Political Representation as Interpretation: A Contribution to Deliberative Constitutionalism

Abstract: This article analogises political representation to legal interpretation. It then applies the analogy to the hitherto neglected question of what political representation means for deliberative constitutionalism. The upshot is a conception of deliberative constitutionalism that, while uncompromisingly grounded on the reasoned expression of the preferences of a polity's constituents through deliberative democratic institutional innovations, it mandates representatives to translate those preferences into general and abstract constitutional law. It thus enhances the deliberative contribution of citizens in the determination of constitutional meaning while preserving the value of representative institutions.

1. Introduction

Deliberative constitutionalism (DC) is a recent response to scholarly trend concerned with overcoming the constitutionalists' general neglect of the deliberative turn in political theory; it seeks to improve the rather unsystematic ways in which deliberative democrats have theorised constitutional matters (Worley 2009, Levy, et al. 2018, Kong and Levy 2018). Deliberative constitutionalists stress that deliberation should influence processes of constitution-making, and that constitutions should structure deliberative procedures of ordinary law-making and constitutional change. Finally, the literature is divided with regard to the institutional perspective from which DC is theorised: some take the judiciary and judicial adjudication as incarnating the idea, while others adopt the perspective of what we traditionally refer to as representative institutions. I position myself in the latter group.[1]

[1] I argued for this institutional perspective in [AUTHOR]

The existing literature is silent as to what political representation is or entails for DC. To fill this hiatus, this article proffers a two-pronged argument. It first develops an account of political representation understood as or analogised to legal interpretation. I call the analogy Political Representation as Interpretation (PRAI). I present PRAI as an instrumental metaphor that accounts for representative practices in democratic law- and constitution-making contexts. It also has normative value in setting limits to those practices. In a second step, I apply the analogy to DC.

Here is a succinct explanation of the first step. PRAI means that, placed in the extremes of the range covered by both categories, descriptive models of representation (e.g., Pitkin 1967, 60) function and limit representative practices in a way analogous to how accounts of interpretation putting emphasis on semantics limit interpretation to the description, discovery or uncovering of the linguistic meaning of legal a text (e.g., Solum 2010, 568). In turn, models of representation emphasising the independent judgement of representatives – particularly some versions of constructivist theories – function and limit representative practices analogously to how notions of legal interpretation emphasising pragmatics and creation consider that that there is no intrinsic semantic fact to the matter concerning what legal texts mean and that meaning is thus heavily dependent on usage. The term 'emphasising' is used in both cases since interpretations are never purely driven by semantics or pragmatics.

In the second step, I apply PRAI to DC. This yields a conception of DC whereby representatives should neither solely describe their constituency, nor purely construct/create its preferences, on pain of doing something else other than representing.[2] In each case, representatives would either fall short of fulfilling their duties of exercising their independent judgement as constitutional law-makers, or would be illegitimately

[2] Henceforth, 'preference(s)' stand for fully formed preferences and beliefs, following Martí (2006, 44).

replacing, as it were, their constituents' preferences with their own. Put differently, just as agents either purely explaining or purely creating are no longer interpreting but, in fact, describing or creating, legislators who either disregard the preferences of their constituents or assume that those preferences are only those they themselves create, are not representing either. PRAI constrains deliberative processes of constitution making so as to avoid those extremes. Deliberation, in turn, allows to publicly control that the constituents' preferences inform the process.

The upshot of this article is a DC that, while uncompromisingly grounded on the reasoned expression of the preferences of a polity's constituents through deliberative democratic mechanisms, it preserves the value of the independent judgement of representatives when translating those preferences into constitutional standards.

Two caveats apply before I proceed. First, I neither regard this as a new concept of representation nor am I interested in proving that interpretation and representation are conceptually linked. Given the lack of reflection on the matter by deliberative constitutionalists, and given the high level of scholarly disagreement regarding the concept of representation, I am more interested in what representation does for DC than in its conceptual analysis.[3]. Second, there is logical space for imagining a deliberative setting operated exclusively by citizens without the mediation of representatives. Yet, I here presuppose their existence. A different world without representative institutions may admittedly require something different than PRAI.

The article is as follows. Section 2 describes DC from the perspective of a discursive interaction between ordinary citizens and those we typically conceive of as their representatives. The section shows that deliberative constitutionalists have not considered political representation as part of their concerns.

[3] As for example, Saward (2010, 6).

Section 3 elaborates PRAI. It proceeds in two subsections. It begins describing the two terms of the analogy: legal interpretation and representation. (3.1). It then elaborates the analogy and gives reasons for its endorsement (3.2).

Section 4 applies PRAI to DC. The upshot is a DC that takes the reasoned preferences of constituents as objects that their representatives then turn into abstract and general constitutional norms. Accordingly, the reasoned expression of the constituents' preferences on constitutional matters, their transmission to representative organs, and the translation of those preferences into constitutional decisions, calls for a combination of democratic innovations at the level of the informal public sphere - most prominently what in deliberative theory is known as mini-publics — , and for dialogue, justification and decision-making at the level of the formal public sphere — most prominently by parliament.

Subsection 4.1 tackles a potential criticism. My focus on constituents and representatives seems to neglect the role that political parties inevitably play in contemporary democracies. I show, however, that DC is compatible with the position of parliament as an organ that, while dependent on the preferences of its constituents, must also account for the role of political parties programming the principles upon which interpretations of the popular will are made. I submit that just as methods of interpretation determining meanings for legal texts are ultimately grounded on moral and political principles, the meaning ascribed to the constituents' preferences by representatives also depend on the principles they commit to, some of which are personal, some of which are determined by party membership. This, which is usually seen as a limitation of representative democracies, makes sense in a DC theorised from the perspective of representative institutions. The publicly stated principles of parties frame the capacity of

representatives to either appeal to the unmediated will of the people or to simply decide with independence of the reasoned preferences of constituents on constitutional matters.

Because the overall argument is presented at a rather high level of abstraction, section 5 concludes by inviting scholars to work on research on institutional design that may turn a DC imagined from the perspective of representative institutions into something feasible.

2. Deliberative Constitutionalism and Political Representation

DC is a tag for a recent theoretical endeavour comprising at least three ideas (Worley 2009, Levy, et al. 2018, Kong and Levy 2018). First, it is a strategy for dissolving the tensions between democracy and constitutionalism (Worley 2009). Second, deliberation should influence processes of constitution-making, and constitutions should structure procedures of law-making and constitutional change (Kong and Levy 2018, 626). Finally, while there is an increasing interest in considering alternative forms of discourse generally used by nonjudicial institutions, deliberation, legal reasoning and adjudication are seen by some as analogous or mutually supportive argumentative and decision-making procedures (e.g. Dyzenhaus 2018, 56).[4]

Although with qualifications I cannot rehearse here, I am sympathetic to the first two tenets characterising this project. Valuing deliberation, however, does not necessarily implies equating legal reasoning with judicial adjudication.[5] I thus side here with those who think DC can also be theorised from the perspective of non-judicial institutions. This idea has a stronger and a weaker version.

[4] This view is not new, however. See, for example, Rawls (1996, 231-240), Eisgruber (2001, 3, 5), Habermas (1996, 279-280), Alexy (2005, 579), Mendes (2013).

[5] [AUTHOR].

The strong version is that DC *ought to be* theorised from the viewpoint of representative institutions. The weaker version is that DC *can* be theorised from such perspective. A strong version is warranted,[6] but there is no need to spend time arguing for it here. The weaker version, which I take as non-controversial, suffices for present purposes.[7] I thus proceed on the bases that we *can* theorise DC as manifested or incarnated in majoritarian representative procedures of deliberative constitution-making where the judiciary plays a less prominent role than the one it traditionally occupies in discussions about the institutional embodiments of deliberative democracy and constitutionalism.

The adoption of this institutional viewpoint raises a question hitherto neglected by deliberative constitutionalists and theorists of representation: what does it mean to represent citizens in deliberative procedures of constitution-making? The quandary is problematic, first, because there is no consensus on what representation is or entails. The notion is vague, ambiguous, and/or underspecified. Hence, deliberative constitutionalists seeking to answer whether constitutional change is representative will have to confront this conceptual muddle. Second, because there is something distinctively puzzling about procedures of constitutional change exercised by representatives: as the ultimate source of their competences lies in the very constitution being reformed, what explains the legitimacy of their actions?[8] Whose will – the constituents' or the representatives' - is the one enshrined in the constitution resulting from a deliberative process? Moreover, deliberative democratic representative procedures of constitutional change are affected by the 'scale problem' of deliberative democracy: 'if deliberation changes minds and positions as deliberative democrats expect … people who did not directly participate in

[6] [AUTHOR] and [AUTHOR].

[7] As manifested in the introduction to Levy, et al. (2018)

[8] The type of problem discussed by Gabrielle Appleby & Anna Olijnyk (2018).

the process do not have reasons stemming from deliberation itself to accept the outcome' (Parkinson 2006, 1).

To address these problems, the upcoming sections develop an analogy between legal interpretation and political representation. The analogy provides deliberative constitutionalists guidance, first, for imagining boundaries within which representative practices of constitutional change should take place. Second, it preserves the linkage between constituents and representatives even in contexts of constitutional reform. Third, it accounts for the role that the independent judgement of representatives plays in representative law-making procedures, which coexists with the need for preserving the preferences of their constituents. Finally, it informs research agendas on institutional design seeking to operationalise a representative DC.

3. Political Representation as Interpretation

This section analogises political representation to legal interpretation. After defining both terms (3.1), it then elaborates and defends the analogy (3.2).

3.1. Interpretation and Representation

Interpretation is a practice of meaning ascription or imposition. It is both a noun and a gerund, a procedural entity that culminates in the decisional act of imposing meaning on an object.[9] This description includes the idea of interpretation as a process and interpretation as the result of that practice, and it creates room for a range of positions whose poles are description and creation, resemblance and substitution.[10] It also accounts

[9] See, for example, Fish (1982, 211), Dascal and Wróblewski (1988, 203-204), Dworkin (1986, 52), Marmor (1992, 14-32), Raz (2009, 250, 268), Guastini (2015, 46), Chiassoni (2019, 3, 4).

[10] Ankersmit (2002, 108).

for the constraints of interpreters' abilities to either exclusively explain an object or to purely create a new one, or to draw a sharp line between those poles.[11]

Interpretation happens in a domain where the object whose meaning is being determined exerts a gravitational pull. Interpreters are trying, after all, to determine what *the object* means. We give meaning to those objects placed in a shared net of linguistic conditions without which we would likely talk past each other.

But interpretation is a not exclusively a backward-looking practice in search for essences or ostensive definitions. It is also a creative forward-looking practice. Pragmatics and context give interpreters room for looking at objects in different lights, sometimes taking them in directions different from the ones their authors or previous interpreters thought possible or even desirable. Hence, semantics inform description and constrain absolute creativity, pragmatics inform creation and constrain descriptivism. In the legal context, this is aptly captured by Chiassoni:

> [T]he meaning of legal provisions – what they communicate in particular contexts of use – neither is simply discovered, nor is a matter of wholesome creation, though it may involve significant pieces of interpretive creativity (2019, 9).[12]

This bears on political representation. To adapt a phrase by Ankersmit, this is where 'the [representative] and the [interpreter] meet'.[13] To determine how, we need to understand what representation is or does.

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[11] Although my take on interpretation is sympathetic to a legal realist view, it is compatible with a broader range of positions. See, Fish (1982, 211-212), Dworkin (1996, 52), Endicott (1994, 451), Goldsworthy (2003, 190), Guastini (2015, 47), Chiassoni (2019, Ch. 6).

[12] Also, Marmor (2005, 167)

[13] The bracketed words in Ankersmit's work are 'politician' and 'historian' (2002, 2).

Pitkin thought that there is 'no great difficulty about formulating a one-sentence definition of [the basic meaning of representation], broad enough to cover all its applications in various contexts'. Representation means 'as the word's etymological origins indicate, *re-presentation*, a making presen again' (Pitkin 1967, 8, Ankersmit 2002, 109).

But the fact is that this does not take us very far and that representation remains an essentially contested concept. (Pitkin 1967, 11, Brito Viera and Runciman 2008, 4, Rehfeld 2018, 219). Yet, as mentioned before, I am less interested in the concept of representation that in what representation does and, as the upcoming section explains, in what it does in democratic law-making contexts. In that vein, the idea of 'making present again' does say some things about its basic elements. Different conceptions emphasise these elements in different, sometimes even conflictive, ways. Hence, I discuss five elements: authorisation, accountability, expertise, participation and resemblance. These elements inform the four views or conceptions of representation I discuss subsequently.[14]

Authorisation is a formal feature of representation where individuals grant others the rights to make decisions on their behalf. Authorisation can take many different forms: lawyers are authorised by their clients to appear before a court, parents are legally authorised to act for their children, etc. In democratic contexts, elections play this role. Plus, the directness of election as a method of authorisation is usually complemented with the indirect selection of different decision-making bodies through appointment by elected officials or their surrogates (Brown 2006, 208).

A second element is accountability. It serves to formally push representatives to seek their constituents' approval in re-elections or, at least, to seek not to be punished by them by voting them out. Yet, it also aims at increasing the transparency with which

[14] Following Brown (2006, 208-221) and Pitkin (1967), respectively.

public officials operate, especially in matters of public expenditure. It is then a feature of representation inasmuch as representatives are trying to anticipate voters' attitudes when deciding how to act.

A third feature, participation, is not always seen as an element of political representation and it may even be antithetical to it. This is because representation is seen as a substitution or supplement to what constituents cannot do or express by themselves. Yet, because the very nature of representation is to make someone's preferences present *again*, those preferences must be manifested at some point in the process in order to consider it at least minimally representative. Without a minimum of participation, decision-makers would be acting without a mandate.

Another feature is expertise. Democratic representative governments must serve the interests of their constituents in conditions of limited access to the knowledge necessary for good decision-making. Expertise may be helpful to achieve decisions based on facts, information and knowledge. It prevents citizens from deciding against their own interests. Representatives either have more knowledge or have access to experts in a more direct way than their constituents. So, even if representation may exist without the need for experts, contemporary democracies strengthen their representativeness by including expertise as a way of deciding in ways that well-informed citizens would.

The final element is resemblance or similarity. Brown emphasises the type of demographic resemblance guaranteeing that 'representatives will spontaneously act in some way favourable to their constituents'. Descriptive representation, he says, 'appears today in the widespread notion that public officials should possess demographic characteristics similar to (or at least admired by) those they claim to represent' (Brown 2006, 218).

These five elements inform different views of political representation that Pitkin analysed under four different models: formalistic, descriptive, symbolic, and substantive (Pitkin 1967).

Formalistic views of representation underscore authorisation and accountability. Individuals thus become representatives when the mechanisms by which they acquire their right to adopt decisions for others have been activated. Authorisation and accountability differ, however, in the criteria by which individuals become representatives. Mechanisms of authorisation grant individuals the competence to act for others and to enforce their decisions whereas accountability gives constituents the ex-post possibility of examining the performance of authorised decision-makers. Yet, at the core of both categories is the idea that there is nothing particularly substantive about the evaluation that constituents make of their representatives.

Symbolic representation comprises ways in which the representative substantively stands for the represented. Representatives seek, through different activities, to elicit positive responses from their constituents, the success of which constitutes a positive measure of their performance. These evaluations can be different in nature. Expertise and accountability, for example, can be interpreted as symbolic inasmuch as representatives decide based on reasoned judgement and correct information which they later offer to their constituents.

Descriptive representation refers to the degree of similarity that constituents and representatives have. The more the similarity between representative and represented, the higher the compliance with this standard, the higher the degree of representativeness. Of course, resemblance can be interpreted differently depending on the metric of comparison, namely, preferences, desires, opinions, social perspectives, policy preferences, etc.

Finally, under substantive representation, the preferences of constituents matter for decision-making processes to the extent that those preferences contribute to getting their 'best interests' satisfied. Yet, representatives may disregard those preferences if, according to their own judgement, they lead to bad or inconvenient outcomes. Here the elements underscored are authorisation and expertise, inasmuch as experts acquire decision-making power on the basis of their knowledge but authorised through formal mechanisms. Moreover, their expertise underpins their imposition of decisions on others. Participation, accountability and resemblance, by contrast, matter less or are more difficult to be measured. Participation loses importance. What matters here is the determination of the best possible interests that constituents may have – interests ordinary citizens may not be able to grasp adequately. This can be a top-down process, to the detriment of participation. Accountability is also lost when the reasons that led an expert to decide in a given context may not be understood by the electorate.

3.2. Political Representation as Interpretation

The possible combinations of elements and views that may (or may not) be considered as 'representation' result in a surprising absence of precision in the literature attempting to understand this entity (Rehfeld 2018, 219).

PRAI is a way of mitigating this. It is as follows: models of representation closer to descriptivism can be analogised to accounts of interpretation stressing the discovery or retrieval of the linguistic meaning of a legal text. In turn, models of representation emphasising the independent judgement of representatives, such as symbolic or substantive views described above, may be analogised to notions of legal interpretation emphasising that there is no intrinsic semantic fact to the matter concerning what legal texts mean and that meaning is thus heavily dependent on usage. The reasoning is analogical in a broad sense: both categories are compared on the bases of, first, their

function – determining the meaning of X, where X stands for legal texts in interpretation and for preferences in representation – and, second, their limits – neither pure description nor pure creation in interpretation, neither pure imperative mandates nor pure independent judgement in representation. Interpretation and representation are, respectively, whatever happens in between those two poles.

From a democratic perspective, the analogy entails that in representation there is something or someone made present to others by virtue of an authorised relationship, in the context of a decision-making process. This implies, first, determining who or what is it that representatives are supposed make present again, and, second, translating the result of that process of retrieval into general and abstract law.

This does not mean that constituents are not themselves capable forming and expressing judgements on general and abstract standards. PRAI presupposes no such incompatibility. But my argument is focused on both the capacities and *duties* of representatives to do both things. Representatives – or more precisely the type of representative this article is concerned with – are also legislators, law-makers, and this marks a significant difference with the attitude that *could be expected* from citizens directly participating in deliberative settings.[15] While this is something one can *expect* from citizens, representatives *have* to do it. Whereas deviations from generality and abstraction can be accounted for as, say, unfortunate in the case of citizens, representatives' diversions from these demands of generality and abstraction can be accounted for as actual breaches of their duties.[16]

[15] How normatively strong the expectation shall depend, of course, on one's the theory of citizenship. Libertarians will expect less from citizens than, say, republicans.

[16] This explains, for example, the prohibition in several countries to pass bills of attainder.

The preceding paragraphs imply two things. First, that representatives must capture or build a network of meanings the source of which is not only their own understanding of what a correct collective decision is in a given context. They are mandated to make the preferences supporting such decision present *again.* Second, that representatives should strike a complex balance between capturing the preferences of their constituents and translating those preferences into something that, by way of abstraction, transcends them. They should then take distance from their constituency's preferences and position themselves as creators of laws appealing to society in its entirety and towards the future (Waldron 2009, 347). Political representatives thus impose meanings in the context of a decision-making process, the result of which cannot necessarily be anticipated by the citizens whose preferences they strive to make present again.

Put in the language of interpretation, PRAI is adamant that representatives are ascribing to *an object*.

Admittedly, not all views of representation set limits to what representatives can do. For example, formalistic notions of representation place 'all the rights at the representative's disposal and all the burdens on the represented' (Pitkin 1967, 20). They downplay any duty by the former to pay attention to the preferences of the latter once their mandate has been formally activated. Yet, some still call this *representation*.[17]

This is not the case for PRAI, which does not account for the entire range of practices we generally describe as representative of something or someone, some of which may be democratic, but others may not.[18] This, however, points at a feature more

[17] Not that calling Hobbes' an account of representation is not debatable. See Pitkin (1967, 34).

[18] Unlike, for example, Rehfeld, whose theory does account for non-democratic practices (2006). For a discussion of non-democratic forms of representation, see Apter (1968) and Saward (2008).

than a bug: by focusing on what in interpretation is an object and in representation the constituents' preferences, it accounts best for what representatives should do in contemporary democratic societies, that is, societies with representative institutions whose *raison d'etre* is their capacity to trace collective decisions to the will of those potentially affected by them (Tribe 1988, 10, Dovi 2018); to create what Böckenforde called a chain of legitimation (2017, 359). PRAI then functions as an indication that practices are representative inasmuch as their assessment shows that those making collective decisions with *erga omnes* effects are authorised by their addresses *and* that the authorisation is in somehow linked to the expression of their preferences. This feature circumscribes the practices and justifications suitable for rendering democratic law-making procedures representative. This is due to adopting an interpretive logic: whatever the meaning imposed and however abstract and creative the result, it must retain its connection with the object at hand.

A possibly criticism to my analogy is that keeping an eye on the constituents' preferences is impossible. Even the most perfect reproduction lacks the here and now of the object being reproduced. Because reproducing objects is subject to an inevitable loss of authenticity (Benjamin 1969), any interpretation that political representatives may make of their constituents' preferences will be either a substitute for what they already manifested in the first place or a distortion of what constituents think.

Critics present this problem in at least two different ways. Rousseau, for example, famously rejected representation due to its redundancy and its incapacity to live up to its own standards: were one able of capturing what the electorate prefers, then representation would become superfluous. If, on the contrary, we were not able to determine what those preferences are, political representation would be impossible (Rousseau 1997, 113-116, Ankersmit 2002, 111). More recently, Saward has championed

an influential constructivist version of these criticisms by challenging notions of representation that assume that knowability of preferences of the represented (2006, 306).

But these criticisms are misguided and generally overstated. Rousseau's is a poor description insofar as it limits representation to the translation of aggregated votes into collective decisions, as Wollheim's 'democratic machines' would operate (Wollheim 1964). This inadequate picture neglects a fundamental aspect of the job typically attributed to representatives, namely to create law, the most salient features of which are abstraction and generality. It is an essential part of representative law-making procedures that their outcome is *abstracted from* the specific preferences of concrete individuals.

It follows that Saward overstates the idea that the search for constituents' preferences must *'assume* a fixed, knowable set of interests for the represented' (2006, 301. Emphasis in the original). The fact that individuals' preferences some policy cannot be known by representatives does not debunk accounts of representation relying on their existence, since voting is not a transmission of orders to representatives about the specific policies voters prefer. Admittedly, votes give limited information. But this assumption does not warrant the claim that representatives cannot know anything about their constituents.[19] After all, the actions performed by representatives require them to take distance from the beliefs and preferences that constituents have on specific matters of policy. They produce law. They are law-makers, and law binds irrespective of the preferences of its addressees. Hence, representatives are both authorised and guided by the constituents' expressions of their preferences, but not in ways that one should assume those preferences can fully represent what constituents would think would they see themselves in the situation of deciding directly on this or that matter (Waldron 2016, 136).

[19] Among other reasons, because interpretations of the empirical meaning of voting are not independent of the normative theory used to understand such process. See, Cohen (1986, 34).

I give a central place to this dual logic. Representatives must find a balance between the preferences of their constituents, and their translations into abstract collective norms.

PRAI is then admittedly concerned with, driven and limited by how representation operates within democratic decision-making contexts.[20] It preserves both the explanatory/creative poles framing interpretive/representative processes. It is also particularly suited for and circumscribed by law-making, for it does not take constituents' preferences as mere information but rather as material that needs to be shaped and accommodated to the production of law.

While this functional orientation towards democratic law-making makes PRAI compatible with a range of understandings of representation, it also makes it incompatible with others. I already mentioned that although formalistic conceptions of representation account for the normative binding nature of the sovereign's commands, they disconnect the latter from the preferences of the former. PRAI cannot do this on pain of losing sight of the object whose meaning is being determined. So, for PRAI, authorisation is a necessary formal requirement for representation, but it is not a sufficient one.

Neither is PRAI exclusively committed to descriptive representation, whose key point is that representatives should have common interests or shared experiences with those they represent, so that the measure of their legitimacy is the accuracy of the resemblance between representative and represented. PRAI, by contrast, places a limited weigh on resemblance. Resemblance may indeed produce benefits: the reflected judgement of a 'similar' representative may be closer to the preferences of the represented. Yet, the knowability of the informed preferences of citizens should emerge

[20] Unlike, for example, Saward (2010, 15).

not from the personality or social conditions of the representatives, but from the procedure that led to those preferences' formation and expression.

PRAI thus operates within space opened between what traditionally is described as delegate or Rousseauian and trustee or Burkean conceptions of representation. Just as in interpretation, where she who *only* mirrors an object or creates a new one is not interpreting, she who claims to *only* create the preferences of those affected by the decisions adopted in a collective decision-making body, is not representing anymore.

Is PRAI normatively appealing? I believe so, for three related reasons. First, as already discussed: it gives a clear idea of the limits imposed on interpreters and representatives. Second, because understanding interpretation as essentially a decisional practice (Guastini 2015, 46) raises awareness about the also decisional aspects of political representation. PRAI then makes clear that any appeal to an unmediated and hence purely descriptive idea of the *will of the people* is far-fetched and deceitful, not because representatives may be ill-intended (although they may certainly be), but because of the properties of their practice. To the extent that representatives are seen as interpreters, it becomes clear that they lack access to unmediated pure knowledge of what the object of representation is, namely the preferences of their constituents.

This leads to the third reason. Because there is no such thing as the purely objective description of the interpreted object and, thus, no such thing as the pure description of the people's will, representatives must show why they adopt this or that interpretation of their constituents' preferences. For that, they will need to make explicit the lenses through which they read what citizens want or think, in the same way that interpreters must rely on methods of interpretation. Whether interpreters remain closer to either the descriptivist or the creative pole of the practice, it shall be manifested through their choice of an interpretive archetype (textualism, originalism, structuralism, etc.).

Depending on one's view on interpretation, the justification for choosing either of these methods will be either external to the interpretive practice (AUTHOR), or internal to it but allowing for a maximum of discretion. (Chiassoni 2019, 4, 157). Either way, that justification is a matter of providing political, philosophical, or moral reasons. The same goes for representation as interpretation: representatives must give meaning to their constituents' preferences not in in a vacuum, but in accordance to their own moral, philosophical or political convictions. Those convictions, due to their institutional position, should be made public. Deliberation, as the next section explains, is suitable for turning that expectation into something feasible.

4. Deliberative Constitutionalism and PRAI

Having elaborated the analogy, this section now addresses the question of what representation entails for DC. It does so by applying PRAI and by weighing the degree to which views of representation are modified by the inclusion of deliberative elements and, in turn, by the degree to which deliberative elements are qualified by inserting representation into the picture.

I theorise DC from the standpoint of representative institutions that, although driven by abstraction and generality, always rely on the people's preferences. This raises the question what type of deliberative process of constitutional change can be institutionalised that remains sensitive to the views of citizens affected by that change, while allowing formal decision-making bodies to abstract themselves from the constituents' views on what constitutional essentials are.

In my version, DC then provides citizens with the means to generate, articulate and express their views about constitutional matters in a more substantive way than just through voting. Subsequently, it should allow for formal decision-making procedures of constitutional law resulting in collective norms abstracted from, but traceable to those

preferences. This include procedures of debate on constitutional matters among citizens that make explicit what individuals consider as fundamental or constitutional values, as well as mechanisms of transmission of these ideas to the formal public sphere where decisions are made. What specific instrument, how can preference formation be realised and how such transmission may operate, may admit sundry institutional forms but, as I will explain, I am sympathetic to the use of certain deliberative innovations like mini-publics during the first stage and consider Parliament as a suitable organ for the latter part of the process.

The first stage is the constituents' preferences. Their formation and expression can be either about how to understand what a current constitution means, or about constitutional change. This change, in turn, can be an amendment or a new constitution. In either case, the preferences of the citizens are constructed and manifested in public procedures of discussion. One way of doing this, supported by social science, is through the implementation of democratic innovations providing occasions for citizens to debate political issues, with information, argument exchange, and reasoned justification, such as mini -publics.

Definitions of mini-publics abound (Ryan and Smith 2014). They range from expansive definitions including experiments as varied as planning cells, citizens' juries, consensus conferences, participatory budgeting, etc. (Fung 2003), to more restrictive ones, which limit mini-publics to deliberative polls. That is, to the random selection of 250-500 citizens brought together to deliberate in small groups, measuring preference transformation using opinion surveys. Experiences around the world show that deliberative procedures among citizens about constitutions and constitutional matters using these institutions are possible, and result in reasonable outcomes. Examples include

the 2010-2013 Icelandic Constitutional Process, the British Columbia Citizen Assembly on Electoral Reform, the Constitutional Convention of Ireland.

In my view, these mini-publics should not have the final say. They are best conceived of as part of a system of decision-making, the final stage of which is Parliament, for three reasons. First, because constitutional matters require a certain degree of calm and prudence. This is then a way of institutionalising deliberative constitutional change without necessarily building too short a path between citizens' immediate preferences and decisions. Deliberations on constitutional topics can be heated and distance between discussions and decisions is salutary.

Second, because, although their selection mechanisms (i.e. random sampling) are inclusive and egalitarian (Hendriks 2005), there is disagreement about whether results of a mini-public can be scaled up to society as a whole (Lafont 2015). This calls for caution. Mini-publics should then complement, not replace, majoritarian democratic procedures.

Third, because as I have insisted in this article, law-making involves abstraction: that citizens have concrete preferences on matters of constitutional design and fundamental rights express only side of what *the people* is. Put in Rosanvallon's terms, the electoral and the social people deliberating and transmitting their preferences for the sake of having representatives turning them into collective constitutional norms, must be complemented with a vision of what *the people* is as a principle in the constitution (2011, 130); as something more than the preferences of contingent present majorities.

DC is then dialogue by citizens with their representatives, about principles and objectives that transcend the citizens of here and now. Some think that such place is reserved for reflexive institutions like constitutional courts (e.g., Alexy 2005, Rosanvallon 2011). I think this is unnecessary; that this view tends to incur a nirvana

fallacy in the contrast between electoral majoritarian short-sightedness as opposed to, say, judicial principled deliberation (Waldron 1999). The shortcomings typically (and many times rightfully) attributed to majoritarian institutions are contingent upon their design and upon what we demand from them. Conceiving of majoritarian institutions so that they will be mandated to publicly deliberate, reason, argue for, and justify their decisions because their design and functional orientation compel their members to do so, is not an impossibility, but a matter of combining institutional imagination, incentives and social norms (Bowles 2016, Simler and Hanson 2018).

Hence, we must consider that because legislation is the product of collective and inclusive decision-making processes, laws can be taken to entail a claim to justifiability that can only be satisfied by reasons, the emergence of which calls for argumentative processes. The legitimacy of legislation should not be seen in an all-or-non-fashion. Legitimacy is gradual, and it is not exhausted by the operation of formal mechanisms giving origin to, say, statutes or decrees. It must also include the arguments justifying those decisions. We should expect discussion and justification from legislators, and this expectation should be even higher when concerned with constitutional matters, for they make the process of constituents' preference retrieval and their ensuing abstraction much more demanding.

Yet, as demanding as these institutional interplays may be, we know that the deliberation happening in a mini-public gives constitutional representatives good materials to work with: this initial deliberative process provides representatives with reasoned and deliberated arguments about what citizens consider constitutional essentials to be. They will have more material to interpret those considerations in their best light and abstract them with the purpose of legislating constitutional law.

4.1 What About Parties?

The following objection could be raised. PRAI and the institutional setting here discuss consider two actors: citizens and representatives. The first form their preferences and transmit them to their representatives, who decide accordingly. But, the objection would go, this fails to include important agents of contemporary democracies: political parties. Members of parliament are, as a matter of fact, not only responsive to their constituents but to political parties too. PRAI, a critic could say, seems to ask representatives to focus on only one of the sources of their programmes discursive, namely the people's preferences. Law-making (and constitutional law-making is no different in this regard) takes place between discursive and entrenched positions: open to change with regard to the constituents' preferences but entrenched with regard to parties (Schäfer 2017, 435). In short, representatives represent not only their constituents, but their parties as well. Or put differently, representatives interpret the preferences of their constituents through the lenses of their parties' ideologies.

But this oppositional logic poses no problem for PRAI. On the contrary, it strengthens it by making explicit the double role constitutional framers have of, on the one hand, paying attention to the preferences of their constituents as expressed in the deliberations taking place in the mini-public and, on the other, of abstracting them and deciding of constitutional decision-making in accordance with the ideological commitments of their parties.

This is a point where PRAI is clearly manifested: citizens' preferences and the subsequent interpretive abstraction from them are captured by the positional and discursive logic of modern party-based democracy with the advantage that the methods applied in the process of interpretation of the citizens' preferences must be openly acknowledged. In fact, given that the political commitments grounding the methods of

interpretation used by representatives are ultimately the ideological commitments of their parties, the lenses through which they interpret their constituents' preferences are publicly available.

This gives institutional form to a DC that, like in interpretation, shuns from merely describing its object. This calls for distrusting any politician's claim that they are merely reproducing the will of the people. Just as there is no such thing as an unmediated access to an object, no pure detached description (Weber [1904] 1949), there is no mirror of the people's will. DC thus comes to terms in normatively attractive ways with the fact that representative procedures create a distance from the preferences of their represented. Just as interpreters distance themselves from their object without leaving the orbit within which it exercises its gravitational force, representatives in DC keep in mind they are making someone's preferences present again before they abstract from them to make collective decisions.

This creates both freedom and constraints: the publicity that is inherent to deliberative democracy imposes a duty on constitutional decision-makers to make explicit that they interpret the preferences of their represented in this or that way, in accordance to these or those principles. They may be independent from parties and this may give them leeway to give a broader variety of reasons for their preferred interpretive method. Yet, if they belong to a political party, such membership not only is not problematic, but a possibility for citizens to access those reasons and ideological commitments, for example, through the parties' manifestos, political campaigns, participation in the media, etc.

5. Conclusion

This article examined political representation in DC by analogising it to legal interpretation.

Deliberative constitutionalists may here find arguments to consider the more democratic side of deliberative theory and to think of representation in constitutional matters. Moreover, theories of representation may profit from looking at representative procedures as interpretive phenomena. This standpoint has the advantage that it limits the practices that may count as cases of democratic representation to those that both respect the preferences of the represented and to those which, while taking those preferences seriously, still make room for the independent judgement of representative law-makers because the very nature of their job calls for this distance between representative and represented (AUTHOR).

I championed deliberative mechanisms of expressions of citizens' preferences on constitutional matters used for the generation of general and abstract constitutional norms by their representatives in public deliberative processes. Although it falls short of elaborating more specific institutional instantiations for DC and that it remains silent, for example, about the deliberative conditions that political parties must meet, it has remained at a level of generality that allows researchers to imagine such devices and to think about what those conditions are. In that vein, this paper positions itself *ad portas* of ongoing scholarly concerns on partisanship and its deliberative exigencies (White and Ypi 2011, Wolkenstein 2016). To what extent it may contribute to these debates must be left for another moment.

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