote for Northern Ireland to remain, 85 percent self-identified as Protestant—again, a marker for British unionism.⁶⁶

There is a great deal more that could be said about these data. However, for present purposes, the basic point is clear enough. As Mac Ginty notes, what the Life and Times survey suggests is that “public attitudes towards constitutional preferences are becoming more diffuse and less absolute.”⁶⁷ But on the other hand, simply asking people whether Northern Ireland should be in or out could easily lead to a hardening of constitutional attitudes. Far from encouraging people from different groups to discuss the options with an open mind, a referendum of this sort might instead serve to (re)polarize opinion. The fear of ending up on the losing side might overwhelm the possibility of meaningful deliberation, and with it, the prospects for moderation. In turn, that might leave ordinary people vulnerable to the manoeuvrings of political elites willing to play the betrayal card. Under these conditions, the obvious question is why anyone would want to hold a referendum—or why it is ever sensible to regard a referendum as a suitable means of securing consent for democracy?

III. TOWARDS MORE DELIBERATIVE REFERENDUMS

On the face of it, then, there are at least two major reasons for thinking that referendums should be avoided in deeply divided societies: majority domination and a solidification of political attitudes. Essentially, both boil down to the claim that referendums can have deeply polarizing effects in already polarized contexts.

Even so, we should not rush to give up on referendums. For one thing, referendums remain the purest form of democracy available to us—other things being equal, direct democracy is better than indirect democracy.⁶⁸ Since democracy means rule by the people, referendums give more immediate expression to our standing as political equals than indirect forms of participation. For another, giving up on referendums means giving up on

⁶⁶ See *ibid.*

⁶⁷ Mac Ginty, *supra* note 57 at 12.

⁶⁸ See Richard Posner, *Law, Pragmatism, and Democracy* (Cambridge: Harvard University Press, 2003) at 167.

certain desirable consequences. As we suggested above, referendums can in principle help legitimize a new constitutional settlement by securing popular consent for that settlement, encourage ordinary people to take a more encompassing view, and improve the prospects for elite moderation and compromise (potentially setting in motion a virtuous cycle: in turn, elite moderation might encourage ordinary people to take a broader view, which might foster deeper levels of consent). For these reasons alone it is worth persisting with referendums. Yet the question is how to improve their performance in practice and, in particular, the actual quality of the deliberation that occurs during the referendum campaign. In what follows, we suggest the three overlapping areas for consideration—timing, inclusion, and the structure of the ballots—each of which, as we will indicate, bears directly or indirectly on the majoritarian and inflexibility problems discussed above.

A. TIMING

If referendums are held too early, they can easily damage future prospects for democracy. They can do so because, at bottom, people will not have had the chance to deliberate, to learn a bit more about one another, to trust that the opportunity for democracy is real, and, more generally, that others mean what they say. The popular rejection of the peace accord signed by the Colombian Government and FARC guerrillas is a case in point. While the accord was subsequently passed by the Colombian Parliament (raising questions of popular consent), many ordinary voters, particularly on the government side, simply did not trust the FARC. In particular, voters “pointed to previous failed peace negotiations when the rebels took advantage of a lull in fighting to regroup and rearm as evidence that the Farc had broken their word before.”⁶⁹

Against this backdrop, it may seem trite to suggest that what both sides needed was more time to deliberate. Yet the point remains true: if a referendum is not to be perceived simply as a blunt “us against them” event, people will need sufficient time to deliberate, before, during, and after.

⁶⁹ “Colombia Referendum: Voters Reject Farc Peace Deal”, *BBC News* (3 October 2016), online: <bbc.co.uk/news/world-latin-america-37537252>.

Otherwise, there is every danger that inflexibility will result—that the referendum will harden attitudes and identities rather than broaden them, and reduce the prospects for moderation accordingly. Of course, in many cases, people will be hungry for change, and hence may rush headlong into a referendum. This puts a somewhat distinctive spin on the most familiar charge levelled at referendums (and direct democracy more generally), namely that ordinary people lack the necessary skills and knowledge⁷⁰—and that because they lack the necessary skills and knowledge, it is better to leave things to elites.⁷¹

In a curious sort of way, some deliberative democrats seem to gesture at this line of thought, at least in the sense that they have sometimes tended to privilege deliberation over consent.⁷² For example, Chambers argues that “one way to ensure that citizens do not get distracted by the end-game is not to invite them to participate in that game, or not directly.”⁷³ By way of example, she cites the case of South Africa, where ordinary people were consulted about the 1994 Interim Constitution but not directly involved in its ratification; ratification was instead left to the transitional, power-sharing government and parliament.⁷⁴ Chambers may be right that public consultation can be enough to ensure consent, and she may also be right that indirect ratification may take the heat out of deep divides. However, as the case of Bosnia shows, indirect ratification may have no such effects. Although the Dayton Accords put an end to over three years of

⁷⁰ See David Butler & Austin Ranney, “Theory” in David Butler & Austin Ranney, eds, *Referendums Around the World: The Growing Use of Direct Democracy* (Washington, DC: AEI Press, 1994) 11 at 18–19.

⁷¹ As noted earlier, for some analysts, democracy in deeply divided societies is best handled by political leaders or other elites. See O’Leary, *supra* note 14. The view that democracy should be left to elites is not confined to such analysts. For a major contemporary statement, see Joseph Schumpeter, *Capitalism, Socialism & Democracy* (London: Routledge, 1943) at 261.

⁷² The tension between deliberation and equality is explicitly thematised by Fishkin. See James S Fishkin, *Democracy and Deliberation: New Directions for Democratic Reform* (New Haven: Yale University Press, 1991).

⁷³ Chambers, *supra* note 45 at 249.

⁷⁴ See *ibid.*

brutal civil war, indirect ratification has done little to move Bosnia much beyond a mere tentative commitment to democratic means. Arguably, the problem in Bosnia is not with ordinary people but with the political elite; recent electoral behaviour and results suggest that the development of a more effective democracy may be as far away as ever.⁷⁵ In any event, it is hard to see how indirect ratification could solve the timing issue—whether direct or indirect, a new democratic settlement is as likely to deepen division as not, unless ordinary people have sufficient time to discuss and debate its provisions. Without sufficient time, greater inflexibility may well result.

There are at least two possible solutions here. First, the major provisions of a constitutional settlement might be introduced sequentially,⁷⁶ for example, over a period of five years. This would not only allow for sustained deliberation, but would also encourage ordinary people to take a broader, more flexible view, freed from the zero-sum fear of losing everything in one go. Similarly, introducing major constitutional provisions sequentially would not only satisfy the demand for change, but would also allow—and indeed encourage—a more sustained examination of the claims of political elites, moderate or hardline.

Secondly, the agreement as a whole might be implemented on a transitional basis only, subject to further review at some specified future point. Again, this would satisfy the demand for change. But it might also help to avoid what one controversial former Quebec Premier, Jacques Parizeau, once described as “the lobster trap”: once a group or segment votes, its members “would be like lobsters with the trap door closing behind

⁷⁵ See e.g. “Milorad Dodik: Serb Nationalist Wins Bosnia Presidency Seat”, *BBC News* (8 October 2018), online: <bbc.com/news/world-europe-45774872>; Maja Zuvela & Daria Sito-Sucic, “Nationalists Win in Bosnia, Including Serb Who Opposes ‘Impossible State’”, *Reuters* (8 October 2018), online: <uk.reuters.com/article/uk-bosnia-election-idUKKCN1MI1ON>.

⁷⁶ On sequencing and multi-stage referendums, see e.g. Spencer McKay, “Building a Better Referendum: Linking Mini-Publics and Mass Publics in Popular Votes” (2019) 15:1 *J Public Deliberation*.

them—unable to escape their fate.”⁷⁷ By removing the fear of finality, a transitional agreement might allow ordinary people to be more open, flexible, and cooperative during the course of a referendum campaign. In short, far from disrupting deliberation, voting in a referendum might, if adroitly timed, actually encourage it.

B. INCLUSION

Unlike some other forms of popular participation, referendums usually intervene at the end point in a decision-making process.⁷⁸ As such, they inevitably encourage people to think in terms of winners and losers.⁷⁹ Yet while to some extent this sort of thinking may be unavoidable, its worst effects can be mitigated. If a constitutional settlement is merely put to the people, majoritarianism may well inhibit deliberation, just as Mac Ginty and others have suggested. However, if the settlement itself reflected the views of ordinary people, the starkness of the vote may lose some of its intensity. The obvious question is how to solicit those views.

One possible approach is simply to ask people for their views using standard opinion polling. There is, however, reason to be wary. In deeply divided societies, concerns about security will typically drive people to live within their own communal enclaves, to marry within their own religious traditions, to send their children to segregated schools, and so forth. They

⁷⁷ Chambers, *supra* note 45 at 247. To be sure, Parizeau’s comments on the role of the “ethnic vote” in the defeat of the sovereignty referendum in Quebec in 1995 are deservedly notorious.

⁷⁸ See Kriesi & Trechsel, *supra* note 37 at 56. This is not always so. As the case of South Africa demonstrates, referendums can be used early on in the transition to democracy to mandate leaders to engage in peace negotiations. For a discussion, see Neophytos Loizides, “Negotiated Settlements and Peace Referendums” (2014) 53:2 *European J Political Research* 234. However, in this paper, we confine our remarks to the more standard case.

⁷⁹ It is possible to use a referendum to confirm the existence of a consensus. This is how McEvoy reads the 1998 referendum on the Belfast Agreement. See McEvoy, *supra* note 24. Even there, however, many in the unionist community bitterly opposed the agreement and rejected the referendum result (though official results were not broken down by community, exit polls suggested that the referendum had only bare majority support in the unionist community).

may therefore go their entire lives without ever engaging in a serious conversation with someone from the other side.⁸⁰ As a result, chances are that their views will not be as balanced or informed as they could potentially be.

But that is not all. If the members of different groups talk only among themselves, their deliberations may conform to what Sunstein calls “the law of group polarisation”.⁸¹ That law refers to a statistical regularity which allows us to predict that when like-minded people meet to discuss an issue of importance to them, they will move toward a more extreme point in the direction indicated by the median point of their prior views and opinions.⁸² Of course, the mere fact of moving in a more extreme direction is neither good nor bad in itself. But if people only engage in political discussions with members of their own group, chances are that they will become more entrenched—less flexible or less moderate—in how they hold their views.⁸³ Insofar as this occurs, it is hard to see what purpose standard public polling might actually serve or why exactly one might want the views of ordinary people to shape the referendum proposal.

Fortunately, public consultation need not be reduced to a matter of simply asking people for their top of the head views and opinions. In recent years, many jurisdictions have held deliberative forums, bringing together people from diverse backgrounds to discuss a given set of policy issues.⁸⁴ The findings from these forums are generally encouraging.⁸⁵ For example,

⁸⁰ See e.g. Billig & Tajfel, *supra* note 16; Coakley, *supra* note 16 at 462, 467.

⁸¹ Sunstein, *supra* note 16 at 176.

⁸² See *ibid.*

⁸³ Cf. Kimmo Grönlund, Kaisa Herne & Maija Setälä, “Does Enclave Deliberation Polarize Opinions?” (2015) 37:4 Political Behavior 995.

⁸⁴ See e.g. Kimmo Grönlund, André Bächtiger & Maija Setälä, eds, *Deliberative Mini-Publics: Involving Citizens in the Democratic Process* (Colchester: European Consortium for Political Research Press, 2014).

⁸⁵ See e.g. Michael X Delli Carpini, Fay L Cook & Lawrence R Jacobs, “Public Deliberation, Discursive Participation, and Citizen Engagement: A Review of the Empirical Literature” (2004) 7:1 Annual Rev Political Science 315; Christopher F Karpowitz & Chad Raphael, *Deliberation, Democracy, and Civic Forums: Improving Equality and Publicity* (New York: Cambridge University Press, 2014); Ian O’Flynn &

evidence from a deliberative opinion poll, a specific type of deliberative forum, conducted in Northern Ireland suggests that deliberation can help the members of different ethnic groups to see one another in a more positive light.⁸⁶ Having deliberated together, Catholic participants came to see Protestants as more trustworthy and more open to reason, while the Protestant participants also came to see Catholics as more trustworthy (but not more open to reason).⁸⁷

In a deliberative opinion poll, participants are randomly chosen. As such, deliberative opinion polls tend to be highly representative and, in that (statistical) sense, inclusive. When we add in the fact that participants usually learn a great deal—changes of opinion tend to be information driven—one can plausibly argue that deliberative forums of this sort can usefully supplement referendums.⁸⁸ Of course, deliberative forums need to be carefully inserted into the referendum process; they need the support of elites from all sides, and their conclusions need to be broadly publicized. As yet, we know very little empirically about the conditions under which such support might be forthcoming. However, we do know that groups will only begin to think about a new constitutional settlement when all sides have reached a “mutually hurting stalemate,” that is, when they have each

Gaurav Sood, “What Would Dahl Say?: An Appraisal of the Democratic Credentials of Deliberative Polls® and Other Mini-Publics” in Grönlund, Bächtiger & Setälä, *supra* note 84 at 41.

⁸⁶ See Robert C Luskin et al, “Deliberating Across Deep Divides” (2014) 62:1 Political Studies 116.

⁸⁷ See *ibid* at 129–31.

⁸⁸ In this respect, the Citizens’ Initiative Review (CIR), used in Oregon and other US states, is instructive. The CIR has been designed to help voters make their judgements on ballot initiative questions. Essentially, a randomly selected deliberative forum meets to discuss the topic on the ballot; its recommendations are then inserted into the ballot materials that are sent to people’s homes. Evidence suggests that voters have quite a lot of trust in the CIR process and that reading the recommendations of the CIR increases voters’ awareness and knowledge about the issue at hand. See Mark E Warren & John Gastil, “Can Deliberative Minipublics Address the Cognitive Challenges of Democratic Citizenship?” (2015) 77:2 J Politics 562; James S Fishkin & Robert C Luskin, “Experimenting with a Democratic Ideal: Deliberative Polling and Public Opinion” (2005) 40:3 Acta Politica 284 at 291.

accepted that there is no point in raising the stakes any further and that it is time to seek a “Way Out”.⁸⁹ Those on the extremes may disagree; they may even seek to “spoil” the process.⁹⁰ As described earlier, outbidding may become a major problem. But insofar as a mutually hurting stalemate creates space for negotiation—and hence for moderation—the moment might be “ripe” for public deliberation.⁹¹

In principle, therefore, there is reason to think that judiciously timed and placed deliberative forums may have an important role to play in overcoming at least some of the drawbacks of standard (i.e. non-deliberative) referendums. In particular, they may help with the inflexibility problem. Of course, while deliberative forums have their role to play—they provide a picture of what ordinary people from diverse backgrounds might conclude under good conditions—they should be viewed as no more than one strategy among others designed to promote deliberation during the course of a referendum campaign. Greater efforts should also be made to, for example, strengthen civil associations that cut across society and to create or strengthen a pluralized media environment.

C. PREFERENCE BALLOTS

Even so, much can still go wrong unless great care is taken in organizing referendums. As Chambers notes, in the summer of 1992, a number of deliberative conferences were set up across Canada to discuss the need for constitutional change, particularly to resolve long-standing disputes between the federal and provincial governments.⁹² These events were, by all accounts, highly constructive, so much so that many of the proposals worked out at these conferences made their way into a formal constitutional

⁸⁹ I William Zartman, “The Timing of Peace Initiatives: Hurting Stalemates and Ripe Moments” (2001) 1:1 *Global Rev Ethnopolitics* 8 at 9.

⁹⁰ Stephen John Stedman, “Spoiler Problems in Peace Processes” (1997) 22:2 *International Security* 5.

⁹¹ I William Zartman, “Ripeness: The Hurting Stalemate and Beyond” in Paul C Stern & Daniel Druckman, eds, *International Conflict Resolution After the Cold War* (Washington, DC: National Academy Press, 2000) 225.

⁹² Chambers, *supra* note 45 at 245.

proposal, the Charlottetown Accord, which was put to the citizens of Canada later that year. Yet as Chambers notes:

The hope of many was that the positive experience of the conferences could be recreated at the national level. Since the conferences themselves had a high approval rating among citizens at large, this hope did not seem so far fetched. It did not, however, pan out. It is not simply that the proposal failed to be ratified, for, after all, the conferences could have got it wrong or failed to take into account a crucial interest or claim. Another type of disappointment was focused on the caliber and tenor of debate. Lacking was the openness and flexibility of the conference participants[.]⁹³

The obvious question is why the quality of debate should have been so much lower—less open and less flexible—among members of the general public than among participants in the conferences. There may be any number of possible explanations (e.g. time, attention, or information asymmetries). Yet according to Chambers, the clearest explanation is to be found in the fact that, as the actual referendum approached, competing political elites began to prey on the fears of ordinary people.⁹⁴ In particular, they began to argue that any concession to other interests would be a loss for their side.⁹⁵ Under such conditions, where outbidding was rife and moderation was in short supply, it is hardly surprising that public opinion hardened and the people voted no.

A similar dynamic was also at work in the 1999 Australian Republic Referendum—a fundamental constitutional issue that continues to divide Australians. Again, the vote was preceded by a period of public consultation. Furthermore, a broadly inclusive constitutional convention was assembled to debate the various issues and to propose a wording of the referendum question. Just as in the Canadian case, support for a “yes” vote was initially strong—“[o]pinion polls consistently put support for an

⁹³ *Ibid* at 245–46 [citation omitted].

⁹⁴ See *ibid* at 246–47.

⁹⁵ See *ibid*.

(unspecified) republic well ahead of retention of the monarchy”.⁹⁶ And yet the referendum failed. Doubtless, in this case also, the machinations of political elites must form part of any convincing explanation. However, according to Bernard Cross, there was a more decisive consideration. In no small part, the referendum failed because the option put to the people was not the option for which they actually wanted to vote.⁹⁷ Monarchists seemed successfully to sow doubt among republicans about whether the precise model—appointment of an Australian president by two-thirds of parliament—was the right one. Some advertisements offered warnings: “This Republic: Don’t risk it” and “If you want to vote for the President...Vote No to the Politicians’ Republic.”⁹⁸

Delegates to the constitutional assembly may have had access to superior information and better opportunities for deliberation about constitutional options. However, the fact was that ordinary people wanted a directly-elected president.⁹⁹ Since this option did not appear on the ballot, it is hardly surprising that they voted no.

A key option for the reform of referendums, therefore, should be the adoption of preferential voting rather than simple majoritarianism. That is, constitutional options can be presented to voters in the style of a “preferendum,” which allows voters not merely to select a single option, but to rank several reform options (as well as the option of retaining the status quo).¹⁰⁰ In a preferential vote-counting process, the least popular *preferences* (i.e. votes for particular options) are removed from the running in successive stages, and the next highest choices of voters who favoured

⁹⁶ Bernard Cross, “The Australian Republic Referendum, 1999” (2007) 78:4 Political Q 556 at 559. See also Ian McAllister, “Elections Without Cues: The 1999 Australian Republic Referendum” (2001) 36:2 Australian J Political Science 247.

⁹⁷ See Cross, *supra* note 96, at 526–64.

⁹⁸ George Williams & David Hume, *People Power: The History and Future of the Referendum in Australia* (Sydney: University of New South Wales Press, 2010) at 191 [emphasis in original].

⁹⁹ See Cross, *supra* note 96, at 526–64.

¹⁰⁰ See Graeme Orr, “Preferenda: The Constitutionality of Multiple Option Referenda” (2001) 3:4 Constitutional L & Policy Rev 68.

eliminated preferences are then counted. As preferences are distributed in this way, eventually one option accumulates majority support.¹⁰¹ Preferendum voting is a way of achieving a majority result for reform despite more than two reform options being on offer. As such, its aim is to allow for a more flexible or nuanced expression of voter preference and hence to avoid blunt reductionism. Preferential referendum voting is useful wherever voters' preferred options for reform (or for no reform at all) are diverse. We saw such circumstances in Australia and (suggestively) in Northern Ireland, above. Such diversities of opinion are hardly unusual. Only some constitutional reform questions—for instance, certain questions of rights, such as equal rights to marry—can be reduced easily to yes/no binaries in a referendum without excluding many other possibilities that voters might favour. Constitutional questions of an institutional nature—such as the choice of a new model of presidency, new federal agreement, or new settlement between peoples in conflict—can raise a particularly kaleidoscopic set of voter preferences.¹⁰²

We saw above Mac Ginty's concern that referendums can distort deliberation by neglecting the full range of perspectives lying beyond the (ostensible) single point of view of the voter, or beyond two sides of a conflict.¹⁰³ Relatively speaking, preferential methods do not oversimplify. Neither, for that matter, do other kinds of multi-option referendums.¹⁰⁴ But preferential voting likely provides the best referendum model because it can present to voters an array of reasonable choices (ideally an array selected previously in a trusted and inclusive deliberative forum), while, as noted, still yielding a bottom line majority result.

¹⁰¹ See *ibid.*

¹⁰² See Thomas Hennessey, *The Northern Ireland Peace Process: Ending the Troubles?* (Dublin: Gill & Macmillan 2000) at 7–9 (recounting the myriad constitutional options considered for Northern Ireland in the decades before the Belfast Agreement and referendum).

¹⁰³ See Mac Ginty, *supra* note 57.

¹⁰⁴ For instance, voters might first be asked to choose whether reform should occur at all—a “yes” or “no” proposition—before being asked to choose among several specific options. After a “yes” vote, the specific option receiving a plurality, but not necessarily a majority, of votes would prevail.

That a majority view still prevails is important for the legitimacy of the outcome and hence for the issue of democratic consent. There can be some reasonable doubt about whether a majority achieved through a preferential ballot is truly a majority. But in democracies there are multiple plausible ways of designing voting systems, and no one is necessarily superior to all others.¹⁰⁵ Run-off voting, including preferential (i.e. instant run-off) voting, is already widely practiced in elections for public office around the world. As George Williams and David Hume write, “No one thinks it is problematic that general elections give voters a range of choices; why should it be different for referendums?”¹⁰⁶

There seems to be no principled reason why, then, if a majority vote derived through preferential voting is legitimate for elections, it should not also be legitimate for referendums. Preferential voting indeed potentially improves consent. It may be a solution to the problem that, where voters have diverse preferences, running the referendum in a binary yes/no mode often yields a result that reflects the views of just one voter group—those who favour the status quo.¹⁰⁷ The standard, unreconstructed referendum has an institutional bias in favour of this group of voters, who may be neither the majority nor even the largest minority. Yet it may be possible to update the referendum, using modern methods such as those we have outlined, to enhance—at least incrementally—both choice and deliberativeness in the referendum. *Pace* Chambers and Mac Ginty, a referendum that seeks to accommodate a diversity of views may avoid corraling voters; it may open up space for deliberation rather than closing it down. And it may do so even in a deeply divided society. At the very least, there is every reason to try.

¹⁰⁵ See generally Rein Taagepera & Matthew Soberg Shugart, *Seats and Votes: The Effects and Determinants of Electoral Systems* (New Haven: Yale University Press, 1989).

¹⁰⁶ Williams & Hume, *supra* note 98 at 258.

¹⁰⁷ See *ibid* at 257–58.

CONCLUSION

There are several lessons from our discussion of options for redesigning referendums and of the deliberative challenges that these options seek to address. First, public consultation is a tricky business. In particular, careful attention has to be paid not just to the findings of deliberative polls and the like, but also to the views and opinions of the vast majority of people who will never participate in such forums. Secondly, although some deliberative democrats argue that political elites are better placed to deliberate than ordinary people, a new constitutional settlement may not be considered legitimate unless non-elites have their say—or their chance to signal their consent. But non-elites may not be able to have their say unless efforts are made to discourage political elites from playing the betrayal card. Finally, the choice that is put to the people must be a meaningful choice. As we have argued, binary choices not only fail to capture the complexity of constitutional issues, but will frequently discount important aspects of popular opinion. So, while timing and public consultation are crucial issues, the structure of the ballot also deserves weighty consideration. In principle, there is no reason why a referendum question must be posed in starkly reductive terms. Just as many countries use a preferential ballot structure for general elections, there is no reason why they should not also use a preferential ballot structure in referendums.

If referendums are not carefully designed and conducted so as to promote moderation, they may undermine deliberation and hence undermine one of the necessary or principal conditions of their own success. Naturally, there is no suggestion here that referendums can solve all the ills that deeply divided societies face or that democracy can be reduced to referendums. Yet, if skilfully and sensitively designed, they can play a crucial role, so long, that is, as ordinary people are made to feel that their views count for something in the process.