WORTH TALKING ABOUT?: MODEST CONSTITUTIONAL AMENDMENT AND CITIZEN DELIBERATION IN AUSTRALIA

PAUL KILDEA

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Paul Kildea

ABSTRACT

This article examines the feasibility of popular deliberation in relation to proposals for modest constitutional amendment. Much of the literature on deliberation and constitutional referendums focuses on major constitutional reform issues which, by their nature, raise broad questions about democracy or national identity which are likely to have popular appeal. Examples include proposals for electoral reform and the Australian republic debate. In Australia, however, it is often the case that referendums will be held on matters that are relatively narrow and technical, often concerning the machinery of government. The proposal to give financial recognition to local government, widely discussed during the 2010–13 federal parliamentary term, falls into this category. This article argues that proposals for modest constitutional amendment pose particular challenges for proponents of citizen participation and deliberation. It contends that they attract little public interest, which in turn discourages governments and media organizations from devoting resources to initiatives and coverage that might support public awareness, learning, and participation. The article also argues that modest reforms will often not be suitable as subjects of a deliberative micro-forum. The article then considers the implications of this analysis for the design of referendum process in Australia, and argues that a robust legal and institutional framework is essential to fostering deliberative ideals with respect to modest amendments.

I. INTRODUCTION

In August 2010 Australia took its first steps down the path of constitutional reform in two very different areas. Following a tight federal election, the Julia Gillard-led Labor government pledged, as part of power-sharing agreements with the Greens and some Independents, to hold two referendums at or before the next election: one on the constitutional recognition of Aboriginal and Torres Strait Islander peoples,[1] and the other on the constitutional recognition of local government.[2] In the following months, expert panels were appointed for both issues—they were asked to run community consultations and to report

Paul Kildea is a lecturer in the Faculty of Law at the University of New South Wales in Sydney, Australia. The author would like to thank Rosalind Dixon and the participants in the Law and Deliberative Democracy Symposium for their helpful comments on previous drafts of this article.

[1]I use the terms "Aboriginal and Torres Strait Islander" and "Indigenous" interchangeably in this article, although the former is my preferred term.

[2]Both referendums have since been deferred and their future remains uncertain. In September 2012 the Gillard government postponed the proposed referendum on Indigenous recognition for at least two years due to a lack of community awareness and support. A planned referendum on local government recognition was effectively deferred until the next parliamentary term after Kevin Rudd (who replaced Julia Gillard as prime minister on June 27, 2013) called a federal election for September 7, 2013. Due to a combination of constitutional requirements and electoral rules, the referendum could not run on this date as insufficient time had elapsed since the passage of enabling legislation through the federal Parliament.

to government on options for reform and levels of public support.[3] Despite these basic similarities, however, the two processes were ultimately very different. While neither could be said to have captured the public imagination, the Indigenous recognition issue attracted far more public interest and participation. It was run over a period of 14 months, involved a well-funded and broad-based national consultation program and attracted moderate levels of media coverage at key moments. On the other hand, the expert panel process on local government reform was, in the words of its Chairperson James Spigelman, much more of "a low key affair" whose consultations "did not attract much in the way of public response."[4] This process was only six months in duration, involved narrow consultations that were dominated by local government personnel, and attracted almost no media attention.

Even before the respective expert panel processes began, the issue of local government recognition felt "small" by comparison. The proposal to recognize Aboriginal and Torres Strait Islander peoples in the Constitution raises potent and emotional questions around racial discrimination, reconciliation, and cultural identity. By contrast, the issue of local government recognition seems far narrower and more technical, concerned as it is with removing barriers that prevent direct commonwealth funding of local government, and granting the latter a higher symbolic status. Given the "small" nature of that issue, I wondered whether the poor public response was somehow inevitable. Was it possible to implement a broadly participatory and deliberative referendum process on such matters? This question seemed important, not only to the future of local government reform but to any number of "small" constitutional changes that are discussed from time to time. In Australia, all proposals for constitutional amendment, irrespective of subject matter, must be approved by referendum, at which it is compulsory to vote.[5] In the past, Australians have been asked to cast their vote on all manner of issues, from those raising fundamental questions of democracy, values and national identity (such as banning communism and introducing a republic), to more prosaic matters concerning the machinery of government.

There is intuitive sense to the idea that where a proposed constitutional change is particularly narrow or technical—what I call *modest* reform—this will pose special barriers to achieving citizen engagement in the reform process. This article seeks to probe this intuitive notion more closely, asking whether modest constitutional amendments raise particular issues in terms of achieving citizen participation and deliberation in the process of constitutional reform and, further, whether this warrants some accommodation in the way we approach the design of referendum process. As will become clear, the case of modest constitutional amendment forces us to confront difficult questions about the feasibility of popular deliberation in a way that larger reform does not. The very nature of modest reform—its technical complexity, specificity and seeming remoteness from people's personal lives—suggests that a greater role for experts and interest groups is warranted in any reform process, but to accept this would seem to involve some abandonment of participatory and/or deliberative ideals. Is this necessary, or can some middle ground be reached? Far from being marginal, this question is of critical importance in nations like Australia where the majority of constitutional amendments put forward are highly technical.[6] In exploring this question and others related to it, I accept that I am only able to do so in a preliminary sense, and that a more developed assessment of whether my intuition is well-founded will require empirical research that is beyond the scope of this article. I base much of my analysis on observations made during the two recent processes on constitutional recognition in Australia, although it likely has resonances with reform programs in other liberal democracies (such as Ireland) which also require that all constitutional amendments (big or small) be passed at a referendum.

The analysis presented in this article exists against a backdrop of substantial activity in both the theory and practice of citizen participation and deliberation in constitutional reform. In recent

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[3]Expert Panel on Constitutional Recognition of Indigenous Australians, *Recognising Aboriginal and Torres Strait Islander Peoples in the Constitution* (January 2012) <http://www.youmeunity.org.au/finalreport>; Expert Panel on Constitutional Recognition of Local Government, *Final Report* (December 2011) <http://localgovrecognition.gov.au/content/final-report.html>.

[4]James Spigelman, "A Tale of Two Panels" (Constitutional Law Dinner, Sydney, February 17, 2012) <http://www.gtcentre.unsw.edu.au/sites/gtcentre.unsw.edu.au/files/dinner_speech_j_spigelman.pdf>5.

[5]*Commonwealth Constitution*, s. 128.

[6]Graeme Orr, "Compulsory Voting: Elections, Not Referendums" (2011) 18 *Pandora's Box* 19, 28, 29.

years numerous authors have considered the normative case for citizen participation and deliberation in the specific context of constitutional change, and advanced suggestions for how it might be achieved. As to the normative case, the legitimacy of constitutional amendment is said to be enhanced where the process preceding it offers meaningful opportunities for citizen involvement, particularly where those opportunities are deliberative in nature and advance a process of public reasoning.[7] In basic terms, the legitimacy of change will be measured according to the degree it was preceded by democratic "goods" such as broad participation, inclusiveness, and informed and reflective decision making.[8] Indeed, citizen engagement is said to be especially important for constitutional change due to its fundamental importance and long-lasting effect,[9] its capacity to shape the identity of a polity,[10] and declining trust in elites to make decisions on constitutional questions.[11]

Recent practice shows that citizen involvement in constitutional reform process might take a variety of forms, ranging from contributing to consultations to participating in a deliberative micro-forum; also relevant are more internal practices, such as absorbing information and reflecting on the issues.[12] Various authors have suggested that, where the fate of amendments is determined by referendums, it is helpful to differentiate between the type and extent of citizen participation that occurs at different stages—namely: initiation; issue-framing and question-setting; and the referendum campaign.[13] Some of the more innovative mechanisms deployed in constitutional contexts have occurred at the second stage; examples include citizens' assemblies on electoral reform in British Columbia, Ontario, and the Netherlands, and the participatory/deliberative mechanisms adopted in Iceland and Ireland as part of broader constitutional review.[14]

The analysis in this article seeks to fill an apparent gap in this emerging literature on constitutional reform and deliberative democracy. The literature to date tends to focus on how the values and goals of deliberative democracy apply to constitutional reform *in general*, but overlooks how the application of those values and goals might vary according to *different types* of constitutional reform.[15] This "gap" in the literature is not confined to scholarship on constitutional matters; as Fung has observed with respect to the design of micro-forums, "[p]ublic deliberation is often considered to be completely general in the sense that its rules, structures, and benefits are not thought to depend upon particular topics."[16] It is not obvious, however, that participatory and deliberative ideals will necessarily apply in the same way to all constitutional reforms. It may be that particular categories of reform raise particular challenges—and, at least intuitively, modest reform would seem to be one such category.

This article proceeds as follows. In Part II I explain what I mean by the term "modest" constitutional amendment and reflect on what distinguishes it from other types of constitutional change. In Part III I examine the particular challenges that modest constitutional amendments pose for incorporating citizen participation and deliberation into the constitutional reform process. I argue that modest

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[7]Stephen Tierney, *Constitutional Referendums: The Theory and Practice of Republican Deliberation* (Oxford University Press, 2012), esp ch. 1; also Simone Chambers, "Constitutional Referendums and Democratic Deliberation" in Matthew Mendelsohn and Andrew Parkin (eds.), *Referendum Democracy: Studies in Citizen Participation* (Palgrave, 2001) 231; Ron Levy, "Breaking the Constitutional Deadlock: Lessons from Deliberative Experiments in Constitutional Change" (2010) 34 *Melbourne University Law Review* 805; John Uhr, "Rewriting the Referendum Rules" in John Warhurst and Malcolm Mackerras (eds.), *Constitutional Politics: The Republic Referendum and the Future* (University of Queensland Press, 2002) 177.

[8]Tierney, above n. 7, 45–56.

[9]Tierney, above n. 7, 14; Chambers, above n. 7, 236.

[10]Tierney, above n. 7, 14.

[11]Matthew Mendelsohn, "Public Brokerage: Constitutional Reform and the Accommodation of Mass Publics" (2000) 33(2) *Canadian Journal of Political Science* 245, 258, 272; Levy, above n. 7. Chambers also suggests there is a need in pluralist societies to, as far as possible, allow people to speak in their own voice on issues of constitutional change: Simone Chambers, "Democracy, Popular Sovereignty, and Constitutional Legitimacy" (2004) 11(2) *Constellations* 153, 158, 169.

[12]On the latter see Robert E. Goodin, "Democratic Deliberation Within" (2000) 29(1) *Philosophy & Public Affairs* 81.

[13]Tierney, above n. 7, 186–87.

[14]Mark E. Warren and Hilary Pearse (eds.), *Designing Deliberative Democracy: The British Columbia Citizens' Assembly* (Cambridge University Press, 2008); P. Blokker, "Grassroots Constitutional Politics in Iceland" (January 12, 2012) <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1990463>; *The Convention on the Constitution* (July 2, 2013), <https://www.constitution.ie>.

[15]Although note Tierney, who has identified constitutive referendums, referendums in divided societies and referendums subject to international influence as raising particular issues in terms of implementing deliberative practice: Tierney, above n. 7, 296.

[16]Archon Fung, "Recipes for Public Spheres: Eight Institutional Design Choices and Their Consequences" (2003) 11 *Journal of Political Philosophy* 338, 343.

reforms by their nature attract low public interest and understanding, and that this in turn discourages governments and media organizations from devoting resources to initiatives and coverage that might support public awareness, learning, and participation. I also argue that that scope for public deliberation is further diminished by virtue of the fact that modest constitutional reforms will often be unsuitable as subjects of a deliberative microforum, which might otherwise serve as a focus for public debate. In Part IV I consider some possible objections to the idea that modest constitutional reform presents special disadvantages for citizen engagement: namely, that what is and is not "modest" reform is difficult to define and liable to change in the course of public debate; and that the category of "modest" reform disregards other factors, such as issue salience and depth of disagreement, that are at least as important in shaping public participation and deliberation. In Part V I reflect on the implications of my analysis for the design of referendum process in Australia, and argue that a robust legal and institutional framework is essential to fostering deliberative ideals with respect to modest amendments.

II. CHARACTERISTICS OF MODEST CONSTITUTIONAL AMENDMENT

All constitutional change in Australia can lay claim to being significant given that what is at issue is an alteration to the document that sets out the nation's fundamental rules of governance. But at the same time, some constitutional change proposals seem to stand out for being relatively minor and technical. I have already mentioned the proposal to give constitutional recognition to a direct funding relationship between the commonwealth and local councils, to which we might add the two previous attempts to accord similar financial (1974) and symbolic recognition (1988) to local government. Other examples from Australia's referendum record include proposals to mandate the holding of simultaneous House and Senate elections, and to remove the parliamentary nexus (that is, the requirement that any increase in the size of the House of Representatives must be accompanied by a proportionate increase in the size of the Senate). The idea of amending the Constitution to enhance federal cooperation, by allowing the cross-vesting of jurisdiction between the commonwealth and state governments, also presents itself as an example of more technical reform.

The feeling that these sorts of amendments are "modest" in character is shown in how we talk about them. In their 2010 book on referendums, Williams and Hume describe the successful 1906 amendment (changing the date on which Senators commenced their terms, for the purpose of allowing House and Senate elections to be held concurrently) as "not momentous" and "highly technical."[17] They describe the 1977 proposals (which included regulating the timing of elections and Senate membership in the event of a casual vacancy) as "not groundbreaking," while the prime minister at the time, Malcolm Fraser, agreed that they were "not dramatic."[18] Similarly, Twomey has acknowledged that the cooperative federalism amendments are "technical in nature and regarded as uninspiring."[19]

It also seems apparent that these sorts of reforms can be distinguished from amendments that are of a "big-ticket" nature. The constitutional recognition of Aboriginal and Torres Strait Islander peoples is one such reform; others from history include the 1999 poll on the republic, which sought to replace the monarch with an Australian head of state, and the 1951 referendum on banning communism. These referendums present themselves as being of high political and social significance by virtue of raising broad questions of democracy, values, and national identity.

But, beyond citing examples, is it possible to be more precise about what constitutes a "modest" referendum? Accepting that a precise definition may not be possible, I suggest that such referendums have three central characteristics: they are technical, specific, and remote.

A. Technical

To say that modest amendments are technical is to recognize that an individual will require

[17]George Williams and David Hume, *People Power: The History and Future of the Referendum in Australia* (UNSW Press, 2010) 106, 111.
[18]Ibid. 155.
[19]Anne Twomey, "Federalism in Australia: Gazing in the Crystal Ball of Constitutional Reform" in Gabrielle Appleby, Nicholas Aroney, and Thomas John (eds.), *The Future of Australian Federalism: Comparative and Interdisciplinary Perspectives* (Cambridge University Press, 2012) 446, 464.

specialist legal knowledge if they are to make well-informed judgments about them. It may be possible for a person to have a basic grasp or feel for the intent or consequences of a modest reform but a deeper level of comprehension will not be obtainable without expert knowledge. To take local government recognition as an example, comprehension of the reform proposal ultimately requires an understanding of existing federal funding arrangements, including the use of tied grants under section 96 of the Constitution, and a grasp of the *Pape*[20] and *Williams*[21] cases that have provided much of the impetus for the current reform process. The local government proposal is no outlier in this respect; indeed, Orr suggests that "the great majority of [referendum] questions have…been fairly technical ones" and that "[o]nly rarely have questions captured a public mood…or spoken at a symbolic level."[22]

While technical complexity is something which all modest amendments share, it does not ultimately distinguish them from other types of amendments. This is because all constitutional reform is, by its very nature, technical and complicated. Even reforms that touch on broad values or principles become highly technical once the detailed work of communicating policy positions into legal language begins. To take just one example, the proposal to recognize Aboriginal and Torres Strait Islander peoples in the preamble to the Australian Constitution—on one level a symbolic act which engages with broad questions of values, history, and identity—ultimately raises a number of technical questions around such matters as where the preamble should be located, and the scope of the High Court to use preambular language in constitutional interpretation.[23]

Beyond technicality, it is the specific and remote nature of a modest amendment that distinguishes it from others types of reform.

B. Specific

Modest reforms are specific in the sense that they are confined in their scope, purporting to make focused, particular changes to the Constitution that do not directly raise broader questions of constitutional design, nor of principle, values, or identity. The proposed local government reform, for example, is confined to establishing the capacity of the Commonwealth Parliament to make direct payments to local government bodies. It does this without purporting to engender any structural changes to the Australian federal system. Previous machinery referendums were similarly specific. The successful 1906 amendment was designed to allow House and Senate elections to be held concurrently, but did not raise larger questions around parliamentary terms or reform. The failed 1967 proposal to remove the parliamentary nexus was similarly self-contained.

C. Remote

A third characteristic of modest reform is that it can seem remote to people's everyday lives. Put another way, it is often difficult to draw a straight line between the proposed amendment and the benefit it will bring to the private and emotional lives of individual citizens. Drawing on language used by Fung, members of the general public may be unclear as to what "stake" they have in the outcome.[24] Reforms that are concerned with the workings of government institutions, including those mentioned above, are especially vulnerable to this perception.

Before continuing, it is important to clarify that while the analysis presented in this article is concerned with modest reform, it does not extend to trivial amendments. One can imagine constitutional alterations that are so minor that they have no practical import—for example, an amendment to section 71 that changed the name of the High Court of Australia to the Supreme Court of Australia. I accept that citizen engagement in relation to such amendments would probably not serve any real purpose. In any event, I do not propose to discuss such trivial alterations because, in reality, they exist only as hypothetical possibilities. None of the changes advanced in Australia's 44 referendums to date could be said to be trivial, and it is difficult to imagine why a future government would go to the trouble and expense of a referendum if the change would bring no real consequence. The analysis that follows,

[20]*Pape v. Commissioner of Taxation* (2009) 238 CLR 1.
[21]*Williams v. Commonwealth* [2012] HCA 23.
[22]Orr, above n. 6, 19, 28, 29. Orr argues that the technical nature of constitutional amendments justifies the abolition of the compulsory voting requirement at Australian referendums.
[23]See, e.g., Anne Twomey, "The Preamble and Indigenous Recognition" (2011) 15(2) *Australian Indigenous Law Review* 4.
[24]Fung, above n. 16.

therefore, is concerned with amendments that are modest but which are not so trivial as to have no practical impact on the constitutional system.

III. MODEST REFORM AND THE CHALLENGE OF CITIZEN DELIBERATION

In this section I consider the particular challenges that modest constitutional amendment presents with respect to citizen deliberation. First, I suggest that such reforms have inherent disadvantages in that popular interest and understanding in relation to such reforms is likely to be low, which in turn depresses motivation to participate. Second, I argue that media and government are likely to respond to these inherent qualities in a way that limits opportunities for citizens to *develop* interest or learning, or to have input into decision making. Third, I contend that modest amendments are mostly unsuited to being the subject of a citizen-led micro-forum (such as a citizens' assembly or constitutional convention), which might otherwise have value for providing a focal point for public debate on the issue. In addressing the first two points my main concern will be with public participation and deliberation on a macro-scale; for the third point my attention is more focused on the micro-scale, but I will consider its implications for wider public engagement.

A. Inherent disadvantages

1. Low interest and its impact on motivation to participate. It may be the case that encouraging citizen interest in constitutional matters will always prove challenging. Certainly, Craven is of the view that "most Australians simply are not interested in issues of constitutional reform, and despite the enthusiasms of their betters, will resist all attempts to impose such an enthusiasm upon them."[25] But levels of enthusiasm vary across issues, and it seems plausible that modest constitutional amendments will be at the lower end of that spectrum. Flowing on from this, low interest is likely to depress motivation to engage with the issue down the track, even where opportunities are provided to do so.[26]

The "remoteness" of modest constitutional amendments presents a particularly high barrier to interest. Citizens may refrain from tuning in because they cannot easily identify what personal stake they have in the reform.[27] This is surely understandable, as it is not obviously apparent how an individual's welfare or deeply held beliefs will be affected by, say, a debate about the mechanism for commonwealth funding of local government, or the timing of federal elections.[28] Where a perception of low stakes exists, encouraging citizens to actively engage with a reform process—e.g., by following it in the media, or by contributing to consultations—will be especially challenging. That this is the case is suggested by various studies, which show that citizens are more motivated to participate if they have a personal connection with an issue.[29]

Of course, any proposal for constitutional change, however slight, will always be of interest to some people and organizations in the community—even if this group does not extend beyond politicians, key stakeholders, and interest groups. For these people, a popular perception of low stakes is likely to be a huge source of frustration. They will hold a strong belief that the proposed amendment *will* have a concrete impact on people's lives and that the popular perception is mistaken. In a recent parliamentary hearing on local government recognition, for example, a primary stakeholder referred to the "disconnect" in citizens' minds between constitutional change and service provision, and suggested that the "complex and comparatively remote" issue of local government recognition required a concerted campaign to "improve public perceptions."[30] But any such campaign would surely be a battle—and perhaps dependent on there being wider promotion and public debate on the issue than can reasonably be expected, particularly if the media is not behind it (a point picked up further below). It may be that modest constitutional reform carries a special vulnerability to

[25]Greg Craven, "Referenda, Plebiscites and Sundry Parliamentary Impedimenta" (2005) 20(1) *Australasian Parliamentary Review* 79, 83.
[26]On the connection between interest and engagement see Fung, above n. 16, 345.
[27]Ibid.
[28]Ibid.
[29]Ibid. Vivien Lowndes, Lawrence Pratchett, and Gerry Stoker, "Trends in Public Participation: Part 2—Citizens' Perspectives" (2001) 79(2) *Public Administration* 445.
[30]Evidence to Joint Select Committee on Constitutional Recognition of Local Government, Parliament of Australia, Sydney, January 16, 2013, 35 (Margaret Anne de Wit).

claims that other issues are more worthy of public interest and engagement—by virtue of being more relevant, more urgent, and more deserving of public attention and resources.

2. Poor understanding. A second inherent disadvantage of modest reform proposals is that, due to their technical complexity, citizens may find them difficult to understand and even alienating. Even for those citizens who feel motivated to learn more about the proposal, they may promptly feel discouraged as they discover that "getting on top of" the issues requires grappling with concepts and jargon with which they are unfamiliar. This is not to say that lay citizens are incapable of acquiring the specialist knowledge necessary to develop an informed opinion on the proposal.[31] However, it is a reality that doing so will require both cognitive capacity and significant time—which, in the case of the latter, is perhaps more than the average individual is willing to give.[32]

As I have noted above, all proposals for constitutional change are technically complex. What puts modest reforms at a particular disadvantage here is that they are so tightly focused (that is, specific) that they do not obviously connect up with wider questions that citizens may more easily comprehend, and that might provide them with a gentle window into a reform's more technical aspects. A citizen might have general feelings or opinions about federalism or Parliament but these are unlikely to be engaged by proposals confined to funding mechanisms and election timing. In fact, when it comes to the issue of financial recognition of local government, even relatively high-level questions—such as whether the amendment is necessary, or whether it will be of benefit to local government—quickly get mired in debates over technical detail.[33] By contrast, big-ticket change like republic reform directly raises more intuitive issues—national identity, for example—that provide a broader entry-point. This does not guarantee that citizens will go on to learn about that issue's more technical side, but it makes the issue far less alienating to potential learners.

B. Limited opportunities

The fact that citizens initially have little interest or understanding of an issue does not necessarily mean that they cannot develop those things later on, perhaps to the point of becoming motivated to contribute to public processes and debates. Indeed, proponents of participatory and deliberative democracy both put great stock in the idea that citizens' interest, perspective, and opinions can transform over time, given adequate opportunities. So, while the inherent disadvantages of modest constitutional amendments are considerable, they do not necessarily pose an insuperable barrier to public deliberation. However, there is good reason to think that both media and government will respond to those inherent qualities by limiting any opportunities that citizens might have to undergo any "transformation"—that is, to develop interest or learning, or to have input into decision making.

The media are crucial sources of information on any issue and serve to influence levels of awareness and understanding among the general public. Among the factors that a media organization will take into account when determining the extent of coverage it gives to an issue is the perceived level of public interest in it.[34] It is this reality that puts modest constitutional amendment at a further disadvantage. Where an issue is generally thought to be of little interest to voters, media will be reluctant to cover it in any detail. Moreover, media outlets will be more inclined to report on an issue where there is some level of "theatre" attached to it—and on this count modest reform would seem to be at a disadvantage.[35] Where coverage is spare, this in turn reduces the opportunities for citizens to become aware that the issue is on the agenda, and to learn about it. Public debate may be muted as a result. It is also the case that modest issues may not have been the subject of much prior media coverage of the sort that might "scaffold" citizens' awareness, interest, and understanding.

In a stark demonstration of this dynamic, the local government recognition process struggled to attract even minimal media attention. In the roughly

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[31]Having said this, variances in cognitive capacity across citizens should not be disregarded: Shawn W. Rosenberg, "Rethinking Democratic Deliberation: The Limits and Potential of Citizen Participation" (2007) 39(3) *Polity* 335, 342–9.
[32]Zsuzsanna Chappell, *Deliberative Democracy: A Critical Introduction* (Palgrave Macmillan, 2012) 35.
[33]See, e.g., Evidence to Joint Select Committee on Constitutional Recognition of Local Government, Parliament of Australia, Sydney, January 16, 2013, 49–50 (James Faulkner).
[34]John Parkinson, *Deliberating in the Real World: Problems of Legitimacy in Deliberative Democracy* (Oxford University Press, 2006) 103.
[35]Ibid. ch. 5.

seven months between the creation of the local government panel in June 2011 and the release of its report in December 2011, just 10 articles in major metropolitan newspapers mentioned the issue.[36] Indeed, no major newspaper reported on the publication of the panel's report and recommendations until six days after its public release.[37] The sparse nature of this media attention continued in the weeks after a referendum on the issue was announced. By contrast, Indigenous constitutional recognition—while receiving only sporadic coverage during the life of its expert panel—registered 226 articles over a 14-month period. (Incidentally, the events that attracted the most media interest had a theatrical side—the release of the report and, a few days later, a large protest about land rights and sovereignty outside the Aboriginal Tent Embassy.) History provides other examples, too. Australia's first referendum in 1906, which concerned an amendment to the Constitution to change the starting date on which Senators would assume their seats, attracted no significant media coverage and public debate was "virtually non-existent."[38] The nation's most recent referendum, on the republic question, meanwhile, was much more a big-ticket reform and generated extensive media coverage, both in the weeks preceding the poll and in the years leading up to it.

Governments, too, may respond to the low stakes and complex nature of modest constitutional reforms by only doing the bare minimum as regards public engagement and education. Where it is perceived that the public have little interest in an issue, governments may be unwilling to devote significant resources to programs and initiatives which, they feel, may ultimately be ignored by citizens. A calculation may also be made that, given the technical and specific character of the issue, the more pressing priority is to get stakeholder and expert views. These types of decisions, when made, will limit the opportunities that citizens have to give input into the decision-making process. Citizens may have to wait until the campaign stage before they are exposed to any sustained public education program.

Again, the recent constitutional recognition processes are demonstrative. The Gillard government devoted very few resources to the local government expert panel. Upon being established in June 2011, the panel was given less than six months to produce a discussion paper, run community consultations, meet with experts and stakeholders, conduct opinion polls, develop recommendations, and report to government. By providing the panel with such modest resources, the government was effectively limiting the space for public deliberation. Not surprisingly, public involvement was slight. In total, the panel held six consultation meetings, attracting just 127 participants, most of whom were local council representatives.[39] It also received 634 submissions—of these, half were from private individuals, 43 percent from local councils, and the remainder were from advocacy groups, experts, state governments, and politicians.[40] In short, it was a modest process, dominated by interest groups and experts. As a point of contrast, the panel created to advance the big-ticket issue of Indigenous recognition was given 14 months to discharge its very similar responsibilities. Armed with more resources, it conducted a process that, while not without its shortcomings, allowed far more scope for public involvement. This is borne out in a variety of measures: for example, this panel held more than 80 public meetings, attracting over 4,000 attendees, and received 3,489 submissions.[41]

In summary, modest constitutional amendments have inherent disadvantages when it comes to encouraging public engagement, which in turn create certain disincentives for media organizations and governments. Taken together, the result is an environment in which any pre-existing attitudes citizens have about the reform are less likely to be challenged, and any opportunities for learning and input are more likely to be sparse. We might expect, too, that experts and interest groups will play an especially strong role in any process established

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[36]In my calculations I have included *The Australian*; *Australian Financial Review*; *Sydney Morning Herald*; *The Daily Telegraph*; *The Age*; *Herald-Sun*; *Courier-Mail*; *NT [Northern Territory] News*; *The West Australian*; *WA [Western Australia] Today*; *Adelaide Advertiser*; *Hobart Mercury*; *Brisbane Times*; and *The Canberra Times.*

[37]Lauren Wilson, "John Howard's Fears on Local Councils in Constitution Ignored" *The Australian*, December 28, 2011.

[38]Williams and Hume, above n. 17, 106.

[39]Expert Panel on Constitutional Recognition of Local Government, above n. 3, 88.

[40]Ibid. 27. Of the submissions, 53% supported constitutional change to recognize local government, while 45% were against. Submissions from local councils expressed almost unanimous support for change: 29.

[41]Expert Panel on Constitutional Recognition of Indigenous Australians, above n. 3, 5–7.

by government. This is not to say that meeting the ideals of broad participation, sound judgment, and meaningful input will be impossible to achieve with respect to modest constitutional amendments—but it is to recognize that there are additional barriers to doing so.

C. Micro-forums?

A common feature of deliberative referendum process is the holding of a deliberative micro-forum for the purpose of informing the framing of the issues or the setting of the referendum question.[42] These forums, which might be in the form of a citizens' assembly, constitutional convention, or similar body, help to provide a focal point to public debate, as well as generating a set of recommendations with "higher recommending force."[43] We have seen how such forums have been deployed successfully on big-ticket amendments such as electoral reform and root-and-branch constitutional review. However, three factors call into question the suitability of micro-forums for advancing debate on modest constitutional change: the questionable value of citizen input, the uncertain quality of deliberation, and the difficulty of establishing a connection between any micro-forum and wider public debate.

1. Value of citizen input. In deciding whether to hold a micro-forum as part of a referendum process, a key consideration is whether citizens bring a "comparative advantage" over other actors such as politicians, experts, and interest groups.[44] In other words, are citizens able to contribute something to debate—for example, particular knowledge or personal experiences—that others cannot? Fung suggests that the subject matter under discussion is important in this respect: it "determines what, if anything, citizens are likely to contribute in terms of insight, information, or resources in the course of participatory deliberation."[45] It follows from this that there are some issues on which the contributions of citizens may not be particularly valuable; for Fung, "[s]ome areas would benefit very little from deliberation because they require highly specialized kinds of knowledge or training or because citizens have no distinctive insight or information."[46]

Past experience shows that successful micro-forums can be held on technical policy issues. Citizens have proven capable of deliberating well on complex big-ticket constitutional reforms in micro-settings, and have done so in non-constitutional contexts such as nanotechnology. Generally, experts are on hand in such forums to answer questions and support citizens' discussion of the issue.

This experience suggests that micro-forums could be used effectively with respect to modest constitutional reforms, despite their technical nature. However, it is important to note that participants in micro-forums are generally not asked to debate the details of a complex policy issue, but instead to discuss its underlying principles and likely implications. Chappell suggests that this is a critical distinction as far as micro-forums are concerned; she argues that "for technically complex problems citizens should only be required to understand the basic principles of the issues at stake to the extent that they will be able to make informed judgments about their social, economic and moral implications."[47] On scientific issues, Einsiedel and Goldenberg see the value of citizen input being in discussion of "such elements as the purposes of [a particular technology], how it is to be used, under what conditions, and how its risks and benefits are to be managed."[48]

The difficulty with modest constitutional amendments is that their specific and technical nature may narrow the scope for debate and discussion around those broader issues—such as purpose, implications, and personal impact—on which citizens could bring their "comparative advantage" to the table. As noted, even relatively high-level questions about local government recognition quickly turn to matters of technical detail.[49] Of course, members of the public will likely have developed well-informed opinions about the quality of local government

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[42]Tierney, above n. 7, 208; Levy, above n. 7.
[43]Parkinson, above n. 34, 171; James S Fishkin, *The Voice of the People: Public Opinion and Democracy* (Yale University Press, 1997) 162; Graham Smith, *Democratic Innovations: Designing Institutions for Citizen Participation* (Cambridge University Press, 2009) 72–110.
[44]Fung, above n. 16, 343.
[45]Ibid.
[46]Ibid.
[47]Chappell, above n. 32, 35.
[48]Edna F. Einsiedel and Linda Goldenberg, "Dwarfing the Social? Nanotechnology Lessons from the Biotechnology Front" (2004) 24 *Bulletin of Science, Technology & Society* 28, 31.
[49]Evidence to Joint Select Committee on Constitutional Recognition of Local Government, Parliament of Australia, Sydney, January 16, 2013, 49–50 (James Faulkner).

services (e.g., libraries, parks, garbage collection) in their local area, but if the question under discussion is confined to the mechanics of funding then these opinions will at best be peripheral to the issue and not particularly helpful. To take another example, amendments directed at enabling the cross-vesting of judicial and executive jurisdiction between the commonwealth and state governments are unavoidably technical, requiring an understanding of a series of complex High Court decisions. Citizens may well have an opinion on which level of government should perform which tasks, and whether the different levels should have the means to work together more cooperatively, but these views would not be particularly valuable in terms of repairing the specific constitutional fault identified by the High Court.

We can contrast these modest reform proposals with, say, the republic issue. This issue, the subject of a constitutional convention in 1998, more easily lends itself to the holding of a micro-forum in that there is more of a blend of technical and wider issues. Among the broad questions that require resolution are the desirability of retaining constitutional monarchy, the method of selecting an Australian head of state, and the powers that should attach to that office. These are questions about which citizens have a great deal to contribute, simply by virtue of being members of the Australian political community with different perspectives on how the nation's history and identity should be expressed through its institutions. It is true that, once you scratch the surface, each of these questions has a technical side. Nonetheless, it is also the case that citizens can debate these wider questions without being required to go into constitutional arcana.

In other words, the republic issue and other big-ticket reforms open up a space in which the discussion of broader questions (the domain of citizens) can inform the resolution of technical matters (the domain of experts). With modest reforms, the space for the former is limited, thus weakening the case for holding a citizen-led micro-forum as part of the reform process. In progressing modest reform, governments might therefore eschew the option of a micro-forum and conduct a narrow consultation process instead, with emphasis placed on collecting the views of experts and stakeholders. Having said this, I do not wish to discount the potential value of micro-forums on modest reform altogether. As Tierney notes, there is scope for more experimentation with micro-forums in terms of what proportion of their membership is devoted to citizens, experts, and politicians.[50] It may be that a micro-forum on a modest reform could be effective where a substantial cohort of members from the latter two groups sit alongside citizen participants.[51]

2. Quality of deliberation. In the event that a government wishes to hold a micro-forum on a modest constitutional reform, one concern may be that the standard of deliberation will be poor due to the technical nature of the issues and the high demands on citizen competence. Putting questions of competence to the side, however, it may be that the remote nature of modest constitutional amendment serves to enhance the quality of deliberation. Where an issue is seen to carry "low stakes," citizens may be more able to enter the deliberative space without preconceived notions or strong opinions and, as a result, more open to hearing new perspectives. Fung says that the promise of such "cold" deliberations is that "[i]ndividuals with low stakes in a discussion will be open-minded, begin without fixed positions, and [be] dispassionate."[52] By contrast, citizens might be less capable of quality deliberation on big-ticket constitutional reforms because they more directly connect up with closely held personal beliefs about such things as race, national identity, and contemporary values. Where this is the case, participants are more likely to bring set positions to the deliberative space, and perhaps be more reluctant to revise them in response to new information or conflicting views.

Of course, whether or not this claim is borne out in practice requires further empirical research. Ultimately, Fung is of the view that "hot" deliberation—on issues where participants have a clear stake in the outcome—will make for better deliberation. He considers that the process will be more thorough and creative, and more likely to yield enforceable results, due to the greater energy and resources that citizens bring to the deliberations.[53]

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[50]Tierney, above n. 7, 292.
[51]The ongoing constitutional convention in Ireland, whose membership is a combintion of randomly selected citizens (two-thirds) and politicians (one-third) is an example of recent experimentation in this area.
[52]Fung, above n. 16, 345.
[53]Ibid.

3. Linking micro- and macro-deliberation. A third difficulty with employing micro-forums on modest change concerns the challenge of forging a connection between the forum and wider public debate. One of the benefits of micro-forums is their ability to bolster wider public awareness, understanding, and participation by serving as a media event and by providing an additional means for citizens to "have their say" on an issue (for example, by emailing forum delegates with their views).[54] This publicity is essential to ensuring that the micro-forum has a genuine impact on wider public debate on the issue, as opposed to serving merely as a stimulating event for the small number of citizens who actually get to participate inside the forum.

The challenge for micro-forums on modest reforms is a simple one in this respect: what if nobody tunes in? Given that such reforms attract little popular interest, there is a risk that any forum could sink without a trace and therefore do little to advance public deliberation. How many citizens would set aside time to watch a televised convention debate on local government funding, or to otherwise follow it in the media?[55] It is possible that public interest could grow over the course of the event, particularly if political leaders make it a priority and encourage people to pay attention. Nonetheless, the extent to which macro-deliberation on a modest reform would be advanced by a micro-forum is doubtful.[56]

IV. QUERYING MODEST REFORM AS A SPECIAL CASE

In the previous section I outlined various reasons supporting the notion that modest constitutional reform poses special challenges for achieving citizen participation and deliberation. Here I want to note two considerations which challenge this idea: first, the difficulty of drawing sharp lines between what is and is not "modest" constitutional reform; and second, the notion that the shape of public deliberation will likely be affected by other factors besides technical complexity, specificity, and remoteness.

A. Modest reform as an unstable category

This article has suggested that it is meaningful to categorize certain constitutional amendments as "modest" due to their technical nature, their specificity, and their seeming remoteness from everyday lives. A further claim that follows from this one is that such amendments can be contrasted with those that are not "modest." However, it might be argued that the whole idea of categorizing certain reforms as "modest" is inherently unstable as none of the three defining characteristics (technicality, specificity, and remoteness) is fixed. On the contrary, it could be argued that the extent to which any reform possesses one or more of these characteristics is liable to change in the face of public debate.

For instance, it is arguable that the more an issue is discussed in public, the less remote it can seem and the more personal it becomes. Similarly, an issue that at first seems specific may take on a more general character, particularly if public debate begins to focus on "proxy" issues. An example of this occurring would be where a debate about, say, the removal of the "nexus" between the House and Senate expanded out into debate on broader issues surrounding dissatisfaction with the quality of political representation. Further, a technically complex issue may become more comprehensible over time, particularly if information is provided to voters and public discussion is of a type that aids understanding. Thus, depending on the type of public debate surrounding the proposed amendment, a reform previously thought of as modest may transform into something else—if not exactly a big-ticket change, then at least a proposal that is more capable of attracting public interest and fostering sound judgment. If one accepts these challenges and sees the whole idea of "modest" reform as unstable, it follows that any predictions that are made about the challenges (or otherwise) of achieving citizen deliberation with respect to a particular reform are unreliable as the very notion of what is and is not modest is liable to change over time.

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[54]Parkinson, above n. 34, 171.

[55]In 1998 some commentators made unfavorable comparisons between the television audiences for the constitutional convention on the republic and the cricket Test match being played at the same time: "Convention No Match for Test" *Herald Sun* (Melbourne), February 4, 1998, 3; Tony Squires, "Convention Becomes a Whinery for the Chardonnay Set" *Sydney Morning Herald* (Sydney), February 7, 1998, 24.

[56]On a similar point about establishing a connection between micro- and macro-deliberation, see Tierney, above n. 7, 293.

A plausible response to this challenge is to observe that the very thing that is most likely to transform how one views a reform proposal (from specific to general, and so on) *is* public deliberation—which, for all the reasons identified earlier in the article, is less likely to occur with respect to modest reforms. A potential halfway point between these two positions is to concede a certain lack of precision in the concept, but to view all constitutional reforms as existing along a spectrum between modest and less modest. This compromise position might also hold that plotting different reforms along this spectrum is useful in terms of conceptualising likely challenges to public deliberation, which in turn is valuable to governments and others involved in process design.

B. The existence of other factors that affect deliberation

A second possible objection to the idea that modest constitutional reform should be understood as a special case is that there are other factors at work—besides technical complexity, specificity, and remoteness—that are equally or more important in determining the shape of public deliberation. Two obvious candidates present themselves: issue salience and depth of disagreement. The first is widely regarded as an important factor in deciding whether deliberation is appropriate, and how effective it is likely to be.[57] James Spigelman, chair of the local government expert panel, drew attention to salience when explaining why his consultation process had been far less extensive than that run by the expert panel on Indigenous recognition—he said that the disparity was "understandable in view of the salience and significance of [Indigenous constitutional recognition] from the point of view of Australia's social cohesion and international reputation."[58] Of course, there will not always be a correlation between an issue's importance to the nation and its appeal to the public; reforms directed at improving cooperative federalism, for example, are nationally important but attract little public interest. As such, we should not expect that more salient issues would necessarily attract higher levels of public participation and deliberation. Nonetheless, a perception that an issue is of high salience might prompt governments to devote greater resources to consultation and public education, and media organizations to dedicate more coverage to the issue.

The extent to which a constitutional reform is the subject of deep disagreement might also affect the shape of public participation and deliberation. Where there already exists a strong consensus on an issue, it is arguable that the case for public deliberation is weaker.[59] Governments, as a result, may be more comfortable with leaving the issue in the hands of elites. On the other hand, where there is strong or passionate disagreement about a proposed amendment, the case for public participation and deliberation is stronger.[60] The absence of a clear consensus was likely a factor in the Australian government's decision to fund an expert panel to run an extensive community consultation program on Indigenous recognition—with multiple options available for effecting constitutional recognition, and public divisions on whether and how to protect against racial discrimination in the constitutional text, it made sense to conduct a process that fostered the airing and discussion of these issues. On the other hand, the existence of consensus probably shaped the design of the local government expert panel process—with important stakeholders already in agreement on the favored option (that is, financial recognition), the need for public deliberation was perhaps weaker.

If we accept salience and depth of disagreement as factors that affect popular deliberation, this does not mean that we must dispense with the idea of "modest" reform as a special category. As noted above, thinking about reform as modest (or not) is useful in determining what challenges to popular deliberation might arise, and how to meet them. Considerations of salience and depth of disagreement might help to deepen that analysis, but are not incompatible with it.

V. ESTABLISHING A DELIBERATIVE FRAMEWORK FOR MODEST CONSTITUTIONAL AMENDMENT

For the reasons outlined in Part III, the scope for popular deliberation on modest changes is far more

[57]E.g., Chappell, above n. 32, 36.
[58]Spigelman, above n. 4, 5.
[59]Maija Setala, "On the Problems of Responsibility and Accountability in Referendums" (2006) 45 *European Journal of Poltical Research* 699, 716.
[60]Ibid.

limited than that for larger reforms. Governments, observing that there are low levels of interest and understanding among the general public, will put in place processes that permit only narrow pathways for citizen input. Media organizations, likewise, will restrict their coverage of the issue and thus limit the space for public debate. Citizens' assemblies, constitutional conventions, and other events that might otherwise provide a spike in awareness, learning, and input on a proposed constitutional amendment may not be appropriate, and in any case governments may balk at devoting resources to such an expensive initiative where public interest is low. Overall, there are relatively few opportunities for citizens to develop informed opinions—whether through accessing reliable information or by being exposed to diverse perspectives—nor to have a chance to give genuine input into key decisions. For all of these reasons, the feasibility of achieving (or even approximating) participatory and deliberative ideals with respect to modest constitutional reform is open to question.

Modest constitutional amendments thus present a challenge to those who believe that the legitimacy of constitutional reform depends on the extent to which the *process* of reform has lived up to participatory and deliberative norms.[61] One potential way around this challenge is to argue that the legitimacy of modest amendment does not require citizen participation and deliberation in the same way that wider reform does, and that non-deliberative modest change can therefore be tolerated. However, it is not entirely clear why the very "goods" that are said to increase the legitimacy of constitutional change generally—such as broad participation, inclusiveness, and informed and reflective decision making[62]—should not have the same impact across all constitutional matters, including those that are relatively technical, specific, and remote. Certainly, many of the reasons that are given to underscore the importance of citizen engagement in general constitutional change—such as its long-lasting effect[63] and declining trust in elites to make decisions on constitutional questions—apply to modest alterations as much as they do to reform generally.[64]

So, we are left with the question of how to advance modest constitutional amendment in a way that approaches participatory and deliberative values. In one sense, this predicament is nothing new. After all, the challenges of translating the theory of participatory and deliberative democracy into practice extend to all policy matters, and the failures of successive Australian governments to bridge theory and practice with respect to constitutional referendums has already been widely remarked upon.[65] But my contention is that these challenges are especially profound with respect to modest constitutional amendments because their technical, specific, and remote nature amplifies the usual concerns about citizen willingness and competence. If one has doubts about citizen willingness and competence when it comes to political matters, then they are likely that bit stronger when modest constitutional amendment is at issue. This pushes us to "hard edge" of a familiar line-drawing exercise, as we are confronted with the task of determining how one can draw the line between the role of the people, and the roles of political elites, experts, and interest groups, without jeopardizing the legitimacy of the reform process.

It is beyond the scope of this article to resolve precisely where that line should be drawn. However, the analysis in Part III indicates that the positioning of that boundary should be different for modest (as opposed to larger) constitutional reform. It suggests accepting a lesser role for citizens, and shifting responsibility for the achievement of deliberative values (such as sound judgment and inclusiveness) in the direction of political elites, experts, and interest groups. This is dubious territory for proponents of participatory and deliberative democracy—

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[61]Scholars who fall into this category include Stephen Tierney, Simone Chambers, and Matthew Mendelsohn (see references in nn. 7, 9, and 11), although I note that these authors discuss constitutional change in general terms, and have not written specifically about what is required to deliver legitimate change when only "modest" amendment is at stake.

[62]Tierney, above n. 7, 45–56.

[63]Tierney, above n. 7, 14; Chambers, above n. 7, 236.

[64]Matthew Mendelsohn, "Public Brokerage: Constitutional Reform and the Accommodation of Mass Publics" (2000) 33(2) *Canadian Journal of Political Science* 245, 258, 272; Levy, above n. 7. Chambers also suggests there is a need in pluralist societies to, as far as possible, allow people to speak in their own voice on issues of constitutional change: Simone Chambers, "Democracy, Popular Sovereignty, and Constitutional Legitimacy" (2004) 11(2) *Constellations* 153, 158, 169.

[65]See, e.g., Cheryl Saunders, "The Australian Experience with Constitutional Review" (1994) 66(3) *Australian Quarterly* 49; John Uhr, "Rewriting the Referendum Rules" in John Warhurst and Malcolm Mackerras (eds.), *Constitutional Politics: The Republic Referendum and the Future* (University of Queensland Press, 2002) 177; George Williams, "Thawing the Frozen Continent" (2008) 19 *Griffith Review* 11.

there is the obvious risk that citizens become marginalized to the point where what remains is a referendum process that is closed and elite-driven. It is therefore important to be more specific about what a deliberative framework for modest constitutional amendment might look like, and the role that both law and good practice have to play in securing that framework.

A. The issue-framing and question-setting stage

The issue-framing and question-setting stage of a referendum poses the greatest challenge in terms of establishing an appropriate balance between the roles of citizens, on the one hand, and those of political elites, experts, and interest groups, on the other. If popular deliberation on a proposed modest amendment is unlikely to occur at this stage (for the reasons outlined in Part III), then parliamentary deliberation and expert scrutiny are all the more important. One way of promoting this without excluding public involvement altogether is by establishing an independent advisory body to conduct an open consultation process that seeks a wide range of views from subject matter experts, interest groups, and the public. Such a process helps to ensure that the proposed reform is informed by a diversity of opinion from actors with technical expertise and relevant experience. At the same time, it gives interested citizens an opportunity to "have their say" on the shape of the matter at hand.

Time is critical at this stage if deliberative values are to be served. The experience of the expert panel on local government recognition points to the way in which the scope for scrutiny and deliberation can be undermined by a rushed consultation process. Experts and stakeholders need sufficient time to prepare detailed submissions and to otherwise advise on the merits of a modest reform proposal. Allowing adequate time is also likely to foster a wider range of contributions, thus ensuring that a variety of policy and legal views is represented.

A balance must be struck, though, as too much reliance on expert and stakeholder views is undesirable. It may be that these groups will be better able to deliberate on complex issues due to their familiarity with the subject matter.[66] On the other hand, they might advance only a narrow set of views compatible with their self-interest, or be less likely to change their preferences in the face of opposing views.[67] Popular involvement in this issue-framing and question-setting stage, even on modest constitutional amendments, is crucial to moderating these pathologies of expert and stakeholder input. Accepting that citizens may have little motivation to contribute to debate on such technical issues, governments must ensure that any consultation process is accessible and inclusive. Consultations should be conducted in a wide range of locations (e.g., urban, regional, rural) to attract diverse input, and be promoted and publicized by government to ensure that people are aware that they are occurring.[68] The expert panel process on local government recognition fell short on both of these fronts. Further, it should be clear to the public how the views collected in the consultation program will inform government decision making, so that there is some assurance that elites and experts will be responsive to citizen input.

In Australia the issue-framing and question-setting stage does not cease with the completion of the work of an advisory panel, but instead proceeds to a phase where the reform proposal is considered by Parliament. It is here that law can be seen to help promote deliberative values, by requiring some measure of rational discussion in relation to the reform proposal.[69] In the Australian context this is achieved by section 128 of the Constitution, which requires that any proposal for constitutional amendment must be presented to parliament in the form of a bill, and passed by both Houses before being submitted to the people at a referendum. Beyond this legal stricture, deliberative ideals can be further served by good practice—namely, ensuring that the bill is not simply passed by rubber stamp, but is instead introduced in a manner that allows enough time for it to be scrutinized by a parliamentary committee and debated in the chamber.

The process outlined here accepts that political elites, experts, and interest groups will likely play a more prominent and influential role in the issue-framing and question-setting stage of a referendum on modest amendments. However, it does not do this in a way that excludes popular involvement or

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[66]Chappell, above n. 32, 35–36.
[67]Ibid.
[68]Lack of publicity was a major failing with respect to the consultations surrounding both recent expert panel processes in Australia.
[69]Tierney, above n. 7, 289–90.

entrenches elite dominance. It accepts a lesser role for citizens, but protects the legitimacy of the process by incorporating meaningful opportunities for popular input.

B. The referendum campaign

As the referendum process advances into the campaign stage, public education becomes the priority. The problem of elite domination is less acute here given that the referendum question has been set and no amount of input or influence can change that. At this stage in the process the goal should be to ensure that citizens have access to basic facts and a wide range of viewpoints so that they can develop a considered opinion on the issue before them.

Ultimately, the structures that can help facilitate this are very similar for both modest constitutional amendments and larger reform. Of course, any education campaign on the former will have a special focus on communicating in plain language the essence of a technical and (to the public) unfamiliar issue. And the importance of official information sources may be greater, given that media coverage of modest amendments may be more sparse than that for big-ticket reforms. But the fundamentals will be similar, and here legal rules have the capacity to both promote and undermine deliberative ideals. In Australia, for example, the distribution of information by the federal government is constrained by legislation in ways that arguably undermine public education. Strict spending caps are enforced, and the main source of voter information prescribed by the legislation is an adversarial "Yes/No" pamphlet that has been widely criticized for being confusing and ineffective.[70] In 2009 the House of Representatives Standing Committee on Legal and Constitutional Affairs recommended significant changes to these machinery laws, but to date few have been implemented.[71] Putting in place a regulatory scheme that gives the federal government sufficient funds and flexibility to run an effective education campaign would assist in giving citizens the tools to cast a considered vote on proposals for modest constitutional reform. It would also help citizens engage in what Goodin has called a process of "internal reflection," in which individuals can "deliberate" in their own minds as to the strengths and weaknesses of a particular proposal.[72]

C. The importance of flexibility

If we accept the need to design referendum process in a way that is responsive to the particular characteristics of modest constitutional amendment, we run the risk of devising rules and institutions that are inappropriate or even damaging with respect to other, more big-ticket reforms. For instance, it may not be desirable to establish an advisory panel process geared towards expert and stakeholder input if the proposed reform was of great public interest and concern. This points to the importance of flexibility in the design of referendum process—that is, being careful to set down rules and procedures that are capable of catering to different issues and circumstances.

In part, this will involve avoiding rigid legal rules, such as the strict spending limits referred to above. Instead, any legislative regulation should look to create a broad framework that could be applied effectively in diverse circumstances. One specific way in which this could be achieved is by incorporating into the referendum machinery laws the capacity for governments to establish a "Referendum Panel" to oversee public education initiatives.[73] Governments could deploy this body differently according to whether a proposed amendment was modest or big-ticket in nature. It could be in existence for a year or more if the government thought there needed to be a longer period of public debate and education; alternatively, its lifespan could be limited to the few months prior to the referendum poll if that was considered more appropriate. Similarly, governments could fund the Panel according to their assessment of the need for public education and engagement on the particular reform issue.

Importantly, allowing for flexibility in this way would not always result in less funds being devoted

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[70] *Referendum (Machinery Provisions) Act 1984* (Cth), s. 11. For a critique of Australia's referendum machinery laws see Paul Kildea and George Williams, "Reworking Australia's Referendum Machinery" (2010) 35(1) *Alternative Law Journal* 22.

[71] House of Representatives Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *A Time for Change: Yes/No?—Inquiry into the Machinery of Referendums* (2009).

[72] Robert E Goodin, "Democratic Deliberation Within" (2000) 29(1) *Philosophy & Public Affairs* 81, 81.

[73] Kildea and Williams, above n. 70.

to modest constitutional amendment. There may be situations, such as those canvassed in Part IV, where the salience of an issue or the depth of disagreement attached to it warrant a more expansive education and engagement program than would usually be associated with modest amendment. In this way, flexibility in regulation is a virtue not only for facilitating a process that is responsive to the differences between modest and larger reforms, but also for its capacity to cater to the differences that exist within the category of modest amendment itself.

VI. CONCLUSION

Modest constitutional amendments pose special challenges for proponents of participatory and deliberative referendum process. Their technical, specific, and remote nature make it less likely that citizens will take an interest in such reforms, and governments and media organizations are prone to respond to this by limiting the opportunities that individuals have to develop an interest in or understanding of the issues, or to have input into decision making. While misgivings about citizen willingness and competence are common amongst proponents of popular deliberation in politics generally, modest constitutional amendment is a special case in that it confronts us with especially "hard decisions" about whether one can draw the line between citizen and elite/expert/stakeholder engagement without undermining the democratic legitimacy of the referendum process. I have argued that, even in the hard case of modest constitutional amendment, this line need not be drawn in a way that surrenders deliberative ideals. I am willing to concede a lesser role for citizens on such issues, and to tolerate the responsibility for deliberation shifting more in the direction of political elites, experts, and interest groups. However, such a process need not exclude popular involvement. Central to achieving this delicate balancing act is putting in place a robust and flexible institutional and legal framework that fosters and protects participatory and deliberative ideals at different stages of the referendum process.

Address correspondence to:
Paul Kildea
The Law Building
University of New South Wales
Sydney NSW 2052
Australia

E-mail: p.kildea@unsw.edu.au