

Constitutional Reticence and Expressive Voting

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In the great divide between constitutional minimalists and constitutional maximalists, Webber here identifies himself with the former camp. He believes, it seems, in a conception of the constitution as the rules of the socio-political game—the processes by which substantive political disagreements should be resolved [and possibly an understanding of precisely which such disagreements *need* to be resolved rather than leaving the parties to just agree to disagree]. This conception gives his evaluative scheme an instrumentalist, pragmatic cast. If we conceive of the ‘constitution’ in these terms—as a set of ‘rules of the road’ that will manage the traffic but not seek to specify the ideal journey (or even a uniquely Australian one)—then alternative constitutional arrangements will be evaluated by how well they manage the traffic—evaluated, that is, by reference to accident-avoidance and ease and speed of journey rather than by reference to the securing of some grand common enterprise. In particular, Webber does not want a constitution that attempts to articulate an ‘identity’ or specify some set of ‘shared values’—partly, as I read him, because he thinks that such issues are matters of in-period rather than constitutional politics, partly because he doubts whether there is enough in the way of common identity or shared values to make the quest to articulate them particularly interesting. (And partly, I would want to add, that questions of identity should not be treated as political business, even if there did happen to be enough commonality to make the attempt plausible.)

Perhaps it does not need to be added that in all these matters I believe Webber is basically right. And by saying that it’s right, I mean not just that that happens to be what I think; I mean also that I reckon it is what every right-minded person should think too. Further, I believe that that is also Webber’s view as to the status of his observations. In other words, he is a realist about this conception of the constitution. He thinks that this conception can be derived from more basic considerations of the common interest—that a less minimalist constitution would be likely to be bad for pretty well everyone.

This raises an issue of approach. Why isn’t the paper entitled *Constitutional Minimalism* or perhaps *Constitutional Pragmatism* or perhaps even *Constitutional Feasibility*? In other words why not lay out directly the consequences of a more ambitious constitutionalism and seek to persuade everyone that that more ambitious exercise would simply not be in the public interest. Why, in other words, not adopt a directly consequentialist argument and leave all this quaint Anglo-Saxon talk of

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'reticence' aside? Why does one need a disposition of reticence rather than a disposition to pursue the public interest? One possible answer is that this is a distinction without substance—that reticence is just what we observe when a proper account of consequences of alternative approaches to constitutionalism is taken into proper account. Reticence on this account is just a kind of short-hand for consequentialism.

But I want to suggest an alternative answer. My view is that even if we all believed that a minimalist constitution would on the whole serve our interests better, this belief would not necessarily be sufficient to induce us to *choose* a minimalist constitution. The problem here is that political process is by its nature too passionate, too 'morally engaged', too much a matter of identity, what I will call too 'expressive'—to make it likely that we would get the best constitution we could, through the kinds of political processes we want to use, without an explicit self-denying ordinance. We will in other words need to adopt a special disposition of restraint—a disposition of 'reticence'.

Now, those (those unhappy few) who are familiar with my work on voting behaviour [Brennan and Lomasky, *Democracy and Decision* (CUP 1993) for example] will immediately recognise that I am here making appeal to something of an *idée fixe* to reinterpret Webber's argument in my own eccentric terms. I am reminded in this connection of a story, well-known among economists, of Robert Solow's remark in commenting on a paper of Milton Friedman's. Solow is reputed to have begun his comments with the statement: 'Everything makes Milton Friedman think about money. Everything makes *me* think about sex; but I manage to keep it out of my papers'. Well, everything makes me think about expressive voting and like Milton Friedman and unlike Bob Solow, I am not reticent about including it in my papers.

Let me briefly rehearse the central argument. This was originally formulated as a critique of one element, for many commentators a characteristic element, of public choice theory—the economic theory of political behaviour. Public choice theory directly extrapolates from consumer behaviour in markets to voter behaviour in large scale elections. Since consumers are 'rational' and because self-interest plays a major [sometimes predominant] role in market behaviour, and since the agents who buy and sell in the marketplace are the *same* agents who vote in elections, it has seemed to public choice theorists to require some kind of radical schizophrenia in agent behaviour if voters were to be taken to behave in anything other than a rational, self-interested fashion. So the choice of which candidate or party to vote for is taken to be equivalent to the choice among possible jobs or assets portfolios and the same considerations are taken to bear. In particular, the hope—implicit in much demographia—that voters would exhibit at the polls a more moral, more public-interested posture than in their dull commercial dealings was to be set aside as hopelessly romantic.

However, the direct extrapolation of market behaviour to the ballot box involves a critical simplification. Consumers are causally efficacious in markets; the opportunity cost of choosing option A is option B forgone and this fact is central to the 'revealed preference' logic that underlies the economic analysis of

markets. But voters are characteristically *not* causally efficacious in elections. The opportunity cost of voting for A is precisely *not* B forgone—only a *vote* for B forgone. Whether I [and everyone else] gets A or B depends on what all the others do; I am only decisive in the very unlikely event that there is an exact tie among all other voters. In all other circumstances, if I make a mistake and somehow vote for a party other than the one I would prefer to win, that mistake will not make any difference to the outcome. There is, in other words, a kind of ‘veil of insignificance’ set between the voter and the electoral outcome. Voting is not like choosing an assets portfolio; it is more like cheering at a football match or sending a get-well card. In either of these latter examples, the action does not *bring about* the outcome which the action refers to; and in a variety of circumstances, an agent can quite ‘rationally’ behave differently when her action is ‘inconsequential’ in this sense. In particular, the relevant question in the voting context is not so much what is it that will make you better off, but rather what is it that will induce you to cheer—to express your support. Now, we cannot rule out on *a priori* grounds the possibility that you may cheer for your self-interest. But to the extent that interests bear at all, it is more likely to be the interests of your class or clan—perhaps, one might hope, of the entire community. And you are no less likely to be induced to cheer for abstract ideals like ‘truth’, ‘justice’ and ‘national identity’. Or ideological principle. Or moral commitment.

As a matter of positive prediction, we might conjecture on this logic that ‘Buy Australian’ advertising programs have relatively little effect on consumer behaviour; whereas questions of national identity and national loyalty might play a very significant role in electoral politics, and not least when there is at hand a salient ‘constitutional’ moment. The logic offers us a picture of political process that is essentially symbolic or expressive; though I may not be able unilaterally by my action at the polls to determine who wins the election, I *can* unilaterally articulate something about who I am.

And this is what the ‘rational’ theory of voting—somewhat surprisingly perhaps—tells us what rational agents will do.

What this means in the constitutional context is that in deciding issues of considerable national substance, ordinary voters are not going to be inclined to look at constitutional changes in the way they might go about purchasing a refrigerator—that is, looking through the *Choice* magazine and deciding which is likely to work best for them over the long haul—but rather as an opportunity to express their own (various) identities. And in this connection it is not to be wondered at if various rival conceptions of ‘national identity’ become a central part of the debate. Such observations do not of course make it any easier to predict whether the Republic or the Preamble will get up (whereas a nice feature of the self-interest hypothesis is that it provides relatively clear predictions); but it does make clear why it is that the issues before us in our current constitutional deliberations are of such a symbolic character and it does suggest that the symbolic aspects will be the most significant in determining the outcomes.

Webber is inclined to see this constitutional preoccupation with identity as being the fault of the ‘usual suspects’. What can we expect, he seems to imply, if

we trust our constitutional deliberations to the same old political party players that inhabit ordinary politics. We might conjecture that Webber might well be a supporter of Hayek's proposition in *Law, Legislation and Liberty* to the effect that we need different chambers to deal with ordinary politics (legislation) and constitutional matters (law). On my view, however, the issues here are endemic to political process. Further, I do not believe that any process *other than* direct electoral judgment would meet minimal requirements of perceived legitimacy.

In the face of this problem, recognising in ourselves the propensity to act symbolically in political contexts, a kind of self-imposed morality of restraint in dealing with constitutional questions seems called for. We need to be self-consciously prosaic and consequentialist in our constitutional deliberations. We need to develop a special constitutional sense, in which the Webber attribute of 'reticence' plays a central role.

In conclusion, a clarification and a question are called for. First, let me make it clear that there is nothing in the argument that suggests that symbolic action is always bad or that electoral behaviour by virtue of its 'inconsequential' nature is invariably deficient compared with the implicit market benchmark. The veil of insignificance shares some features with the more famous 'veil of ignorance'; both veils liberate agents from excessive preoccupation with their own narrow material interest and make it more likely that they will take a wider view. But the veil of insignificance also carries particular temptations and difficulties and it is crucial that we be aware of the negative possibilities. In particular, there is the danger that constitutional arrangements be made to carry excessive symbolic freight—that they be required in particular to articulate the 'national identity'. Webber believes that that demand is mistaken. He is right.

My final question relates to political feasibility. Suppose we were to accept the Brennan argument for Webberian reticence. Would such an argument be politically potent—as it needs to be if it is to have any purchase? In other words, is 'reticence' on the Brennan argument 'feasible'? Certainly, in a period of apparent widespread mistrust of political elites and extensive enthusiasm for popular political participation in all forms, raising doubts about the normative authority of the *vox populi* in its rawest form does not seem likely to win many friends. And 'reticence' does not on its face sound much like an attribute that many voters will be disposed to cheer for. Put another way, we may admire reticence in others but not inclined to practise it ourselves. I accept this as a serious difficulty. I do not believe it to be a decisive one. There is an anti-heroic disposition around in Australia that is itself not so far from scepticism about politicians. And comfortingly it is probably the case that more Australians cheer for and identify with football teams than with political positions or political parties—which fact shows in my view a good sense of the proper priorities. The lesson I draw from these facts is this. Constitutional reticence is the child of political scepticism out of boredom; but it is exactly the unheroic nature of that parentage that might give us some hope that such reticence could have a tolerable life in Australia.