A Civic Senate for a New Era

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Introduction

Many people agree that there are problems with the Canadian ‘Chamber of Sober Second Thought’. The recent debacle of Senate fund misappropriation caps off a long standing concern about the Upper House’s neutrality and accountability. As this has been unfolding, the tradition stating how the Senate is a parliamentary counterbalance to the federal executive has increasingly faced public scrutiny. One argument leveled against the Senate is that it merely operates as an arm of the Prime Minister’s Office. To this point, the Senate has been historically known and more recently exposed in court vis-à-vis the Duffy Affair, to operate in terms of patronage. Senators are traditionally granted their terms by the Governor General, on the advice of the Prime Minister. This process has consistently appeared to be a partisan tool for the political control of decision-making authority. Party discipline is a notorious part of Canadian politics, and moreover, the partisan stripes of sitting Senators are plainly visible: 45 Conservative Senators and 29 so-called “independent” Liberals. Thus, what remains of the 22 vacancies will surely be an ongoing point of contention, even with (and perhaps in spite of) the new advisory panel set up to inform the appointment of Senators.

Senate reform seemed to be an important factor in the 2015 Canadian federal election. The New Democratic Party made the case for abolishing the unelected and unaccountable institution. The Liberals stayed the course and argued that by building-up intergovernmental relations it could potentially lead to an elected Senate. The Conservatives sought Supreme Court ascension for unilateral introduction of term limits and elections for Senators which ultimately was denied. For the latter two parties, attempting to abolish the Senate would be impossible due to its constitutional entrenchment. What we are left with is the consideration, going back to the early 1990s, of whether the Charlottetown Accord’s drawn out discussions of establishing an elected Senate to better represent Canadian regions, will resurface and hit the ground running. The notion of path-dependency lingers, however, as change is largely influenced by the ‘stickiness’ of institutions and how strongly they are embedded in both the constitution and political culture.

Nonetheless, political agency should not be taken for granted, and it may very well be that now is the time where the need for alternatives gathers clout and the support for implementation is at its strongest. As it stands, the political atmosphere has appeared ripe with opportunity. The enthusiasm on the future course of policy-making and democratic reform has set the tone for political discourse by scholars to discuss reforms in the Senate. Traditional approaches to Senate reform continue to revolve around two positions: abolish the Senate and thus Senators, or change the appointment of Senators into an electoral system. By contrast, this paper proposes the establishment of a Civic Senate. It situates democratic deficits, namely the lack of civic engagement in political institutions and democratic decision-making, as the reason to specifically reform the Senate. Ultimately, this paper utilizes deliberative democratic theory and practice to open up the lines of dialogue on formal civic engagement in Canada.

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1 I’d like to thank the editors at QPR for their time and helpful comments.
Institutions have historical importance in Canadian political science literature. Most institutional analysis entails a mixture of describing institutions in formal-legal terms; a normative assessment in how well they function; seen as integral to shaping policy and political outcomes; and how they operate in relation to social and economic contexts. Compelling reasons exist for institutions to play such a large role in academic literature since Canadian politics is imbued with constitutional and conventional path dependencies in every day political operations. Canada is a constitutional federation with legally enshrined roles and duties assigned to federal and provincial governments. This means that jurisdiction influences how politics operates in Canada and that interactions between different orders of government are often a matter of contention.

Simeon and Cameron suggest that federalism and democracy are complexly interrelated: on the one hand, federalism is linked to liberal constitutionalism, emphasizing limits on majority rule through the separation of powers and constraints on local and national majorities through the division of powers. On the other hand, federalism is linked to the competition of governments seeking the loyalty of citizens through desirable packages of policies. The latter relates to the principle of subsidiarity which states that the social organization of decision-making should operate at the level of government closest to the individuals affected. Though provinces have a high degree of jurisdictional and fiscal autonomy, they operate as partners and contenders with the central government in similar political formation. Essentially, all constitutionally recognized levels of government in Canada take on the form of executive federalism where bargaining and negotiations taking place among senior executives between the two orders of government.

This has been a central feature of Canadian governance and intergovernmental relations since the 1970s. Moreover, Canadian institutions and practices of federalism are embedded in broad economic and political relations, and changes in these environments have an impact on how intergovernmental relations operate with respect to attitudes, conflicts, and aspirations. Levels of government continue to disagree on the basis of regional interests, and fiscal arrangements remain sources of conflict, as provinces try to absorb the impact of federal budget cuts. It is inherent to this system that competition ensues between governments for positive developments, and avoiding blame for negative ones.

Institutional problems within intergovernmental relations and Canadian federalism have been attached to what is known as the ‘democratic deficit’. The term was initially applied to the lack of transparency, accountability and inclusion found in the European Union. From there it was used to describe the institutional deficits within Western democracies that contributed to public
disaffection with elite-led political decision-making. As this relates to the Canadian Westminster-style representative model, various criticisms have been leveled at how mediation of power creates an imbalance: the executive holds a concentrated level of authority and influence, even over the legislature; the party system is unrepresentative of votes earned and seats gained (provincially and federally), as well as regionally divisive and concentrated at the federal level; and the federal system operates behind closed doors at the intergovernmental level between Premiers and the Prime Minister. The trickle-down effect plays in here, with the public sector operating in a market-like, mechanical, technocratic fashion, distant from any sort of public inclusion in policy administration.

Overall, the scholarship on democratic deficits has been fairly well established over the past two decades, and not least by a simple measure of voter turnout. In the 1997 federal election only 67 percent of registered voters cast a ballot (the lowest since 1925), and in 2008 this declined to 59 percent. The significance of this is that citizens do not think it matters who they vote for. Considering this, can we only write off disconnects between citizens and political institutions just because citizens are disinterested? Studies have indicated that there has been a decreased level of satisfaction with particular political structures in Canada. Canadians much like citizens in other OECD countries, have felt that they have little influence over government, undermining the sense of political efficacy they have in politics. The sense of powerlessness and disconnection from Canadian politics has only increased into the new millennium which could be attributed to the elite-led politics characteristic of our political system. This raises a question: should Canadians be content with the democratic system they have? To this question it is notable that Canadian citizens feel they are capable of arriving at political judgments and agreeable to national problems being solved at the grassroots level.

Despite this, the internal dynamics of Canadian government shows that the bureaucratic features of hierarchy and rigid command structures leave little flexibility for citizens to possess a more active role other than following orders. Also, Members of Parliament at the federal level do not directly answer to their constituents. Political party members are answerable to their caucus, and caucus tradition holds that deliberations remain secret, preventing constituents from holding them directly accountable. Nor do bureaucrats answer to constituents. Bureaucracy traditionally

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10 Simeon and Cameron, “Intergovernmental Relations and Democracy,” 278.
entails Ministerial responsibility, which claims that accountability rests with Minister’s at the department level, who in turn is accountable to the legislature. Moreover, most intergovernmental relations under the federalist model continue to occur behind closed doors, and there tends is a veil between action and consequence, such that citizens cannot identify who is responsible for what government does.

The above suggests that the impetus for political reform is largely driven by serious problems with the manner in which Canadian political and executive institutions operate. Consequently, a lack of meaningful involvement in politics - which entails decisions that affect people’s daily lives - is one reason to suggest that the reform of democratic institutions needs to be more mindful of the people they are intended to serve.

Alternating Public Power through a Civic Senate

There is a tendency to view Canadian citizens as misinformed about how the Senate functions and what its purpose is. In addition, there is a long-standing elitist conception of representative democracy that promulgates notions about the masses being ignorant and unsuited to govern. One of the more concerning aspects of this sort of claim is that it fails to either apply or undertake empirical research on the epistemic and deliberative capacities of people. Part of this claim arises out of the preference to have merit as the basis of political decision-making. Yet, one problem that tends to be undermined is that merit is not a straightforward concept and practice where the ‘best of the best’ get to steer and row Canadian political institutions. The practice of merit has its own history of exclusion and this is no more readily apparent than within the Senate, which has had property, gender, race and age qualifications embedded within its foundation. Still, the means by which we discern merit seems to be an arbitrary matter, not least when we reflect on the conventional powers of appointment via the Prime Minister. What we accord as ‘experience’ as a prerequisite for serving in the Senate is not that easily discernible either. As recent as the year 2000, fifty percent of Senators that had been appointed had zero experience as far as being elected to office and serving the public, which means other factors had mattered in their appointment. What this intends to point out is that the composition of formal political institutions is just as important of a factor to consider as are their functions. A lack of reflection on who becomes a Senator can undermine the purposes it is meant to serve, especially when we see why there is such a profound public dissatisfaction with the Senate.

This is where deliberative democracy as a supplement to merit-based decision-making can be fruitful to think about. Broadly speaking, deliberative democracy is mentioned in public law, international relations, public policy, and identity politics. It has spread through the field of democratic theory, and has not only emerged from robust academic debate between discourses of liberal, communitarian, republican, or participatory forms of democracy, but also as a result of political phenomena happening in the world at large. Deliberative democracy has fermented its position(s) amidst the consolidation of neoliberalism, new public management, and the dominant

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18 Simeon and Cameron, “Intergovernmental Relations and Democracy,” 287.
20 See Appendices Joyal ed., *Protecting Canadian Democracy*.
A normative view of representative politics a la social choice theory, and should largely be viewed as a response to the perceived democratic deficits the above mentioned approaches have promoted. Deliberative democracy in democratic reform literature of Canada is often mentioned in a cursory way with citizens needing to be more broadly included into politics, but without examining this in relation to federalism. In some cases, it is met with skepticism by claiming it is not pragmatic for complex multi-level fora, without understanding the international context.

The paradigm has gone through three waves. The first era in the 1990s challenged mainstream democratic theory. For deliberative democrats, communication (and democracy for that matter) was considered to be more than the aggregation of fixed preferences. In fact, preferences in the deliberative democratic model are amenable to change through collective dialogue. The prevailing logic of democracy operates at the fixed preference level, most evident in social choice theory which argues that the political process is not an end in itself or about public action, but rather an instrumental method for private individuals to choose or deny competing political elites, similar to how the economic market operates with respect to goods and services. The second era of the early-to-mid 2000s was devoted to the different applications of deliberation that were being implemented, including public hearings, public submission processes, client polling, deliberative polling, town hall meetings, citizen juries, citizen assemblies, participatory budgeting, neighbourhood councils, and issues forums. The terrain of research had shifted by supplementing political theory with real-world institutionalized practices. Presently, there has been a systemic turn wherein political systems are now being considered in their entirety, i.e. the ways in which political institutions relate to each other and the extent to which they are deliberative. As an example, understanding the deliberative quality of legislative institutions has been sought as a means to provide greater insight into the extent to which national parliaments operate in terms of the quality of their discourse.

What is relevant here is specifically how deliberative democracy can be used to remedy some of the democratic deficits of elite-led intergovernmental relations within Canadian federalism, and the Westminster-style representative model of government. One area of focus should be on the Senate, especially because the impending vacating of seats creates a sense of urgency to act. Upon thinking about what to do with the Senate one has to consider an important question: does the Senate serve a purpose? If it is felt that the Senate can be better used as a check or a balance of power to the federal Executive that is fused with Parliament, then its current role has to be translated into a different, more open and accountable form. When considering how to

alter the form of the Senate we should go outside the bounds of traditional inquiry. The Senate should go public and the seats of the Senate should be made available to Canadian citizens. A Civic Senate would still act as an Upper Chamber of review, but the sitting body of appointed Senators would be replaced by the method of stratified random sampling. To be sure, the appointment of public officials by lottery has been used quite successfully in recent times. Strategic random sampling was applied in the two citizen assemblies on electoral reform in British Columbia and Ontario. Civic Senators would serve for a set or defined term, where they are offered a stipend or salary for their participation, and represent their regions in deliberations. What this essentially means is that the fundamental relationship between citizens and democratic institutions would be reformulated. The design of the institution would be quite novel and potentially influence the expansion of democratic rights in the Charter of Rights and Freedoms. In addition to the democratic rights of running for office and voting in elections, people could have the right and duty in being Canadian, to review legislation generated by Cabinet by sitting in the Senate.

There are a few reasons that make the Senate suitable for this direction. First, the purpose of the Senate is to deliberate. Considering this, the emphasis of civic reform is not so far off when recognizing how deliberative democratic practices are highly structured within a network of rules, various contexts, specific resource frameworks, and formal to informal levels. This links up with a primary function of the Senate which is legislative review. Senators have more time and less numbers to study bills coming out of the House of Commons. Deliberative processes by contrast, utilize various epistemic measures to inform participants about topics under investigation, notably observed in learning phases. Moreover, the smaller number that comprises the Senate in comparison to the House of Commons is suitable to highly structuring the quality of its deliberations, something that is also noticeable in the civic legislative assemblies found in British Columbia and Ontario in regard to electoral reform. Second, the primary function of the Senate has been noted to be a compliment to the House of Commons, as it is not a confidence chamber and does not compete with the House in its most elective function, i.e. to make and unmake governments. Deliberative democracy has always been conceptualized as a supplement to representative democracy, not a replacement. The fact that the Senate is not supposed to be a partisan institution fits well with deliberative democratic practice, notably in the reason-giving element of dialogue. Civic Senators would not be appointed according to partisan stripes and thus would not be obligated to tote any party line. Third, the Senate is in place to scrutinize government legislation. This directly relates to the use of deliberative engagement as a primary

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31 This is very relevant because through this practice it was the first ever legislative assembly in Canada to have achieved gender parity.


34 Smith, “The Improvement of the Senate,” 237.

35 Gutmann and Thompson, Why Deliberative Democracy?
means for deepening participation in the political decision-making process.\textsuperscript{36} Beyond broad inclusion of the citizenry, at the heart of these practices is the goal of increased transparency and accountability, something that is seriously needed in the Senate. For deliberative democrats, a legitimate political order should be justifiable by those living under its laws.\textsuperscript{37} This means that the democratic process can be enhanced if policy better reflects citizen interests. The potential to achieve this arises by better informing citizens through epistemic measures and concomitant opportunities to deliberate on political issues.

Is the idea of a public Senate likely to be denied? The standard answer is that Senate reform comes with red herrings and limitations. It would thus be quite easy to play off the ‘real change’ slogan of the Liberal Party. Yet, despite the fact that democratic reform tends to be within the bounds of tradition due to path dependency and partisan politics, some politicians may be persuaded of the merit of this approach. Partly because their powers as Members of Parliament would remain intact, but also because a civic institution such as the one suggested above would by design, represent citizens differently. Ultimately, replacing the appointment process in the Senate with randomly selected citizens would challenge the longstanding chamber of privilege and property qualification, and place Canada on the map for political and democratic innovativeness, meshing traditional politics with new age public engagement.

**Thoughts on Application**

The starting point of reforming the Senate by means of sortition lies with the shifting of the Prime Minister’s prerogative powers of Senate appointment. Two means to achieve this are only briefly touched on below. One the hand, the Senate can be improved by nonconstitutional means, and unilateral action by the Prime Minister. This is the suggestion made by David E. Smith, who argues that all aspects of the Senate appointment process should be transparent and open to the public. The general criteria for selecting Senators, the specific reasons for the selection of each individual Senator, the rational for not selecting other candidates, information about composition, role, and the deliberations of an appointments commission, should all be publicized.\textsuperscript{38} To be sure, this looks like a blueprint for the current ‘expert’ panel that has fairly recently been established as the means by which Senate seats will be filled. This means that Senators will still be appointed by the Prime Minister, but based on the advice of this ‘expert’ panel.

What remains controversial with this idea is that the panel receiving and ranking candidates, alongside the choices made by the Prime Minister, is not fully without concern over the removal of partisanship from the process of selecting Senators. Moreover, the means by which ‘experts’ discern the ‘merit’ of candidates is also not without problems as the selection of candidates may not ensure the broad diversity and experience that is needed to fulfill the main tasks of the Senate rather than the political favour of the PMO. By contrast, the proposal of using random sampling is much more public and inclusive, wherein Canadians are randomly selected according to particular indicators, like race, ethnicity, language, age and gender. This is arguably a better way to make the Senate more diverse and reflective of the Canadian public. Moreover, the way in which the pool of candidates are selected has the potential to bring forth a broad range of skills, experience and expertise that tend to be denied by traditional means of selection, carrying

\textsuperscript{36} Graham Smith, *Democratic Innovations: Designing Institutions for Citizen Participation (Theories of Institutional Design)* (United Kingdom: Cambridge University Press, 2009).

\textsuperscript{37} Chambers, “Deliberative Democratic Theory.”

\textsuperscript{38} Smith, “The Improvement of the Senate,” 257.
particular socio-economic, gendered and racial stereotypes. Within this method, a separate institution could be set up to undertake the process of sortition or lottery selection.

Scholarship has suggested that citizens within deliberative settings not only rise to the occasion but measure up well on indicators like the understanding of complex phenomena, and the ability to compromise on various issues. Participatory institutions have gone well beyond small one-off mini-publics. Values have been shown to change through deliberations, and moreover, citizens have proven capable of learning very complex political processes in short periods of time. This happens in delegate phases of participatory budgeting with residents working with city staff on municipal budgets, and this happened with the British Columbia and Ontario Citizens’ Assemblies regarding electoral reform. No less of a concern should be placed on having people run for office and participate in governance with no previous experience. There are (public sector) resources at the disposal of elected representatives to overcome initial transitions and epistemic barriers. These also carry into deliberative institutions that are designed with an eye to learning, not simply inclusion.

On the other hand, there are constitutional procedures that might have to be met to reform the Senate as suggested and would thus have to attempt to fulfill amending provincial formula requirements. Yet while these must be met, there are also historical factors that have to be reflected in context with formal procedures. A discussion about Senate reform needs to be mindful of the rounds of debates that took place in the lead up to the constitutional referendum in 1992. Several lessons were learned from the Charlottetown Accord. One lesson was that First Ministers can agree on reforming the Upper House. With agreement on making the Senate ‘Triple-E’ long standing arguments had finally settled on a set of principles for implementation. The second lesson was that there must be public consultation since Meech Lake had proven to be dead in the water based on backroom dealings. The Spicer Commission instituted in the next round of constitutional discussions led to cross-country meetings that involved individual Canadians, academics, representatives of advocacy groups, unions, business groups, and politicians. The plebiscites were indeed refreshing from the norm of national politics. Despite them, there was a disparity between interest groups, such as the National Action Committee on the Status of Women, First Nations women groups, labour unions, as well as different regional governments, and the federal government. Eventually a constitutional package was put forth to a national-wide referendum in 1992 and ultimately did not pass. It became clear that no major constitutional change could be made from that point forward without popular ratification.

Bargains made among political elites with minimal political involvement do not stand well with Canadians. Considering this, do the two – executive’s ascension and citizen’s inclusion - need not be mutually exclusive in constitutional discussions and subsequent outcomes? Not necessarily. Perhaps a referendum would actually pass the citizens of Canada with the broaching of reform premised on civic political authority beyond the ballot box.

Rounds of public consultation more inclusive of the public would be a clear stipulation, as this body would be designed for public purposes. Here, the design of the constitutional institution would have to be reflected upon. How would people be selected in terms of a random sample from

40 See James, S. Fishkin, When the People Speak: Deliberative Democracy and Public Consultation (Oxford University Press, 2009).
42 Simeon and Cameron, “Intergovernmental Relations and Democracy,” 288.
the registered voters list? What sort of stipend(s) would be available? Would participation be mandatory like jury duty? Would regions be represented based on representation by population or equality across the provinces? Could virtual forums be used at any point? How could gender parity be achieved? What sort of stratification could be used to ensure a solid presence of visible minorities? What extent of language translation services would need to be provided, and would proceedings be bilingual? Would Senate committees remain and if so, how would they be filled? Could there be a way of incorporating elected or panel appointed Senators to function alongside Civic Senators? What sort of veto power would the Senate have or not have? Would the Civic Senate become an institution only for public-law review proposed by Parliament rather than allowed to introduce its own legislation? Would term positions be sufficient at two to four years, or would a longer period be needed? Could the age requirement be dropped from 30? How would property qualifications no longer be a requisite? How should public bureaucrats and academics be incorporated into proceedings to supply expert information for epistemic purposes?

These concerns - at least to this author - are not insurmountable to conceptualize. There is a great wealth of historical and academic resources to draw from, and this includes but is not limited to actual deliberative legislative processes like the British Columbia Citizens’ Assembly that could inform the process, and even make what it achieved more finely tuned. Democracy is meant to be an enduring institutional form of popular sovereignty, and the idea of utilizing the Senate for a space of sober reflection, not on behalf of citizens, but by them, offers up one idea for our Canada in transition.

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