

State-of-the-Art: The Deliberative Constitutionalism Debate and a Republican Way Forward

1. Introduction

Recent scholarly publications attest that constitutionalists and deliberative theorists show growing interest in *deliberative constitutionalism*.¹ This theory brings together two fields in legal and political theory traditionally considered as in tension:² whereas constitutionalism is traditionally associated with curbs on majoritarian power,³

¹ See, for example, John Worley, 'Deliberative Constitutionalism' [2009] 2 (5) Brigham Young University Law Review 431, and, most prominently, two recent handbooks, namely, Ron Levy, Hoi Kong, Graeme Orr, and Jeff King (eds.), *The Cambridge Handbook of Deliberative Constitutionalism* (CUP 2018), and André Bächtiger, John Dryzek, Jane Mansbridge, and Mark Warren (eds.), *The Oxford Handbook of Deliberative Democracy* (OUP 2018), in particular, Kong and Levy's chapter). To my knowledge, the first to use the expression *deliberative constitutionalism* is James Bohman, 'Survey Article: The Coming of Age of Deliberative Democracy' [1998] 6 (4) *The Journal of Political Philosophy* 400, 413.

² Daniel Weinstock, 'Compromise in Deliberative Constitutionalism' in Ron Levy, Hoi Kong, Graeme Orr, and Jeff King (eds.), *The Cambridge Handbook of Deliberative Constitutionalism* (CUP 2018) 181; John Parkinson, 'Ideas of Constitutions and Deliberative Democracy and How they Interact' in Ron Levy, Hoi Kong, Graeme Orr, and Jeff King (eds.), *The Cambridge Handbook of Deliberative Constitutionalism* (CUP 2018) 246.

³ See, for example, Friedrich Hayek, *The Constitution of Liberty* (University of Chicago Press 1960) 205-219; Robert Shapiro, 'Polyphonic Federalism: State Constitutions in the Federal Courts' [1999] 87 (6) *CalLRev* 1409, 1438; Ronald Dworkin, *Taking Rights Seriously* (HUP 1978); Peter Jones, *Rights* (Macmillan 1994); Richard Bellamy, *Political Constitutionalism: A Republican Defence of the Constitutionality of Democracy* (CUP 2007) 92-107 without endorsing this view; Luigi Ferrajoli, *Principia Iuris: Teoria del diritto e della democrazia* (Laterza 2012); cf Weinstock (n 2) 182.

deliberative democracy is governed by radical ideals.⁴ That is, it demands that collective norms derive from the will of those individuals potentially affected by their enactment and enforcement through fair, open, egalitarian, and rational discussion.⁵

Contributors to this budding body of literature affirm that these tensions between democracy and constitutionalism and, more specifically, between deliberative democratic theory and constitutionalism, have led deliberative theorists to reflect on constitutional matters at high levels of abstraction,⁶ without always noting the heterogeneity of constitutional norms, generally overlooking ‘what is institutionally distinctive about

⁴ Jürgen Habermas, *Between Facts and Norms. Contributions to a Discourse Theory of Law and Democracy* (The MIT Press 1996) chapter 8; Bohman (n 1) 400); Joshua Cohen, ‘Reflections on Deliberative Democracy’ in Thomas Christiano and John Christman (eds.), *Contemporary Debates in Political Philosophy* (Wiley- Blackwell 2009): 247-263, 249.

⁵ See, for example, Bernard Manin, ‘On Legitimacy and Political Deliberation,’ 15 (3) *Political Theory* [1987] 338-368, 352; Joshua Cohen ‘Deliberative Democracy and Democratic Legitimacy,’ in Alan Hamlin and Philip Pettit (eds.), *The Good Polity* (Blackwell, 1989) 23; James Bohman, *Public Deliberation, Pluralism, Complexity, and Democracy* (The MIT Press 1996) 7, 9; Frank Michelman, ‘How can the People ever make the Law? (A Critique of Deliberative Democracy), LXXIV *The Modern Schoolman* [1997] 311-330; Bohman (n 1) 408-410; Jon Elster, ‘Introduction’, in J. Elster (ed.), *Deliberative Democracy* (CUP 1998); Samuel Freeman, ‘Deliberative Democracy: A Sympathetic Comment’, 29 (4) *Philosophy and Public Affairs* [2000] 371-418, 382; José Luis Martí, *La República Deliberativa* (Marcial Pons 2006) 92-93, 211.

⁶ Habermas (n 4); Carlos S. Nino *The Constitution of Deliberative Democracy* (YUP 1996); Jon Elster *Deliberation and Constitution Making*, in Jon Elster (ed.) *Deliberative Democracy* (CUP 1998); James Fishkin, ‘Deliberative Democracy and Constitutions’ in *What Should Constitutions Do?* Ellen Frankel; Miller Fred, Jeffrey Paul (eds.) (CUP 2011) 242-260; Gargarella (2014: 1-47, 3). Roberto Gargarella, ‘‘We the People’ Outside the Constitution: The Dialogic Model of Constitutionalism and the System of Checks and Balances’ 1 *CLP* [2014] 1-47, 3.

constitutions'.⁷ As a result, past contributions to deliberative theory, fundamental as they are, 'remained abstract and largely unmoored from specific legal and constitutional traditions'.⁸ On the other hand, constitutional theorists have resisted joining the influential deliberative turn in political theory of the last four decades.⁹ To these list of problems one could add that the important contributions by Habermas, Michelman, Nino, Rawls, Gargarella, Pettit, etc., ought to be actualised, so to speak, in light of the knowledge gained since deliberative democracy entered its 'institutional' or 'empirical' turn.¹⁰ This state-of-affairs in these different theoretical fronts has now prompted scholarly efforts to present deliberative constitutionalism as a distinct field, capable of dealing with these difficulties.¹¹

This article presents and discusses the state of the art in deliberative constitutionalism. It seeks to expound some its main tenets, to provide a critical analysis of those features and, in light of the weaknesses identified in that examination, to offer an alternative interpretation of deliberative constitutionalism allowing for the scholarly literature to move forward. That alternative interpretation is a republican account of

⁷ Ron Levy and Hoi Kong, 'Introduction', in Levy, Kong, Orr and King (eds.), *The Cambridge Handbook of Deliberative Constitutionalism* (CUP 2018) 1-13, 2.

⁸ Simone Chambers 'Deliberative Democracy Theory', 6 Annual Review of Political Science [2003] 310; Levy and Kong, *ibid* 2.

⁹ *ibid* 4.

¹⁰ E.g., Archon Fung, 'Survey Article: Recipes for Public Spheres: Eight Institutional Design Choices and Their Consequences', 11 (3) *The Journal of Political Philosophy* [2003] 338-367; Jonathan Kuyper, 'Democratic Deliberation in the Modern World: The Systemic Turn', 27 (1) *Critical Review* [2015: 53] 49-63; David Owen and Graham Smith, 'Survey Article: Deliberation, Democracy, and the Systemic Turn', 23 (2) *The Journal of Political Philosophy* [2015] 213-234, 213-214).

¹¹ Ron Levy and Graeme Orr, *The Law of Deliberative Democracy* (Routledge 2017) 4.

representative ongoing deliberation about constitutional politics. We can call this *republican deliberative constitutionalism*.¹²

I thus begin with an overview of the current state of the art that identifies three core ideas pervasive to current contributions to deliberative constitutionalism (Section 2): first, these accounts take seriously, and are affected by, the tensions between democracy and constitutionalism. Scholars deal with these issues mostly implicitly. This, with one important exception on which I shall focus here, namely, John Worley's seminal defence of what he refers to as a 'logical' compatibility between deliberative democracy and constitutionalism (2.1). Second, deliberative constitutionalists consider that deliberation should influence processes of constitution-making, and that constitutions should be set up to allow for deliberative procedures of ordinary law-making and constitutional reform (2.2). Third, although there is increasing consideration for forms of discourse practised by non-judicial institutions, deliberation and legal reasoning are still seen by some as analogous or mutually supportive argumentative procedures. As a result, these authors see the courtroom as the vantage point from which deliberative constitutionalism should be theorised (2.3).

Having described deliberative constitutionalism, I then provide a critical discussion of its first and third tenet, which I see as problematic and as hindering the literature from advancing (section 3). I first suggest that in its current state, and in its most articulated formulation, namely Worley's, deliberative constitutionalism falls short of unclenching the tensions between democracy and constitutionalism (3.1). Additionally, I will question the equation that some deliberative constitutionalists make between deliberation and legal reasoning and/or judicial adjudication (3.2).

¹² Henceforth, RDC.

These limitations invite further reflection. There are, of course, many ways of dealing with the two aforementioned problems, but I will suggest that reading deliberative constitutionalism through the lenses of republican theory is a well-suited strategy for the purposes of instantiating the law-to-deliberation/deliberation-to-law dynamic, as well as for easing the tensions between constitutionalism and democracy while voiding the tendency to equate deliberation and legal reasoning.

In that vein, the subsequent part presents RDC as an alternative providing useful tools for coping with the shortcomings currently affecting deliberative constitutionalism. The section first specifies the strand of republicanism I follow, which relies on an instrumental understanding of civic virtue, and then moves on to specify the elements comprised by RDC (section 4).

RDC has three elements: republicanism, ongoing deliberation on constitutional matters, and deliberative representation. First: republicanism. RDC takes seriously the constitutionalists' concern for safeguarding fundamental rights as well as the insistence by deliberative democrats that the correctness of collective decisions ought to depend on the discursive conditions of their adoption. Republicanism is the political theory that best instantiates these two aspects. Its understanding of political freedom and civic virtue call for the concurrence of the fundamental rights that constitutionalists hold dear and the political participation that deliberative democrats see as necessary to bring about and secure those rights. Republicanism is well-suited, in short, to bring together constitutionalism and deliberative democracy (4.1).

Second: ongoing deliberation on constitutional matters. RDC's reliance on deliberative democracy and on republican civic virtue commits it to a conception of constitutional politics understood as an ongoing practice of deliberation, rather than as a segmented process that confines constitutional deliberation and change to revolutionary

moments, as traditional understandings of constitutionalism have it. To justify this aspect of RDC, I will discuss Ackerman's influential distinction between normal and constitutional politics and justify the contention that constitutional politics can also take place during 'normal' times (4.2).

Third: deliberative representation. The discussion on the ongoing nature of constitutional politics sets the bases for answering the question of which institutional perspective(s) could be apt for theorising deliberative constitutionalism. RDC highlights the discursive exchanges between citizens and their representatives as an alternative to a more traditional reliance on judicial adjudication as the embodiment of deliberation. This warrants a research agenda centred on imagining mechanisms of deliberation and justification which may be used at the constitutional level by representative institutions and not exclusively or even foremostly by courts (4.3). I limit myself here to present such agenda, the specifics of which must be left for another moment.

The final part offers concluding remarks (section 5).

2. Deliberative Constitutionalism: A Description of the State of the Art

The editors of the *Cambridge Handbook of Deliberative Constitutionalism* introduce the volume by claiming that although deliberative democracy has been historically rooted in the history of constitutionalism, there are important respects in which constitutionalists have overlooked the influential deliberative turn in political philosophy of the past four decades.¹³ Scholars have instead generally focused on how governmental elites should

¹³ See Levy and Kong (n 7) and Levy and Orr, *ibid* (n 11) 4-5. As a critic puts it, 'over the recent years ... [deliberative democracy] has become the dominant tradition within political theory'. Marc Pennington, 'Democracy and the Deliberative Conceit', 22 (2) *Critical Review* [2010] 159-184, 159.

deliberate in a democracy,¹⁴ and on the mechanisms through which constitutions may limit the governed and oblige government to control itself,¹⁵ mostly by removing fundamental matters from political contingency.¹⁶

Deliberative constitutionalists, by contrast, see constitutional democracies as legal and political phenomena whose creation, interpretation and change ought to be guided by deliberation, reasoning and justification, thus strengthening the legitimacy and discursive correctness of the legal systems to which they grant validity. Additionally, they argue that constitutions should structure deliberative procedures of ordinary law-making and constitutional reform.

The theses presenting themselves as cases of ‘deliberative constitutionalism’ or falling under that label are too diverse to offer a single definition. My description of this developing body of literature will then focus on three tenets or desiderata present in the theory more or less ubiquitously. First, the theory is part of a broader and long-standing debate about how to dissolve the alleged internal contradiction between constitutionalism and democracy. Deliberative constitutionalism is both confronted with those tensions and seeks to offer solutions for them (2.1). Second, deliberative constitutionalists agree that deliberation should influence processes of constitution-making, and constitutions should be set up to allow for deliberative law-making procedures (2.2). Third, recent contributions to deliberative constitutionalism explicitly engage with the question of which fora are to be seen as instantiations of deliberative ideals. There is increasing

¹⁴ Ron Levy and Hoi Kong, *ibid* (n 7) 2.

¹⁵ James Madison *The Federalist* 51 (first published 1788, Basil Blackwell 1948).

¹⁶ Stephen Holmes, *Passions and the Constraints: On the Theory of Liberal Democracy* (UCP 1995); Mila Versteeg and Emily Zackin, ‘Constitutions Untrenched: Toward an Alternative Theory of Constitutional Design,’ 110 (4) *American Political Science Review* [2016] 657-674, 657.

interest in considering alternative forms of discourse by non-judicial institutions. Yet, deliberation, legal reasoning and adjudication are still seen by some prominent scholars as analogous or mutually supportive argumentative and decision-making procedures. This puts courts as privileged actors of deliberative constitutionalism (2.3). I now expound these tenets.

2.1. Feature 1: Relieving Internal tensions

Inasmuch as deliberative constitutionalism seeks to bring together a theory of democracy and some understanding of constitutionalism, it is confronted with the long-standing question ‘how to make compatible constitutionalism and democracy’. As it is well-known, constitutional democracy has been described as a paradoxical union of two contradictory principles and as oxymoronic.¹⁷ While democracies are predicated upon their capacity to trace the legitimacy of collective decisions to the will of those potentially affected by them, thus imputing the source of political power to the sovereign people,¹⁸ constitutionalism is identified with limitations on that power.¹⁹

¹⁷ Classic texts in this discussion are: Jon Elster, ‘Introduction’ in J. Elster and R. Slagstad (eds.) *Constitutionalism and Democracy* (CUP 1988) 1-18, 2; Stephen Holmes, ‘Precommitment and the Paradox of Democracy’ in Jon Elster and Rune Slagstad (eds.), *Constitutionalism and Democracy* (CUP 1988) 195-240; Stephen Holmes, ‘Gag rules or the politics of omission,’ ‘ in Jon Elster and Rune Slagstad (eds.), *Constitutionalism and Democracy* (CUP 1988) 19-58; Jürgen Habermas, ‘Constitutional Democracy: a Paradoxical Union of Contradictory Principles,’ 29 (6) *Political Theory* [2001] 766-781.

¹⁸ Andrew Rehfeld, ‘Representation Rethought: On Trustees, Delegates, and Gyroscopes in the Study of Political Representation and Democracy’, 103 (2) *American Political Science Review* [2009] 214-230.

¹⁹ See, for example, Friedrich Hayek, *ibid* (n 3) 155; Michael Dowdle and Wilkinson, ‘On the Limits of Constitutional Liberalism: In Search of Constitutional Reflexivity’ in *Constitutionalism Beyond Liberalism* (CUP 2017) 17-37. I will here refer to this version of constitutionalism as ‘traditional’. It includes, for instance, what some like Mark Warren call ‘liberal constitutionalism’, what Loughlin calls ‘negative

This contrast is a generalisation, but it rests on influential understandings of democracy and constitutionalism that, although criticised and revised by many scholars, with some even questioning its current impact,²⁰ remain the starting points for the construction of alternative proposals.²¹ As Dowdle and Wilkinson put it, the idea of constitutionalism as committed to the limitation of political power ‘has come to dominate the ‘comparative constitutional imagination’.²²

In its most basic formulation, then, the puzzle raised by the expression ‘constitutional democracy’ is why a nation that rests the legality and legitimacy of its collective decisions ‘would choose to constitute its political life in terms of commitments to an original agreement – made by the people, binding on their children and deliberately structured so as to be difficult to change’.²³

constitutionalism’ (2015: 8), and what some have referred to as ‘legal constitutionalism’, for example, Bellamy (2007: 1) and Tomkins (2001; 2010). Mark Warren, ‘Liberal Constitutionalism as Ideology: Marx and Habermas’, 17 (4) *Political Theory* [1989] 511-534; Martin Loughlin, ‘The Constitutional Imagination’, 78 (1) *The Modern Law Review* [2015] 1-25, 8; Richard Bellamy, *ibid* (n 3) 1; Adam Tomkins, ‘In Defence of the Political Constitution’, 22 (1) *OJLS* [2001] 157-175; Adam Tomkins, ‘The Role of the Courts in the Political Constitution’, 60 *University of Toronto Law Journal* [2010] 1-22.

²⁰ Martin Loughlin, *ibid* 24.

²¹ cf Michael Dowdle and Michael Wilkinson, *ibid* (n 19).

²² Michael Dowdle and Michael Wilkinson, *ibid* 33; Ron Levy and Hoi Kong, *ibid* (n 7) 2.

²³ Laurence Tribe, *American Constitutional Law* (2nd edn, The Foundation Press 1988) 10. See also Richard Bellamy, *ibid* (n 3) 90; John David Lewis, ‘Constitutions and Fundamental Law: The Lesson of Classical Athens’ in Ellen Frankel Paul, Fred Miller Jr and Jeffrey Paul (eds.), *What Should Constitutions Do?* (CUP 201) 242-260, 245). See also Jon Elster, *ibid* (n 17) 2, claiming that ‘[c]onstitutionalism refers to limits on majority decisions; more specifically, to limits that are in some sense self-imposed. The limits take a variety of forms. They can be procedural or substantive; they can block or merely slow down the process of legislative change’.

The blooming literature on deliberative constitutionalism is affected by this long-standing concern. The necessity to deal with that question is, however, more an implicit assumption in the recent literature of deliberative constitutionalism than an explicit concern.²⁴ There is however, one account explicitly dealing with the matter, on which I shall focus. In a seminal article, Worley explicitly argued that deliberative democracy and constitutionalism are ‘logically coherent’.²⁵ He argues for this logical coherence by rejecting two of main arguments claiming that democratic and deliberative principles are inconsistent.

First, Worley criticises the view that sees constitutionalism and deliberative democracy as presupposing different motivations of political actors, self-interest the former, some version of altruism the latter. For him constitutionalism does not entail that self-interest always motivates political agents. Additionally, he claims, the normative commitment of deliberative democrats towards justice or the common good is not a thesis about the actual motivations individuals have in democratic societies, but about the ‘motivations political actors must have if the ideal of deliberative democracy is to be actualized’.²⁶ To the extent that we conceive of these attitudes as regulative ideals we can consistently conclude that ‘constitutional democracy is not incompatible with deliberative democracy’s common good principle’.²⁷ Constitutionalism and democracy are, on that front, compatible.

²⁴ An exception, prior to the explicit advocacy for deliberative constitutionalism, is Samuel Freeman, *ibid* (n 5) 417.

²⁵ John Worley, *ibid* (n 1).

²⁶ *Ibid* 449.

²⁷ *Ibid* 451.

Second, Worley rejects the view that sees citizens in constitutionally limited democracies as entering decision-making processes with predetermined preferences on the one hand, and citizens in a deliberative democracy as willing to change their preferences in light of better arguments, on the other.²⁸ This portrayal of the discussion, he thinks, ‘overstates the role of preference transformation in deliberative democracy.’²⁹ For Worley, deliberative democrats do not need to endorse the preference transformation principle as long as decision-makers are ‘obliged to promote the public good rather than their individual self-interests’.³⁰

2.2. Feature 2: Deliberation to Law, Law to deliberation

Commentators present deliberative constitutionalism as a ‘hybrid of constitutional and deliberative democratic theory’ that provides a ‘more complete picture of constitutional legitimacy’.³¹ This leads to two groups of questions: first, ‘can deliberative democratic methods of constitutional lawmaking enhance the legitimacy of a constitution?’ (deliberation-to-law). Second, ‘can the practice and the effects of law, especially constitutional law, in turn enhance deliberative democracy?’ (law-to-deliberation).³²

Scholars give different versions of these ideas.³³ Cartier, for instance, understands deliberative constitutionalism as ‘a field of scholarship that attempts to infuse

²⁸ *ibid* 448, 451.

²⁹ *ibid* 451.

³⁰ *ibid* 452, 454.

³¹ Hoi Kong and Ron Levy, ‘Deliberative Constitutionalism’ in André Bächtiger, John Dryzek, Jane Mansbridge, and Mark Warren (eds.), *The Oxford Handbook of Deliberative Democracy* (OUP 2018) 626-640, 626.

³² *Ibid* 628; Ron Levy and Hoi Kong, *ibid* (n 1) 1.

³³ See Gabrielle Appleby and Anna Olijnyk, ‘Constitutional Deliberation in the Legislative Process’ in Ron Levy, Hoi Kong, Graeme Orr, and Jeff King (eds.), *The Cambridge Handbook of Deliberative*

constitutionalism with insights and teachings from deliberative democratic theory in order to strengthen the legitimacy of public power'.³⁴ In her view, it stands in two pillars: 'that state action must be limited and that all constituents of the state, together with its citizens, are partners in the delimitation and application of those limits'.³⁵

Walters, in turn, avows that deliberative constitutionalism encompasses three ideas. First, deliberative democracy 'should be extended to the practice of constitution-making'. Second, it is 'a strategy to be adopted in relation to the interpretation of existing constitutions, one that seeks to enhance deliberative democracy within a community'.³⁶ Third, what he calls "deliberation *about* law" – or "deliberation about legality" or "deliberation about constitutionalism".³⁷

Hence, deliberative constitutionalism is brought about and sustained by the reciprocal interaction of legal and deliberative elements. In turn, legal systems shape and secure the basic conditions under which proper deliberation is to emerge. This also works in the opposite direction: constitutional and legal orders must result from rational discussion among those individuals potentially affected by a constitution and by the laws to which it gives existence and validity.

Constitutionalism (CUP 2018) 88-100, 91); Joel Colón-Ríos, 'Deliberative Democracy and the Doctrine of Unconstitutional Amendments,' in Ron Levy, Hoi Kong, Graeme Orr, and Jeff King (eds.), *The Cambridge Handbook of Deliberative Constitutionalism* (CUP 2018) 271-281.

³⁴ Genevieve Cartier, 'Deliberative Ideals and Constitutionalism in the Administrative State' in Ron Levy, Hoi Kong, Graeme Orr, and Jeff King (eds.), *The Cambridge Handbook of Deliberative Constitutionalism* (CUP 2018) 57-71, 58.

³⁵ *Ibid* 71.

³⁶ Mark Walters, 'Deliberating about Constitutionalism' in Ron Levy, Hoi Kong, Graeme Orr, and Jeff King (eds.), *The Cambridge Handbook of Deliberative Constitutionalism* (CUP 2018) 167-180, 167.

³⁷ *Ibid* 167.

2.3. Feature Three: Institutional Perspectives

Scholars generally favour two main answers to which institutional perspective deliberative constitutionalism should adopt:³⁸ either the standpoint of representative institutions and the citizenry,³⁹ or the courts'. As I will explain in the next section, there are good reasons for preferring the former. Yet, prominent deliberative constitutionalists see legal and judicial reasoning as fit for framing disputes deliberatively.⁴⁰ The idea was championed by important scholars prior to the explicit support for deliberative constitutionalism,⁴¹ but it persists in contemporary scholarship.

³⁸ I say generally, because, for example, Eric Gosh includes mini-publics and Gastil and Hale focus on jury systems. Eric Gosh, 'Deliberative Democracy and the Counter-majoritarian Difficulty: Considering Constitutional Juries' [2010] 30(2) *Oxford Journal of Legal Studies* 327; John Gastil and Dennis Hale, 'The Jury System as a Cornerstone of Deliberative Democracy.', in *The Cambridge Handbook of Deliberative Democracy* (CUP 2018)

³⁹ For example, Gabrielle Appleby and Anna Olijnyk, *ibid* (n 33).

⁴⁰ This most likely derives from a more general tendency of focusing on courts as the centre of their reflections. Richard Fallon Jr., 'A Constructivist Coherence Theory of Constitutional Interpretation', 100 (6) *HarvLRev* [1987] 1189, 1189; Joel Bakan, 'Constitutional Arguments: Interpretation and Legitimacy in Canadian Constitutional Thought', 27 (1) *OsgoodeHallLJ* [1989] 123; Robert Post, 'Theories of Constitutional Interpretation', 30 *Representations* [1990] 13; Frederick Schauer, 'Judicial Supremacy and the Modest Constitution', 92 (34) *CalLRev* [2004] 1045; Victor Ferreres Comella, *The Constitution of Spain. A Contextual Analysis* (Hart 2013) 210. For a critical survey of these sorts of accounts, see Donald Bello Hutt, 'Constitutional Interpretation and Institutional Perspectives: A Deliberative Proposal', 31 (2) *Canadian Journal of Law and Jurisprudence* [2018] 235.

⁴¹ For example, John Rawls, *Political Liberalism* (Columbia UP 1996) 231-240; Christopher Eisgruber, *Constitutional Self-Government* (HUP 2001) 3, 5; Jürgen Habermas, *ibid* (n 4) 279-280; Stephen Macedo, 'Introduction', in Stephen Macedo (ed.), *Deliberative Politics: Essays on Democracy and Disagreement* (OUP 1999) 6; John Ferejohn and Pasquale Pasquino, 'Constitutional Courts as Deliberative Institutions: Towards an Institutional Theory of Constitutional Justice', in Wojciech Sadurski (ed.), *Constitutional*

Consider some examples. Dyzenhaus wonders ‘why [deliberative democrats] want to load reasoned justification ... with the weight of “democratic deliberation”’.⁴² For him, the divide is a distinction without a relevant difference; ‘the product of the usual academic narcissism of small differences’.⁴³ Allan, in turn, considers that ‘[t]here is ... no sharp division between political argument and legal reasoning; the latter is mainly more specific, attentive to the demands of justice in the particular case, having regard to the implications of previous practice’.⁴⁴ Crowe’s model of constitutional deliberation as dialectical equilibrium is also instantiated in or theorised from the courtroom, as it is meant to build ‘an accurate model of how judges actually decide constitutional cases’ so as to determine, in an informed fashion, what forms of reasoning are normatively desirable’.⁴⁵

3. Two Shortcomings

I do not see the idea that constitutionalism should incorporate deliberative elements as particularly problematic. This section thus critically reflects on the first and third elements

Justice: East and West (Kluwer 2002) 22; Robert Alexy, ‘Balancing, Constitutional Review, and Representation’, *ICON* [2005] 572, 579; Conrado Mendes, *Constitutional Courts and Deliberative Democracy* (OUP 2013).

⁴² David Dyzenhaus, ‘Deliberative Constitutionalism through the Lens of the Administrative State’, in Ron Levy, Hoi Kong, Graeme Orr, and Jeff King (eds.), *The Cambridge Handbook of Deliberative Constitutionalism* (CUP 2018) 44-56, 56.

⁴³ *ibid* Dyzenhaus (2018: 56).

⁴⁴ TRS Allan, ‘The Deliberative Constitution at Common Law’, in Ron Levy, Hoi Kong, Graeme Orr, and Jeff King (eds.), *The Cambridge Handbook of Deliberative Constitutionalism* (CUP 2018) 145.

⁴⁵ Jonathan Crowe, ‘The Role of Snap Judgements in Constitutional Deliberation: A Dialectical Equilibrium Model’, in Ron Levy, Hoi Kong, Graeme Orr, and Jeff King (eds.), *The Cambridge Handbook of Deliberative Constitutionalism* (CUP 2018) 166.

of deliberative constitutionalism described in sections 2.1 and 2.3, respectively. I show, first, that Worley failed to argue for the logical coherence of constitutionalism and deliberative democracy. As a result, the question how to make the two compatible remains open in the current state of the art (3.1). Second, I sound a note of caution for the idea that deliberation legal reasoning and/or adjudication should be equated. Consequently, deliberative constitutionalist should adopt a different institutional perspective (3.2). These critical observations to the present state of the theory warrant positive efforts of the kind I elaborate in section 4.

3.1. First Problem: Misrepresenting the Internal Tensions Between Constitutionalism and Deliberative Democracy

The first problematic aspect of deliberative constitutionalism is how the tensions between deliberative democracy and constitutionalism are portrayed. More specifically, Worley misrepresents the incompatibility between deliberative democracy and constitutionalism. What he is really contrasting is aggregative and deliberative democratic theories, not deliberative democracy and constitutionalism. As a result, he attacks a strawman.

This is clear in his citation of Miller,⁴⁶ which he quotes approvingly: ‘[i]n the liberal view, the aim of democracy is to aggregate individual preferences into a collective choice’.⁴⁷ However true, this contrast between aggregative and deliberative democracy does not track the tension between the latter and traditional accounts of constitutionalism; it is not the same divide in different terms. That citizens’ preferences are exogenous to

⁴⁶ John Worley, *ibid* (n 1) 447.

⁴⁷ David Miller, ‘Deliberative Democracy and Social Choice’, 40 (1) *Political Studies* [1992] 54, 55. My emphasis.

the decision-making process is a feature of aggregative democratic theories,⁴⁸ not of constitutionalism. The traditional model of constitutionalism is certainly compatible with both aggregative and deliberative democratic theories, as one can perfectly envision a deliberative democracy governed by a constitution where individuals deliberate and change their preferences as long as the issues discussed are not constitutionally entrenched, hence removed from democratic discussion. It is in this proviso – *as long as the issues discussed...* –, and not where Worley places the discussion, where the incompatibilities between democracy and constitutionalism manifest themselves. As a result, and despite Worley's efforts, the oxymoronic nature of the relationship between deliberative democracy and constitutionalism, remains and keeps affecting deliberative constitutionalism.

To be clear, I do not intend to present this criticism of Worley as a self-standing knock-down argument against deliberative constitutionalism. Rather, these reflections are meant to show that the most articulate discussion of one of the central problems for deliberative constitutionalists is limited and that, as a consequence, there is room for improvement.

3.2. Second Problem: Equating Legal Reasoning, Adjudication, and Deliberation

Another troubling feature of deliberative constitutionalism regards the relationships between legal reasoning, adjudication, and deliberation. This section, which builds on

⁴⁸ James Buchanan, 'Social Choice, Democracy, and Free Markets', 62 (2) *Journal of Political Economy* [1954] 114, 117; Robert Nozick, *Anarchy, State and Utopia* (Basic Books 1974) 57; Jon Elster, 'The Market and the Forum: Three Varieties of Political Theory', in James Bohman and William Rehg (eds.) *Deliberative Democracy* (CUP 1997); David Held, *Models of Democracy* (Polity 2006) 213; José Luis Martí, *ibid* (n 5) 213.

previous and more extensive work,⁴⁹ shows that the association between these terms is misleading and that, as a result, scholars are warranted in adopting non-judicial institutional perspectives for the theorisation of deliberative constitutionalism.

Commentators have extensively criticised perspectives that place courts as deliberative exemplars before deliberative constitutionalism was presented as a distinct field.⁵⁰ Yet, as I showed in section 2.3, deliberative constitutionalists have not abandoned this association.

My first contention is that although decisions adopted through legal reasoning do buttress the legitimacy of a constitutional system, the ways in which such reasoning processes operate should not be accounted for as deliberative. Deliberation and legal reasoning instantiate different principles in qualitatively different fashions.

Consider a practice taken as the exemplar of legal reasoning: judicial adjudication. The legitimacy of this practice is often said to rest on the capacity and duty of judges to engage in reasoning and argumentation, hear the parties before them, discuss

⁴⁹ I fully elaborate this argument in Donald Bello Hutt, *Measuring Popular and Judicial Deliberation: A Critical Comparison*, 16 (4) *ICON* [2018] 1121.

⁵⁰ For example, Richard Bellamy, *ibid* (n 3); Jeremy Waldron, *The Dignity of Legislation* (CUP 1999); Jeremy Waldron, 'Do Judges Reason Morally?', in Grant Hushcroft (ed.), *Expounding the Constitution: Essays in Constitutional Theory* (CUP 2011); Richard Bellamy, 'The Democratic Qualities of Courts: A Critical Analysis of Three Arguments', 49 (3) *Representation* [2013] 333; Maya Sen, 'Courting Deliberation: An Essay on Deliberative Democracy in the American Judicial System', 27 *Notre Dame Journal of Law, Ethics and Public Policy* [2013] 303; Donald Bello Hutt, 'Deliberation and Courts: The Role of the Judiciary in a Deliberative System', 152 (64) *Theoria* [2017] 77.

with them, bolster internal debate about the merits of those arguments, and issue justified decisions.⁵¹ Prima facie, these are deliberative desiderata.

But things are more complicated. Adjudication is not deliberation. Adapting Fuller's wording, it is not the only way to give 'formal and institutional expression to the influence of reasoned argument in human affairs.'⁵² Close inspection shows that the different stages of a judicial procedures fail to instantiate key deliberative ideals. First, at the beginning of the trial, the parties' arguments and preferences are likely to remain fixed — no one goes to court expecting to have their minds changed when confronted with the counterpart's arguments. Deliberativists, by contrast, expect procedures to increase information,⁵³ and to generate the institutional conditions for parties to be convinced by better arguments.⁵⁴

Moreover, deliberative procedures are supposed to generate epistemic and educative gains.⁵⁵ In court, however, such virtues are measured vis-à-vis other tribunals through the generation of reasoned precedents other judges may use in the justification of

⁵¹ For example, John Rawls, *ibid* (n 41) 231-240; Jürgen Habermas, *ibid* (n 4); Amy Gutmann and Dennis Thompson, *Democracy and Disagreement* (CUP 1996) 45; Robert Alexy, *A Theory of Constitutional Rights* (OUP 2002); Robert Alexy, *A Theory of Legal Argumentatio* (OUP 2009); Conrado Mendes, *ibid* (n 41); Maya Sen, *ibid* 304.

⁵² Lon Fuller, 'The Forms and Limits of Adjudication', 92 (2) *HarvLRev* [1978] 353, 366. Hoi Kong and Ron Levy intuit this difference: 'despite similarities, deliberative constitutionalism is not the same as dialogue theory'. *Ibid* (n 31) 634.

⁵³ Bernard Manin, *ibid* (n 5) 349; Carlos S. Nino, *ibid* (n 6) 117-128.

⁵⁴ Jürgen Habermas, *Legitimation Crisis* (Polity Press 1988) 108.

⁵⁵ Conrado Mendes, *ibid.* (n 41) 113.

their respective decisions.⁵⁶ From the parties' viewpoint, however, calling this learning and education is an overstatement.

Nor does it count as an example of deliberation when judges retire to discuss behind closed doors. Judges are expected to discuss in a collegial fashion, believing in a 'supra-individual good ... on which the external respectability of their decision will depend'.⁵⁷ Yet we cannot measure if their discussions are infused with cognitive modesty, or if they 'make themselves vulnerable to the scrutiny of their fellow colleagues'.⁵⁸ With few exceptions,⁵⁹ we do not know what goes on during this stage, because the very structure of judicial procedures bans parties from entering the forum where such virtues ought to be on display. By contrast, deliberativists are adamant that publicity is a condition for meaningful, impartial,⁶⁰ democratic deliberation.⁶¹ To be clear, there may be good reasons for including opacity during some parts of decision-making processes. My contention is that those reasons do not stem from deliberative democratic theory.⁶²

⁵⁶ Mendes, *ibid.* (n 41) 114.

⁵⁷ *ibid.* 134.

⁵⁸ *ibid.* 134; Cass Sunstein, *Legal Reasoning and Political Conflict* (OUP 2018) 4.

⁵⁹ Bob Woodward and Scott Armstrong, *The Brethren: Inside the Supreme Court* (Simon and Schuster 1979); Bruno Latour, *The Making of Law. An Ethnography of the Conseil d'Etat* (Polity Press 2009); André Rufino do Vale, *La deliberación en los tribunales constitucionales* (Centro de estudios políticos y constitucionales 2017); Dominique Schnapper, *Une sociologue au Conseil constitutionnel* (Gallimard 2010).

⁶⁰ Jon Elster, *ibid.* (n 6) 111.

⁶¹ Amy Gutmann and Dennis Thompson, *ibid.* (n 51) 128-164; Jürgen Habermas, *ibid.* (n 4) 183; James Bohman, *ibid.* (n 1) 402; José Luís Martí, *ibid.* (n 5) 93.

⁶² A possible exception to this argument is Elster's hourglass metaphor of public participation during constitution-making processes, where public involvement should be broad at the outset, then narrow during the phase of bargaining among interests, and then broad again at the end. But I do not consider this a

It is, then, not obvious that legal reasoning is tantamount to deliberation, at least as manifested in its most prominent instantiation, namely judicial adjudication. This finding justifies the contention, explored here in the following section, that representative institutions and the informal public sphere are also fora where the ideals of the theory may be incarnated. Future research on deliberative constitutionalism should pay attention to that possibility.

4. An Alternative: Deliberative Constitutionalism Through Republican Lenses

The preceding discussions showed first, that although scholars are pointing in interesting directions in bringing together constitutionalism and deliberation, there is plenty of room for further reflection. Second, that some commentators have mistakenly conflated the types of reasonings and justificatory practices habitually employed by jurists and judges with those valued by deliberativists. To the extent, however, that deliberative constitutionalism is to be instantiated, we should not look necessarily or even primarily at the courtroom.

We are thus left with the following picture: in its current state, deliberative constitutionalism a promising theory, but is not yet what its proponents claim it is: a ‘capacious yet no less determined rival to dominant theories’; a ‘meta-theory capable of unifying other constitutional theories about the legitimacy of public power arrangements.’⁶³

potential objection because the institutional settings Elster has in mind when using the metaphor are not judicial procedures. More prominently, but not exclusively, because unlike participants in a constitution-making-process, judges are not part of those potentially affected by their own decisions. Jon Elster, ‘Legislatures as Constituent Assemblies’, in Richard W Bauman and Tsvi Kahana (eds.), *The Least Examined Branch: The Role of Legislatures in the Constitutional State* (CUP 2006).

⁶³ Hoi Kong and Ron Levy, *ibid* (n 31) 627.

In this section I want to propose RDC as a possible way forward for deliberative constitutionalism. By tackling each of the problems discussed in section 3, RDC brings deliberative constitutionalism closer to its goals. But before I elaborate on its particulars, I must clarify some things about the type of republicanism I believe best advances the deliberative constitutionalist agenda, for republicanism is a heterogenous tradition. The strand that best fits the tenets of deliberative constitutionalism is called civic-republicanism or neo-republicanism, whose paramount values are political freedom as non-domination or structural independence from arbitrary or uncontrolled power,⁶⁴ and a certain instrumental interpretation of civic virtue. A demand, that is, for doing ‘one’s part in supporting the public good’.⁶⁵

Freedom as non-domination is the core republican value.⁶⁶ Some question whether the concept includes other competing notions, particularly freedom as absence

⁶⁴ This definition is purposively framed in broad terms. It is similar in spirit with Philip Pettit, *Republicanism: Republicanism. A Theory of Freedom and Government* (Clarendon Press 1997) 51-79; Quentin Skinner, *Liberty Before Liberalism* (CUP 1998) 70; Charles Larmore, ‘A Critique of Philip Pettit’s Republicanism’, 35 (1) *Noûs* [2001] 229, 229-230; Quentin Skinner, ‘A Third Concept of Liberty’, 117 *Proceedings of the British Academy* [2002]; Philip Pettit, ‘Keeping Republican Liberty Simple: On a Difference with Quentin Skinner’, 30 (3) *Political Theory* [2002] 339, 347; John McCormick, *Machiavellian Democracy* (CUP 2011) 145; Frank Lovett, ‘Republicanism’ (Stanford Encyclopedia of Philosophy [2014] <<http://plato.stanford.edu/cgi-bin/encyclopedia/archinfo.cgi?entry=republicanism>> accessed 16 June 2020; Frank Lovett, *A Republic of Law* (CUP 2016) 115.

⁶⁵ Frank Lovett, *Republicanism ...ibid.*

⁶⁶ Philip Pettit, *On the People’s Terms: A Republican Theory and Model of Democracy* (CUP 2012) 7.

of interference,⁶⁷ and some doubt the theory's distinctiveness.⁶⁸ These are important debates, but I do not enter them here, and instead rely on the consensus that freedom as non-domination is 'absolutely central to the contemporary civic republican program'.⁶⁹ But to the extent that critics are right and freedom as non-domination is not a uniquely republican idea, then my position would simply be re-described using different terms; the same *ideas*, especially freedom as non-domination, would still apply.

Things are more vexed with respect to the meaning and scope of civic virtue, so I should clarify the specific sense in which I apply it to. Civic virtue bears more significantly on my discussion, inasmuch as RDC finds in deliberative democracy the *locus* where virtuous civic disposition can be exercised.⁷⁰

In my view, civic virtue is an instrumental disposition to both contest and programme governmental policy with the goal of preventing domination. I thus take an instrumentalist approach that avoids republicanism's classical demands for citizens' identification with some form of higher-self embodied in a community,⁷¹ from strong forms of edificatory perfectionism,⁷² or from seeing politics as an intrinsically valuable

⁶⁷ Philip Pettit, 'Keeping Republican Liberty Simple ...', *ibid* (n 64).

⁶⁸ Allan Patten, 'The Republican Critique of Liberalism', 26 (1) *British Journal of Political Science* [1996] 25 ; Robert Goodin, 'Folie Républicaine', 6 *Annual Review of Political Science* [2003] 55.

⁶⁹ Frank Lovett, *Republicanism...* *ibid* (n 64); Philip Pettit, *ibid* (n 66) 5.

⁷⁰ I fully elaborate these links in Donald Bello Hutt, 'Republicanism, Deliberative Democracy, and Equality of Access and Deliberation', 84 (1) *Theoria* [2018] 83.

⁷¹ Jason Brennan and Loren Lomasky, 'Against Reviving Republicanism', 5 (2) *Politics, Philosophy, and Economics* [2006] 221.

⁷² I here use the term 'edificatory' in Kramer's sense. In his view these versions of perfectionism are meant to promote the edification of citizens living under the authority of a perfectionist state [that] treat citizens

component of human flourishing. That is, I distance myself from the so-called ‘civic-humanist’ republican tradition.

Rather, I see civic virtue as a condition for freedom that is compatible with individualistic or even pessimistic views about political engagement. By contrast, the instrumentality of virtue means that self-interested individuals will need to be attentive to other’s preferences and justify theirs to others if they want their arguments to win the day. The driving force behind the call for public engagement rest fundamentally on procedures and on the norms and incentives they produce, not on the expectation that virtue will be an attribute of every individual’s character. The account which I believe best fits what deliberative constitutionalists have been arguing should thus be appealing even to those who buy into egotistic moral and political anthropologies and are thus doubtful of the possibility of designing and implementing the types of policies that would be conducive to securing freedom through collective decision-making procedures.

Summing up, I understand republicanism as aiming at safeguarding individual freedom from the potential exercise of arbitrary power through institutional measures allowing citizens to be vigilant of each other’s preferences and actions. In contemporary politics, this calls for the implementation of mechanisms by which individuals may have access to the fora where those preferences are formed and employed as reasons for decision-making, as well as to the information about the consequences of their implementation.

RDC thus seems to me to capture the core principles that deliberative constitutionalists have advanced, while giving greater force to their arguments. The remainder of this article elaborates that republican alternative solution to the problems

in ways that show ‘an elementary lack of trust in their maturity as deliberative agents. Matthew Kramer, *Liberalism with Excellence* (OUP 2017) 251..

discussed in section 3. The proposal is a regulative ideal of deliberative democracy comprising three elements: republican constitutionalism, ongoing deliberation on constitutional politics, and discursive representative democracy.

4.1. Republicanism: Easing the tensions Deliberative Democracy and Constitutionalism

Section 3.1 showed that deliberative constitutionalists in general and Worley in particular, currently fall short of bridging constitutionalism and deliberative democracy. By inserting republican theory into the picture, this section suggests that we may ease their tensions more effectively — a constitutionalism centred on securing republican freedom and on implementing mechanisms allowing citizens to engage in public discussion about their common affairs, requires a deliberative democracy.

The wariness traditional understandings of constitutionalism show towards democracy derives from a distrust of majoritarianism.⁷³ This understanding of what constitutions do and of the dangers they are to prevent is at the core of the tension between constitutionalism and democracy. Hence, this section will explore these oft-invoked worries of majoritarian arbitrariness and show that republicanism is well suited to tackle them in ways that require the concurrence of constitutional regulations and deliberative democracy.

Several reasons justify the traditional use of constitutionalism to limit democratic government. The following have been particularly influential: we have no guarantee of either the efficiency or the justice of majoritarian procedures, for citizens are

⁷³ A fear well captured by Mill: ‘the people ... may desire to oppress a part of their number; and precautions are much needed against this as against any other abuse of power’. John Stuart Mill, ‘On Liberty’, in Stephan Collini (ed.) *On Liberty and other writings* (first published 1859, CUP 1989).

rationally and irrationally ignorant,⁷⁴ ‘licentious, stupid, short-sighted’.⁷⁵ Moreover, majoritarian voting procedures yield unfair and incoherent results; they fail to translate individual preferences into collective decisions that reflect those initial inputs,⁷⁶ and, in them, individuals lose the sense of responsibility that is inherent in private choice.⁷⁷ To the extent that democracies are detached from constitutional limitations, decisions are arbitrary and rights are jeopardised.⁷⁸ As Hume suggested, these concerns rest on a view of citizens as knaves.⁷⁹

Today, however, we have good reasons to reflect on what Hume also told us: that ‘it appears somewhat strange, that a maxim should be true in *politics* [that every man must be supposed a knave], which is false in *fact*’.⁸⁰ We know today that Hume’s puzzlement was warranted: it is *in fact* false that individuals are knaves. More precisely, individuals are neither purely self-interested, irrational and so on, nor completely altruistic or fully informed. Rather, we cultivate different dispositions in different

⁷⁴ Bruce Ackerman, *We the People: Foundations* (HUP 1991) 234-235; Thomas Christiano, *The Rule of the Many: Fundamental Issues in Democratic Theory* (Westview Press 1996) 105; Ilya Somin, *Democracy and Political Ignorance: Why Smaller Government is Smarter* (Stanford University Press 2013) 18-19; Jason Brennan, ‘How Smart is Democracy? You Can’t Answer that Question a Priori’, 26 (1-2) *Critical Review* [2014] 33; Jason Brennan, *Against Democracy* (PUP 2016).

⁷⁵ James Madison, ‘Who Are the Best Keepers of the People’s Liberties?’, in Ralph Ketcham (ed.) *Selected Writings of James Madison* (first published 1792, Hackett 2006) 227-229.

⁷⁶ Kenneth Arrow, *Social Choice and Individual Values* (YUP 2012).

⁷⁷ James Buchanan and Gordon Tullock, *The Calculus of Consensus: Logical Foundations of Constitutional Democracy* (Liberty Fund 2004) 37.

⁷⁸ Ronald Dworkin, *Sovereign Virtue. The Theory and Practice of Equality* (HUP 2000) 190.

⁷⁹ David Hume, ‘Essay VI: Of the Independency of Parliament’, in Eugene F. Miller (ed.) *Essays Moral, Political, Literary* (first published 1741, Liberty Fund 1987) 42. My emphasis.

⁸⁰ David Hume, *ibid.* My emphasis.

normative and institutional environments.⁸¹ Yet, talk of short-sightedness, ignorance, irrationality and self-interest downplays the role that institutions and norms have in shaping citizens' civic and moral dispositions.⁸² Few individuals are consistently self-interested. By contrast, we know that 'moral and other-regarding motives are common'.⁸³ Anthropological models based on pure self-interest are not only conceptually false and empirically rare,⁸⁴ but can be counterproductive for institutional design.⁸⁵ This of course, does not mean that human beings are angels; we are not.⁸⁶ It means that our actions are triggered and influenced by a variety of factors, norms, incentives and institutions, constitutions among them.

These findings suggest that traditional accounts of constitutionalism concerned primarily with limiting democratic power for the sake of controlling irrational majorities may be putting the cart before the horse. We are thus warranted in imagining majoritarian deliberative constitutional arrangements without falling into naiveté or wishful thinking.

⁸¹ Cass Sunstein, 'How Law Constructs Preferences?', 86 *GeoLJ* [1997-1998] 2637; Jon Elster, *ibid* (n 48) 15-16, 19; Félix Ovejero, *La Libertad Inhóspita. Modelos humanos y democracia liberal* (Paidós 2002) 178-179; Herbert Gintis, Samuel Bowles, Robert Boyd, and Ernst Fehr, 'Moral Sentiments and Material Interests: Origins, Evidence, and Consequences' in Herbert Gintis, Samuel Bowles, Robert Boyd, and Ernst Fehr (eds.), *Moral Sentiments and Material Interests: The Foundations of Cooperation in Economic Life* (CUP 2005) 3, 8; Samuel Bowles, *The Moral Economy: Why Good Incentives are no Substitute for Good Citizens?* (YUP 2016) 2, 3, 6, 14, 24, 35, 37; Félix Ovejero, *La deriva reaccionaria de la izquierda* (Página indómita 2018) 195, 271.

⁸² Félix Ovejero, *¿Idiotas o ciudadanos?* (Montecinos 2013).

⁸³ Samuel Bowles, *ibid* (n 81) 41.

⁸⁴ Samuel Bowles, *ibid* (n 81) 40-46.

⁸⁵ Samuel Bowles, *ibid* (n 81) 37.

⁸⁶ Kevin Simler and Robert Hanson, *The Elephant in the Brain: Hidden Motives in Everyday Life* (OUP 2018)

At the same time, because the cogency of those models hinges on securing adequate normative and institutional conditions, constitutional limitations become necessary too. One alternative, which reads democracy and constitutionalism as cooperating and thus, not in tension, is essentially republican and deliberative. The reasons are the following.

The constitutive features of republicanism and deliberative democracy call for institutions that rely on the participation and deliberation of citizens for their functioning and stability without considering them as purely altruistic and politically addicted, as it were. In turn, deliberative democracy demands collective decisions to be adopted via public discussion, with the inclusion of all potentially affected persons.⁸⁷ Such features find accommodation in republican schemes inasmuch as they do not necessarily rely on an excessive confidence that individuals will be willing to engage in politics for the sake of altruism or self-realisation.

Nor is republicanism tantamount to bare individualism, as freedom comes at a price. It requires citizens to be aware that freedom is conquered, that it ought not to be taken for granted, and that intersubjective or collective means towards its preservation should be adopted. Deliberative democracy provides the institutional means by which the preservation of republican freedom through a virtuous exercise of political rights of citizenship may obtain. Two reasons warrant this claim.

First, deliberation is linked to publicity, publicity to impartiality, and impartiality to a notion of the common good that is relatively independent of individuals' moral psychologies; they must consider others if they want to see their preferences win the day.⁸⁸ Second, ideal republican citizens are analogous to ideal democratic deliberators. Individuals are free from domination because they ideally possess the conditions

⁸⁷ Jon Elster, 'Introduction', in Jon Elster (ed) (CUP 1998) 8.

⁸⁸ Ibid 11.

necessary for them not to bow to others; they can stand their ground in the face of disagreement or change their preferences truly as a matter of judgement and choice.⁸⁹ Deliberative democracy is, in turn, concerned with generating spaces and facilitating free and equal discussions so that the arguments wielded, and the decisions adopted, avoid factual power imbalances and derive from intersubjective reasoning instead.⁹⁰

It can be readily seen how this mutually beneficial reading of republicanism and deliberative democracy relaxes the tension between the two, as it is less concerned with limiting the scope of topics available for public discussion than with securing the conditions under which that discussion is to be deemed as reasonable, fair, and legitimate. A republican deliberative constitutionalism thus takes seriously the danger of potential misuses of political power by putting into place safeguards guaranteeing that individuals do not see themselves governed by majorities who do not need to justify their preferences but merely vote for them.

4.2. Ongoing Constitutional Politics

The first element of the proposal here advanced entails that the content of constitutional law is determined by the exercise of democratic deliberation among citizens instrumentally (but reciprocally) safeguarding their liberty as non-domination. Yet, to the extent that deliberative constitutionalism is oriented towards guaranteeing freedom and that the price of freedom is, as the old republican adage has it, its *eternal* vigilance, it demands that the exercise of democratic deliberation at the constitutional level should be continuous, thus questioning the ‘classic readings of the modern

⁸⁹ Philip Pettit, *ibid* (n 66) 84.

⁹⁰ Bernard Manin (n 5) 352.

constitution that stress foundings, documents and births of constitutional orders in voluntaristic acts of rational agency'.⁹¹

Now, this emphasis on ongoing processes of constitutional deliberation could be deemed as more appropriate for ordinary legislation than for constitutionalism.⁹² But this is not necessarily the case. To show why, this section discusses the most articulated and influential thesis championing the idea that constitutional change is exceptional and limited to specific moments, namely Bruce Ackerman's. I will focus on one aspect of Ackerman's theory, namely the anthropological model underpinning his distinction between normal and constitutional moments. As we saw above, Worley hinted at this aspect when contrasting the anthropological models informing constitutionalism and deliberative democracy, alas in a misleading way. I here offer an account that better captures the core principles of deliberative constitutionalism.

A good starting point is Ackerman's assumption that 'lawmaking institutions [should be structured] in ways that make the best use of the existing supply' of public virtue.⁹³ Accordingly, he reserves deliberativeness to moments of higher law-making, where 'much of the softness of normal public opinions will dissolve [and where] [a]pathy will give way to concern, ignorance to information, selfishness to serious reflection on the country's future.'⁹⁴

⁹¹ Simone Chambers, 'Kickstarting the Bootstrapping: Jürgen Habermas, Deliberative Constitutionalism, and the Limits of Proceduralism', in Ron Levy, Hoi Kong, Graeme Orr, and Jeff King (eds.), *The Cambridge Handbook of Deliberative Constitutionalism* (CUP 2018) 257.

⁹² I thank Dimitrios Kyritsis for raising this objection.

⁹³ Bruce Ackerman, *ibid* (n 74) 236.

⁹⁴ *ibid* 287.

In these periods, representatives and citizens speak a common language refining and renewing their constitutional pre-commitments.⁹⁵ Constitutional moments are thus exceptional in that citizens are more active and less apathetic than during normal times.

Yet the view of citizens as largely apathetic and politically inactive during normal politics seems to take for granted that this is how individuals act regarding public affairs and does not give enough weight to the role that institutions, social norms, and incentives play in framing citizens' public and private dispositions.

I say 'enough', because Ackerman does acknowledge that higher law-making is triggered by an *institutional* (mainly judicial) reluctance to enact policies which the citizenry eventually learnt that it desires to implement.⁹⁶ Ackerman thus recognises the role that institutional design has for triggering dialogue and for wakening citizens from their slumber. Yet, while admitting this, he is also adamant that he relies on a 'realistic sense of the limited supply of citizenship that is available in normal politics',⁹⁷ as if such supply was a given.⁹⁸ This is where we depart.

His assumptions are mistaken. They treat virtue and its reproduction as costly, as if it was a consumption good. But virtue is not something individuals store and that runs out once consumed, as it were. By contrast, virtuous activities such as political participation have uncommon characteristics in terms of the effects produced by their exercise.⁹⁹ While consumption goods produce initial feelings of satisfaction that decrease

⁹⁵ *ibid* 288. I am here adapting Ackerman's words. He speaks of the *American* government.

⁹⁶ *ibid*

⁹⁷ *ibid* 236.

⁹⁸ In the same vein, James Buchanan and Gordon Tullock, *ibid* (n 77) 26; Philip Pettit, *ibid* (n 76) 18, 227.

⁹⁹ Richard Solomon and John Corbit, 'An Opponent-Process Theory of Motivation', 68 *The American Economic Review* [1978] 12.

with each use or intake of additional units (the law of diminishing marginal utility), activities like participating in politics, deliberating, playing musical instruments, learning languages, nurturing friendships, etc., they are initially ‘costly’, but their execution produces an increase of the experienced satisfaction. Sundry activities become satisfactory as the result of promoting personal contact with others which may not necessarily be economic satisfactions. They are often outside the sphere of economic calculation.¹⁰⁰

The second error lies in the idea that because virtue is a scarce resource, then public institutions should be designed under the assumption that citizens will be not willing to participate in them. As I have suggested above, this puts the cart before the horse. First because, as we have said, talk of scarcity of virtue is misleading. Second, because this unwarrantedly downplays the possibility that the configuration of institutions may encourage participative dispositions. It ignores the fact, once more, that the ‘costs’ we attribute to political activities are not independent of our institutional designs. Paraphrasing Ovejero, if institutions are deaf, nobody will take the time to speak to them.¹⁰¹

I must be careful, however, not to overstate my criticism. By discussing Ackerman, I seek to cast doubts on conceptions of constitutionalism that fraction constitutional dialogue on the grounds that there is something such as scarcity of virtue. Implementation of deliberative mechanisms by which citizens may discuss constitutional matters should not be made under the assumption that there will eventually be certain moments when ‘enough’ virtue will be available. But I must be clear: Ackerman’s model

¹⁰⁰ Tibor Scitovsky, *The Joyless Economy. An Inquiry into Human Satisfaction and Consumer Dissatisfaction* (OUP 1976) 83-84.

¹⁰¹ Félix Ovejero, *ibid* (n 81) 178-179. See also Jürgen Habermas, *ibid* (n 4) 298.

of citizen is to a large extent compatible with the kind required and fostered by the republican account here proposed. My contention is, instead, that he does not give enough weight to the reasons why constitutional deliberation could also occur during normal politics.

4.3. Democratic Representation and Deliberative Reasoning. Bases for a Research Agenda

This final section addresses the question of what institution would best reflect a change of perspective that moves away from courts, and which type of discourse ideally embodies it.¹⁰²

The republican aspects of my account give the citizens themselves an important instrumental role in safeguarding their own freedom. Accordingly, we should ask whether and how RDC is able to incorporate that dimension. One answer consistent with this orientation looks at the relationship between the two most obvious candidates for institutional instantiations of the ideals here championed. These are well captured by Habermas's notions of the informal and the formal public sphere, and by the desideratum that 'formally institutionalized deliberation and decision must be open to input from informal public spheres'.¹⁰³ In short, the main actors of RDC are citizens and their representatives. Such relationship must be accounted for by a conception of political representation that give expression to an ongoing process of constitutional deliberation and to the safeguard of rights and liberties in a republican sense. Such process ought to

¹⁰² I argued for a change of perspective from which legal theory and constitutional interpretation should be theorised in Donald Bello Hutt, *ibid* (n 40).

¹⁰³ William Rehg, 'Translator's Introduction,' in Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (The MIT Press 1996) ix-xliii, xxxi.

include the participation of citizens and it must account for representative institutions as normatively valuable.

The topic merits an examination I cannot fully provide here; theories of representation are too diverse.¹⁰⁴ There is also a great deal of imprecision in the literature analysing the concept of representation, and one subsection is not the place to solve this problem.¹⁰⁵ What can be said is that, fortunately, contemporary democratic theory encourages a revision of the idea of representation that allows us to understand it as more than as a necessary evil or a second-best and that sees the relationship between citizens and representative institutions normatively as a dialogical continuum, rather than as a solution for practicalities of scale.¹⁰⁶ This warrants a research agenda that should ideally focus on building argumentative and justificatory models of representative deliberation.

One important case of that literature, which I am inclined to side with and which I believe to be well suited for RDC, is Urbinati's notion of representation as advocacy.¹⁰⁷ Her conception accounts for and justifies a compatibility between representation in the formal public sphere and deliberative public speech in the informal public sphere, by looking at speech as a means of mediation that belongs to all citizens, 'linking them and separating them at the same time ... [giving] meaning to voting, which presumes

¹⁰⁴ For classic discussions on the concept of political representation, see Hanna Pitkin, *The Concept of Representation* (University of California Press 1967) and Bernard Manin, *The Principles of Representative Government* (CUP 1997).

¹⁰⁵ Mónica Brito Viera and Davic Runciman, *Representation* (Polity Press 2008) 4; Andrew Rehfeld, *ibid* (18) 216; Andrew Rehfeld, 'On Representing', 26 (2) *The Journal of Political Philosophy* [2018] 219.

¹⁰⁶ Unlike, for example, Axel Tschentscher, André Bächtiger, Jürg Steiner, and Marco Steenbergen, 'Deliberation in Parliaments: Research Objectives and Preliminary Results of the Bern Center for Interdisciplinary Deliberation Studies' 4 (1) *Legisprudence* [2010] 14.

¹⁰⁷ Nadia Urbinati, 'Representation as Advocacy', 28 (6) *Political Theory* (2000) 758, 765.

evaluation and discrimination among articulated opinions...'¹⁰⁸ The nature of that linkage is not personal, but discursive. Under this view, citizens' participation in politics is not seen as the mere pursuance of having their preferences individually fulfilled by representatives in parliament, as theories competing with deliberative democracy would have it.¹⁰⁹ Social theory has shown the problems with this type of conceptions and they should be taken seriously.¹¹⁰ Rather, the linkage is discursive, because it requires representatives to take those preferences as material for deliberation and posterior decision-making, translating the former into general and abstract norms applicable to the citizenry in its entirety.¹¹¹

This discursive conception of political representation is adamant that the legitimacy of lawmaking is subject to conditions of rationality and justification that should be present at both the informal and the formal public sphere. Ideally, those processes ought to have incorporated the preferences of all the individuals potentially affected by a collective decision, while giving representatives the task of translating those preferences into binding *general and abstract* decisions, the legitimacy of which will to a great extent depend on whether they are appealing to their addressees because the process that lead to their enactment complied with reasonable deliberative standards.

Although this notion of representation particularly strengthens RDC, it is liable to criticisms from alternative conceptions, most prominently, perhaps, from some

¹⁰⁸ *ibid* 758-786, 765.

¹⁰⁹ For example, Joseph Schumpeter, *Capitalism, Socialism and Democracy* (Routledge 2003) and Robert Dahl, *Democracy and its Critics* (YUP 1989), respectively.

¹¹⁰ Kenneth Arrow, *ibid* (n 76).

¹¹¹ I fully elaborate this idea in Donald Bello Hutt, 'Political Representation as Interpretation: A Contribution to Deliberative Constitutionalism, *Ratio Juris* [forthcoming].

constructivist theories. These theories prize the capacity of representatives to not only frame but to create the preferences of their constituents.¹¹² That is fine for RDC, for insofar as it takes the citizens' preferences on constitutional matters as material to be translated into collective decisions, there is also a constructivist undertone to it. Yet, some take an extra-step and straightforwardly assume that such preferences cannot be known.¹¹³ The representative is, thus, charged with bringing about those preferences and presenting them to their constituents. This is an important objection that deliberative theories such as the one here defended need to take seriously. The answer is, broadly, that such theories fail to understand the normative and informational value of voting, as limited as it may be. Here, however, I must limit myself to present the problem in the form of suggestions for further research.¹¹⁴

There are important efforts to instantiate conceptions of representations compatible with the one here sketched. It suffices to say that RDC understands representative lawmaking in admittedly demanding ways that require the capturing of the preferences of citizens about constitutional issues, and the translation of those preferences into general and abstract constitutional norms. At this point, it seems to me that the next stage of RDC research should involve the articulation of models of deliberation and justification centred on the relationships between ordinary citizens in the informal public

¹¹² See, for example, Richard Ekins, *The Nature of Legislative Intent* (OUP 2012) 161.

¹¹³ Most prominently Michael Saward 'The Representative Claim', 50 (3) *Contemporary Political Theory* [2006] 297, 302. For a useful description of different branches of constructivism, see Chiara Valentini, 'The Legislative Assembly and Representative Deliberation', 64 (1) *The American Journal of Jurisprudence* (2019)

¹¹⁴ Some of which aims in the direction here See, for example, Luc Wintgens, 'Legisprudence as a New Theory of Legislation', 19 (1) *Ratio Juris* [2006]; *Constituent Assemblies*, Jon Elster, Roberto Gargarella, Vatsal Naresh, Bjorn Erik Rasch (eds) (CUP 2018)

sphere and their representatives,¹¹⁵ considering that ordinary and constitutional politics are closer than often acknowledged. This is the natural consequence of, on the one hand, giving up on legal reasoning and judicial procedures as ideal incarnations of deliberative principles, and by contrast, of putting the premium of constitutional deliberation on citizens and their representatives, on the other.

To the extent that deliberative constitutionalists seek to take both terms of the theory seriously, they must reflect on what discursive procedures and what type of argumentative and justificatory schemes are the ones that can be demanded from our representatives. There are some efforts in that direction.¹¹⁶ Determining to what extent they embody RCD requires further reflection.

5. Conclusion

Current developments in political and constitutional theory are leading constitutionalists and deliberative democrats to champion the idea of a deliberative constitutionalism. I critically examined what I take to be the three more salient features advanced by those adhering to this project: the need for relieving the tension between deliberative democracy and constitutionalism, the desideratum that deliberation qualifies procedures of constitutional creation and reform and for constitutionalism to give way to deliberative procedures of lawmaking, and the idea that legal reasoning embodies deliberative ideals.

¹¹⁵ See, for example, Jon Elster, Roberto Gargarella, Vatsal Naresh, Bjorn Erik Rasch, *ibid.*

¹¹⁶ E.g. Luc Wintgens, *ibid.* (n 113); Daniel Oliver-Lalana, 'Foreword: Towards a Theory of Legislative Argument', 4 (1) *Legisprudence* [2010] 3; Daniel Oliver-Lalana, 'Le importa a alguien que los legisladores razonen? Sobre el análisis y el control del debate parlamentario de las leyes', 57 (2) *Revista da Faculdade de Direito da Universidade de Lisboa* [2016] 5.

I then argued that these important developments in constitutional theory and deliberative democracy are in need, nevertheless, of further reflection and elaboration. As it currently stands, deliberative constitutionalism falls short of unclenching the tensions between deliberative democracy and constitutionalism, and it tends to unwarrantedly associate legal reasoning with deliberation.

Finally, I offered an alternative version of deliberative constitutionalism. Reading deliberative constitutionalism through republican lenses is one way out of the difficulties exhibited by current versions of the theory. I have championed this strategy as an avenue facilitating advances in the scholarly literature in deliberation and constitutionalism and as an innovative application of republican ideas to an emergent and relevant scholarly field in constitutional theory. Moreover, the overall argument sets the bases for a research agenda seeking to develop argumentative models of justification for constitutional ongoing deliberation in representative institutions. This is consistent with the directions that the different bodies of literature here analysed are currently taking. That is, a direction towards understanding constitutionalism as something more than a limitation of political power, as traditional accounts of constitutionalism have it, without giving up on constitutionalists' concern for safeguarding fundamental liberties.

Acknowledgements:

The author wishes to thank the reviewers as well as the editorial team of *Jurisprudence*. I am also very grateful to Dimitrios Kyritsis, Chiara Valentini, Adrian Blau, Ana Cannilla and Jeff King for their help, reading, commenting and criticising earlier versions of this article. The manuscript was presented and discussed at the Universidad Nacional de Cuyo (Mendoza, Argentina), the Seminario 3 of the Universidad Alberto Hurtado (Santiago, Chile), the Seminario Austral (Valdivia, Chile), the seminar of the Cátedra de cultura jurídica (Universidad de Girona, Spain), and the research seminar series in philosophy of law organised by the Centre for Research in the History, Philosophy, and Sociology of Law and in Computer Science (CIRSFID) (University of Bologna). The manuscript was written during my time as a visiting researcher at the Tarello Institute for Philosophy of Law in Genoa and the Faculty of Laws at University College London in the winter of 2019-2020.