Legal Studies, Vol. 35 No. 4, 2015, pp. 720–730
DOI: 10.1111/lest.12102

REVIEW ESSAY
Undemocratic deliberation

Joshua Braver*

Constitutional Courts and Deliberation Democracy, by CONRADO HÜBNER MENDES. Oxford: Oxford University Press, 2013, 272 pp (£50.00 hardback). ISBN: 978-0-19-967045-1.

While many normative accounts of judicial review are premised on the deliberative capacity of courts, they rarely specify in what this deliberation consists. They hastily move from the judiciary's tenure, indirect method of selection and reason-giving requirements to conclude that courts are deliberative. By calling upon the extensive literature on deliberative democracy, Conrado Hübner Mendes aims to provide a richer and fuller account of deliberation within constitutional courts.[1] Indeed, he provides the most rigorous and comprehensive account of the practice available today. His contribution is to forge 'an evaluative model' of a court's deliberative performance to provide a guide how to 'invigorate their deliberative capabilities and performance'.[2]

The model specifies that a deliberative court is 'is one that maximizes the range of arguments from interlocutors by promoting public contestation at the pre-decisional phase; that energizes its decision-makers in a sincere process of collegial engagement at the decisional phase; and that drafts a deliberative written decision at the post-decisional phase'.[3] This deliberation will help the court reach a better decision; narrow the range of disagreement; ensure that all arguments are addressed; and communicate respect to the judges, litigants and the larger public sphere.[4] In this deliberation, judges should strive, within reason, to reach agreement so as to forge a unanimous opinion.

Mendes does not fetishise deliberation as an end in and of itself, but rather as a means to make better decisions. He acknowledges that in urgent situations a quick decision is more important than deliberation and that judges may need to calibrate decisions to minimise backlash and resistance.[5]

My central problem with the book is its refusal to fully engage with the relationship of deliberation between courts and legislatures. Deliberative theory should take into account not only one part of the system, but its deliberative capacity as a whole.[6] Hence,

* Doctoral Candidate, Yale Department of Political Science. Special thanks to Helene Landemore (Yale University) for her insightful comments and suggestions.

1. For the purposes of this review, I follow Mendes here in using the term 'constitutional courts' in an expansive sense to include any unelected court that has the power to strike down a statute for violating the constitution: C Hübner Mendes *Constitutional Courts and Deliberation Democracy* (Oxford: Oxford University Press, 2013) p 74. For much of the review, I will use the term 'court' or 'courts' as shorthand for constitutional courts.

2. Ibid, pp 51–53.

3. Ibid, p 107.

4. Ibid, p 115.

5. Ibid, pp 196–219.

6. See J Mansbridge et al 'A systematic approach to deliberative democracy' in J Parkinson and J Mansbridge (eds) *Deliberative Systems: Deliberative Democracy at the Large Scale* (Cambridge, UK: Cambridge University Press, 2012).

Mendes should show how his deliberative court would support, or at least not damage, deliberation in the legislature and in civil society.

Mendes may have addressed this issue more fully if he had not intentionally avoided examining the democratic legitimacy of judicial review. Noting the intractability of this question, Mendes attempts to sidestep it so as to focus on improving the deliberative capacity of pre-existing courts. On its face, this approach seems fair. However, his drawing upon the literature of deliberative democracy, with its requirements of equality and participation, aggravates courts' legitimacy problem. I will examine this democracy deficit in Mendes' theory of judicial review and in his preference for unanimous opinions.

DELIBERATIVE DEMOCRACY: DIRECT OR REPRESENTATIVE?

The nagging and central problem with judicial review is the democratic illegitimacy of a court's power to strike down a statute. Why should unelected and unaccountable judges have the power to undo the agreement of the people's representatives in a legislature? For most of the book, Mendes seeks to avoid the 'straight-jacket' of this dilemma because irrespective of it, 'there is a lot of theoretical work to be done in order put courts in their best light and reform them accordingly' (227).[7] Since we're stuck with judicial review, we had better figure out how to best use it.

Fair enough. However, Mendes chooses the theory of deliberative democracy to accomplish this task, and this theory is not neutral towards judicial review. Deliberative democracy originates as an attempt to answer criticisms of direct democracy and to put it on a more sure footing.[8] Critics of direct democracy worry that it encourages unprincipled decision making and facilitates majority tyranny, and that citizens lack the information, expertise and skills to decide issues well. Deliberation, the putting forth of impartial reasons by equals to justify an argument in the pursuit of consensus, would help citizens avoid these pitfalls. John Dryzek, paraphrasing Joshua Cohen's foundational work, defines deliberative democracy as a theory in which 'outcomes are legitimate to the extent they receive reflective assent through participation in authentic deliberation by *all* those subject to the decision in question' (emphasis added).[9] Notable real-life examples of direct and deliberative democracy include participatory budgeting in the Brazilian city of Porto Alegre,[10] and the 'crowdsourcing' of the drafting of a new Icelandic Constitution.[11]

7. Hübner Mendes, above n 1, p 227.

8. B Barber *Strong Democracy* (Berkeley, CA: University of California Press, 1984). See the introduction and most of the articles in A Fung and O Wright (eds) *Deepening Democracy* (London: Verso, 2003).

9. J Dryzek 'Legitimacy and economy in deliberative democracy' (2001) 58 Pol Theory 651, citing J Cohen 'Deliberation and democratic legitimacy' in A Hamlin and P Pettit (eds) *The Good Polity: Normative Analysis of the State* (Oxford: Blackwell, 1989) pp 17–34. Similarly, S Benhabib argues, 'Legitimacy in complex democratic societies must be thought to result from the free and unconstrained deliberation of *all* about matters of common concern': 'Toward a deliberative model of democratic legitimacy' in S Benhabib (ed) *Democracy and Difference: Contesting the Boundaries of the Political* (Princeton, NJ: Princeton University Press, 1996) p 68. In contrast to these participatory definitions, Mendes defines the first condition of deliberative democracy as presupposing 'the need to take a collective decision that will directly affect those who are deliberating, or *indirectly* people who are absent' (p 14). Mendes does not address how indirect participation is an adequate substitute.

10. G Baiocchi *Militants and Citizens: The Politics of Participatory Democracy in Porto Alegre* (Stanford, CA: Stanford University Press, 2005).

11. H Landemore 'Inclusive constitution-making: the Icelandic experiment' (2015) J Pol Phil forthcoming: available at http://onlinelibrary.wiley.com/doi/10.1111/jopp.12032/abstract (accessed 18 January 2015).

https://doi.org/10.1111/lest.12102 Published online by Cambridge University Press

Mendes argues that courts are a blind spot or a gap in the theory of deliberative democracy. He attributes this to a misplaced impression that judicial reasoning is technical. But it is more probable that deliberative democrats avoid the court because it is an unlikely tool to empower ordinary citizens. Indeed, in an important text of applied deliberative democracy, Henry S Richardson applies the theory to draw power away from the executive bureaucracy to the legislature and to ordinary citizens. The executive bureaucracy is more accountable than the judiciary. If bureaucrats are a threat to a deliberative democracy, are not courts even more so?[12]

I should be careful not to overemphasise the participatory thrust of deliberative democratic theory.[13] The literature is vast and varied, and much of it accepts that representation is a necessity in modern democracy. Because of the large size of the state and the busy schedules of modern citizens, it is impossible for everyone to deliberate on every issue.

Still, the problem of representation has continually plagued the theory of deliberative democracy.[14] Deliberative theorists address the problem of representation in a variety of ways.[15] One answer is that legislative representation is acceptable because it can respect the premises of deliberative democracy, specifically those of participation and equality. Participation requires that those who are affected by a collective decision have a right to participate in it, and equality requires that there is no hierarchy of status between participants. Electoral representation of the legislature manages to partially meet these requirements. Since every citizen has one equally weighted vote, each is given an equal say in who shall represent him or her. Furthermore, there is some indirect participation because legislators are incentivised to listen to their constituents to gain re-election. Perhaps direct participation better meets the requirements of deliberative theory, but given modern conditions and the other benefits of representation, it is an acceptable

12. H Richardson *Democratic Autonomy: Public Reasoning about the Ends of Policy* (Oxford: Oxford University Press, 2003).

13. Much of the focus of deliberative theory is on mini-publics, whose relationship to mass participation is questionable. In his foundational work, James Fishkin acknowledges that his 'deliberative polls' sacrifice mass participation in order to achieve equality and deliberation: J Fishkin *When the People Speak* (Oxford: Oxford University Press, 2009). However, this acknowledgement would not help Mendes show how deliberative democracy can justify the undemocratic practice of judicial review. Unlike in judicial review, the deliberative poll's sacrifice of mass participation is compensated and addressed in a variety of ways. While courts are populated and selected by elites who serve long terms, the members of a deliberative poll are chosen through stratified random sampling that occurs repeatedly, which intends to make them an accurate picture of the population and creates more frequent opportunities for any member population to be selected. Lastly, few advocate that the decisions of deliberative polls or other mini-publics should be binding rather than advisory. For some deliberative democrats, mini-publics still excessively sacrifice the value of mass participation. See eg C La Font 'Deliberation, participation, and democratic legitimacy: should deliberative mini-publics shape public policy' (2015) J Pol Phil forthcoming; available at http://onlinelibrary.wiley.com/doi/10.1111/jopp.12031/full (accessed 18 January 2015).

14. See eg S Chambers 'Rhetoric and the public sphere: has deliberative democracy abandoned mass democracy?' (2009) 37(3) Pol Theory 323.

15. For a summary of the various solutions to the problem of how to deliberate in modern, large societies, see Dryzek, above n 9.

https://doi.org/10.1111/lest.12102 Published online by Cambridge University Press

compromise.[16] For deliberative democrats, participation and equality require much more from a legislature than fair representation and elections, such as equal power between participants and equal consideration and respect for all arguments. Nonetheless, legislatures partially fulfil, and have the potential to fully fulfil, the requirements of participation and equality in ways that unelected and unaccountable institutions cannot.

Even when it accepts representation, deliberative theory still offers a strong critique of existing legislative theory and practice. Minimalist and pluralist theories of democracy argue that elections and legislatures merely select leaders or aggregate preferences, and hence justify the logrolling, unprincipled compromises and lack of meaningful debates that pervades our legislatures.[17] By calling for increased discussion and justification, deliberative democrats hope to curb these practices, and transform voters and representatives' preferences into more reflective choices that might achieve a common good, or at least filter out selfish and impartial reasons.[18]

There are no minimalist or pluralist theories of courts. Almost everyone agrees that that judges should deliberate with each other and give impartial reasons.[19] Even if this agreement is under-theorised, how urgent is it to apply the literature of deliberative democracy to our most deliberative institution? Where's the bite?

When applied to legislatures, deliberative democracy's reason-giving requirements require radical change. But when applied to courts, the sources of critique are the premises of participation and equality in deliberation. It is exactly these two requirements that Jeremey Waldron and Richard Bellamy, perhaps the greatest critics of judicial review, have used to attack constitutional courts as undemocratic.[20] Citizens do not participate in deciding cases that will greatly affect them, and their ability to select judges and hold them accountable is usually indirect and minimal. It is worth quoting Mendes response to this problem in full: [21]

> Deliberation, as defined here, is a process of inter-personal practical reasoning about a course of collective action. This does not entail that deliberators need to have the power to decide. Reducing deliberators to the ones who have actual authority

16. This is the position of Richardson, above n 7, and it seems to be the position of other deliberative democrats who focus on legislative deliberation. See A Gutmann and D Thompson *Why Deliberative Democracy* (Princeton, NJ: Princeton University Press, 2004); IM Young *Inclusion and Democracy* (Oxford: Oxford University Press, 2000). Gutmann and Thompson argue that elections may yield better deliberators and that freedom includes that of not participating in politics in order to devote that time to other pursuits: ibid, p 31. Young is interested in representation in multiple sites, such as corporations.

17. For a minimalist theory, see eg W Riker *Liberalism against Populism: A Confrontation Between the Theory of Democracy and the Theory of Social Choice* (Prospect Heights, IL: Waveland Press, 1982). For a pluralist one, see eg R Dahl *A Preface to Democratic Theory* (Chicago: University of Chicago Press, 1956).

18. Gutmann and Thompson, above n 16.

19. Mendes' target is Ronald Dworkin, who imagines a Herculean judge who deliberates without the help of others. It is unclear that Dworkin actually wants judges to act in this way. After all, no judge is Hercules. The picture serves certain illustrative purposes. It is a theoretical exercise to help clarify the capabilities of an ideal judge. Perhaps for this reason, Mendes adopts most of Dworkin's theory of interpretation.

20. R Bellamy *Political Constitutionalism: A Republican Defence of Democracy* (Cambridge, UK: Cambridge University Press, 2007); J Waldron *Law and Disagreement* (Oxford: Oxford University Press, 1999). Note that neither Jeremy Waldron nor Richard Bellamy are deliberative democrats.

21. Hübner Mendes, above n 1, pp 46–47.

https://doi.org/10.1111/lest.12102 Published online by Cambridge University Press

> would be short-sighted. Those who are, so to say, powerless, but willing to engage in argumentation and be subject to its ethical burdens, can meaningfully contribute to the quality of the process. It would be a cognitive loss to miss that. Otherwise, deliberation would be conceivable only in formal sites between decision-makers. All other communicative processes would fall outside its reach.

This response is insufficient. Mendes has chosen deliberative democracy as a tool to reinvigorate courts and is on the hook for the accompanying participatory baggage regardless of whether that results in a 'cognitive loss'. The fact that judges should consult arguments from both appellants and the public sphere and then justify their decision with reasons is not an adequate substitute. For example, we may believe that a king is good when he listen to his subjects and justifies his decisions to them. Indeed, to ignore this difference and condemn all kings as tyrants would be to miss a very important distinction. But we would never claim that this 'cognitive gain' could be justified on the grounds of deliberative democracy. As is evident from the name, the theory has both deliberative and democratic requirements. You cannot embrace the former and ignore the latter.

Furthermore, and most importantly, the requirements of participation and equality do not lead inexorably to Mendes' conclusion that 'deliberation would be conceivably only in formal sites between decision-makers'. Mendes would have us believe that taking too strict an interpretation of deliberative theory would exclude a focus on public deliberation on constitutional issues.[22] In fact, deliberative theory forces us to pay attention to the deliberation that occurs between representatives and represented, between civil society and the government. Election is the one of the central mechanisms to encourage this give and take between civil society and the legislature.

Without elections, how can courts relate to and encourage productive deliberation outside the courtroom? In the judicial context, there are a variety of variables to analyse on this point, including mode of appointment, docket-formation, and transparency of deliberations and hearings. Mendes discusses each of these with the aim of fostering internal collegial deliberation or ensuring that the court adequately consults his theory of the public before making its decision. In this review, I will discuss his theory of interpretation and his theory of the public display of internal division to illustrate how concern with the external deliberation leads to a more democratic court than Mendes imagines while still remaining internally deliberative.

THEORY OF INTERPRETATION

Almost everyone agrees that courts should deliberate, but disagrees about how they should do so. By what criteria should they interpret a constitutional provision? Can deliberative theory make a meaningful intervention here? I argue that Mendes' moral theory of judicial review is unrelated to the theory of deliberative democracy that he embraces. A better fit for his normative commitments is judicial review that engages in substantive interpretation to increase the quality of deliberation within the legislature and civil society.[23]

22. Indeed, Mendes redefines deliberative democracy's premises of equal participation of deliberative theory to make them far less exacting. The requirement of participation is watered down so that deliberative theory 'presupposes the need to take a collective decision that will directly affect those who are deliberating, or *indirectly people who are absent*': ibid, p 14.

23. For two similar accounts that influenced the one offered here, see W Eskridge 'Pluralism and distrust' (2005) 114 Yale L J 1294; R Post and R Siegel '*Roe* Rage: democratic constitutionalism and backlash' (2007) 42 Harv C R–C L L Rev 427–430.

https://doi.org/10.1111/lest.12102 Published online by Cambridge University Press

Mendes argues for a 'moral' or Dworkinian approach to judicial review tempered by respect and curiosity for the opinions of other judges, branches and civil society. Litigants invoke open-ended and value-laden terms and rights in the constitution, such as justice, equality, freedom and dignity. Judges must interpret these provisions in light of a theory of justice. Candour and open deliberation require that judges openly communicate their impartial moral reasons for their decisions in the opinion rather than hide behind 'a curtain of legalisms' (178–180). But Mendes distances himself from the Dworkin's Herculean and solitary view of the ideal judge. Mendes' deliberative judge is open to persuasion from other actors confronting the same issues, including other judges and the legislature.[24]

Does the theory of deliberative democracy require judges to interpret the constitution in light of their theory of justice? Mendes' answer is yes, because of the open-ended nature of constitutional clauses. Yet, this argument holds regardless of one's stance on deliberative democracy. It is odd that Mendes' theory of judicial review largely does not engage with the normative literature that forms the basis of his book.[25]

In light of the legitimacy deficit of judicial review, perhaps constitutional courts should be 'custodians of deliberation' for the legislature. Mendes divides this school into two approaches. In the procedural approach, epitomised by John Hart Ely and Jürgen Habermas, courts should protect the basic rights necessary for the civil society and legislature to deliberate and decide issues, such as free speech and the protection of elections. In the avoidance approach of Cass Sunstein and Alexander Bickel, courts should either avoid deciding the issue through doctrines of standing or decide as little of it as possible. In both, courts avoid intruding into substantive issues that are best resolved by the legislature. Judicial decisions on controversial issues will only aggravate conflict by removing it from the give and take of political channels and cementing it in inflexible law. Mendes rightly faults these theories for ignoring the deliberative potential of the court itself.[26] Courts are wards for the deliberations of other institutions, but engage in very little deliberation themselves. His account aims to fix this oversight.

I would add to Mendes' criticism that avoidance and procedural approaches ignore the question of deliberation within the legislature. Elections are not ends in and of themselves. For deliberative theory, they are an important, but clumsy, tool to facilitate deliberation, which is the higher goal and the true measure of legitimacy. Today's legislatures too often fail to deliberate. The avoidance and procedural theories leave us with a legislature that either aggregates the selfish desires of voters or one in which politicians struggle to protect and enhance their individual power.[27]

Mendes, though, is wrong to paint Habermas with the same brush as these other theorists. Similar to Ely, he has a process-based theory of judicial review, but this judicial review is meant to buttress the deliberative capacities of the democratic system as a whole. Hence, its requirements are far more robust. As summarised by Christopher F. Zurn, it includes

24. Hübner Mendes, above n 1, pp 91–93, 185–188.

25. Mendes does state that the judges should listen and consider the reasons put forth by the legislature and civil society in deciding on what decision best achieves justice. But this theory is a small modification to the underlying Dworkinian theory of interpretation.

26. Hübner Mendes, above n 1, pp 86, 93.

27. C Zurn 'Deliberative democracy and judicial review' [2002] 4/5 Law & Phil 479 (criticising Ely for embracing a minimalist theory of democracy and distinguishing it from Habermas' deliberative approach).

https://doi.org/10.1111/lest.12102 Published online by Cambridge University Press

> Keeping open the channels of political change, guaranteeing that individuals' civil, membership, legal, political, and social rights are respected, scrutinizing the constitutional quality and propriety of the reasons justifying governmental action, and ensuring that the channels of influence from independent, civil society public spheres to the strong public sphere remain unobstructed and undistorted by administrative economic and social powers.[28]

For Bickel and Sunstein, courts' deliberations are relatively unimportant because their main task is to get out of the way of the legislature's decision making. The same cannot be said for Habermas' theory of judicial review. Constitutional courts assist and augment deliberation in the legislature. Surely, collegial debate would help judges decide on how to identify and protect the vast and varied rights necessary for deliberation outside the courts.[29]

The judiciary may augment legislative deliberation in a variety of ways. They may require legislatures and the social movements that back them to justify legislation on the basis of impartial reasons.[30] For example, in her concurring opinion in *Lawrence v Texas*, Justice Sandra O'Connor wrote that legislation restricting homosexuality may not be based on 'moral disapproval' or on 'a bare desire to harm the group'.[31] This has forced opponents of gay marriage to justify their position with reasons that often do not stand up to scrutiny, such as the claim that the purpose of marriage is to procreate.

Courts may also nudge legislators to give equal concern to less powerful actors in civil society who are often ignored in the legislative process. For deliberative democracy, the political process must not only give citizens an equal vote, but also equal concern and respect. The problem is that through the use of money and connections, some actors are able to dominate the political process. Courts may push back to ensure that the legislature have considered all arguments and interests. Similarly, courts may counter 'blind spots' or 'burdens of inertia in the political process'.[32] A court's decision is not a guarantee of success, but it has the potential to open up of the issue to the political process.

Another problem with the theories of avoidance and process is that they are overly optimistic about the legislature's power to resolve disagreement. Democracies break down. Free and fair open elections and a lively civil society do not guarantee stability. Actors may feel they have more to gain by exiting from the system than engaging with it. Anger over high-stakes issues may reach such a boiling point that violence ensues, or even civil war.[33] While Bickel and Sunstein are right that reckless courts may aggravate these conflicts, I believe that courts may also help manage them. This management may require substantive engagement with the underlying moral conflict violating the spirit of Ely's process approach. Such engagement is difficult and dangerous, so surely collegial deliberation among judges is helpful to the process.

Courts' stances on substantive issues do not always destroy deliberation within civil society. Courts may channel, guide and harness conflict to force parties to engage and

28. Ibid, at 520–521.

29. Judges may even disagree with each other and with Habermas on which rights are necessary or conducive to deliberation in civil society.

30. See Eskridge, above n 23, at 1306.

31. *Lawrence v Texas*, 539 US 558, 582 (2003) (O'Connor J, concurring in the judgment); Eskridge, above n 23.

32. R Dixon 'Creating dialogue about socioeconomic rights: strong-form versus weak-form judicial review revisited' (2007) 5 Int'l J Const L 391.

33. Eskridge, above n 23, at 1294.

https://doi.org/10.1111/lest.12102 Published online by Cambridge University Press

deliberate with one another. Through law, they may create new baselines or compromises to restructure disagreement.[34]

One example in the USA is the undue burden standard for abortion regulations established in *Planned Parenthood v Casey*.[35] Abortion remains of the most high-stakes and sensitive issues in US constitutional politics. It pits the autonomy of women against the possible life of a foetus. In *Roe v Wade*,[36] the US Supreme Court ruled that the state may not regulate abortion in the first trimester. The decision ignited a backlash and may have contributed to the rise of the culture wars and the new religious right. The conflict seemed intractable and violence flared. Some extremists threatened and attacked doctors who performed abortions and even bombed their clinics. This '*Roe* rage' has become a central example for theorists who advocate judicial minimalism.[37]

Almost 20 years later, the Supreme Court revisited the issue in *Planned Parenthood v Casey*. As Robert Post and Reva Siegel have noted, the Court devised a flexible legal standard to restructure the conflict between pro-choice and pro-life proponents.[38] Unlike in *Roe*, this time the Court tried to recognise both sides of the conflict. It overruled its subsequent holding that no regulations were permitted in the first trimester and recognised for the first time the state's interest in the potential life of the foetus. Regulations such as the mandatory waiting period, required disclosures and parent consent for minors were permitted as long as they did not pose an 'undue burden' on the pregnant woman's ability to receive an abortion. Conflict over abortion, of course, did not end, but the legal standard of undue burden provided a new baseline and standard for which the parties could fruitfully engage without either one feeling that the democratic process was incapable of accommodating their point of view.[39]

In contrast to Dworkin or Mendes, the Supreme Court did not decide between different theories of justice. Nor did it avoid the issue as Bickel and Sunstein recommended, leaving the political process to continue to struggle. Rather, the Court devised a flexible legal standard to restructure the dispute to controversies over what regulations could be considered an undue burden.[40] While this ruling did not end conflict over abortion, it successfully dampened its excesses for almost two decades.[41] A court, based on the values of deliberative democracy, would not unilaterally decide matters of justice, but facilitate civil society's deliberation to decide the issue. That task is complicated and fraught and it would benefit from the collegial deliberation that Mendes outlines.

34. Mendes does address and incorporate 'dialogic' theories of judicial review, but these are different than the view I have put forth below.
35. 505 US 833 (1992).
36. 410 US 113 (1973).
37. See eg C Sunstein *One Case at a Time: Judicial Minimalism on the Supreme Court* (Cambridge, MA: Harvard University Press, 2001) p 37.
38. Post and Siegel, above n 23, at 427–430.
39. N Devins 'How *Planned Parenthood v Casey* (pretty much) settled the abortion wars' (2009) 118 Yale L J 1318.
40. Another example is the Supreme Court of Canada's Patriation Reference [1981] 1 SCR 753. After a repeated series of breakdown in negotiations between Prime Minister Trudeau and the provinces, Trudeau threatened to unilaterally pass patriation and the Charter of Rights and Freedom through Parliament. The provinces argued that convention requires unanimous provincial approval of substantial constitutional change. The Supreme Court of Canada ruled that 'a substantial degree of provincial consent' was necessary. The decision hit a middle ground between the two parties' positions, both of which would have made negotiation and deliberation impossible.
41. Ibid.

https://doi.org/10.1111/lest.12102 Published online by Cambridge University Press

EXTERNAL AND INTERNAL DELIBERATION

Mendes distinguishes between internal and external deliberation.[42] The former refers to deliberation or collegial engagement among the judges within the court and the latter how the court interacts with the larger public sphere. Both are important and serve their own unique purposes. In internal deliberations, judges should listen respectfully to each other's points of view in the pursuit of consensus. In its external deliberations, judges should collect as many points of view from the public as possible and thoroughly address them in the opinion.[43] I want to raise the possibility that there is a tension or trade-off between the two. If I am correct, then judges' internal deliberation in pursuit of consensus may come at the expense of deliberation within the larger public sphere.

The explanation is simple: internal deliberation is more likely to lead to unanimous opinions, and unanimous opinions are less likely to spur legislative and public debate.[44] Mendes is aware of this possible trade-off between external and internal deliberation, but only addresses it briefly and dismisses the idea as 'strained and little illuminating'. He criticises it on three grounds.[45]

Let's take up each of these criticisms in turn.

First, he criticises the trade-off idea for ignoring how the content and style of the opinion has a profound effect on the deliberation. Of course, the content and style of the opinion are important for external deliberation. However, that fact has little bearing on the independent question of the relationship between a unanimous or plural opinion on deliberation. Content and number of opinions are both important variables to consider for the prospects of external deliberation.

Secondly, he expresses scepticism that a causal relationship between internal and external deliberation is descriptively accurate. However, the experience of the US Supreme Court and the German Constitutional Court give substantial reason to believe that a trade-off exists. Many criticise the US Supreme Court for its lack of collegial deliberation. The purpose of the conference is not to discuss a case, but to determine the composition of the majority in order to assign an opinion. In conference, judges vote in order of seniority. Each judge accompanies his or her vote by a few sentences or even a few words such as 'I agree with' or 'I would reverse on jury instructions.' After the initial poll, no discussion ensues. Since senior justices speak first and there is only one round of speaking, there is no opportunity to reflect or revise stances in light of the comments of the more junior justice. If the Chief Justice is with the majority, he has the power to assign the opinion and if he is not, the most senior justice in the majority will assign it. The author of the opinion will circulate a draft to others in the majority and incorporate their suggestions. Some deliberation will occur within this process. But what is crucial to note is that the deliberation occurs among the majority, and there is usually little effort to change the initial votes at conference.[46] The entire structure of

42. One of Mendes' contributions is to try to replace the two-pronged distinction between external and internal with a three-part one of pre-decisional, decisional and post-decisional, to better measure deliberative performance. I use the first distinction for the sake of simplicity: Hübner Mendes, above n 1, pp 113–118.

43. Ibid.

44. J Ferejohn and P Pasquino 'Constitutional adjudication: lessons from Europe' (2003–2004) 82 Tex L Rev 1671 at 1692.

45. Hübner Mendes, above n 1, pp 96–97.

46. W Rehnquist *The Supreme Court* (New York: Vintage Books, 2000) p 256; C Eisgruber *The Next Justice Repairing the Supreme Court Appointments Process* (Princeton, NJ: Princeton University Press, 2009) pp 56–60.

https://doi.org/10.1111/lest.12102 Published online by Cambridge University Press

drafting the opinion then defies deliberation's goal of reaching a unanimous opinion. Indeed, most of the time other justices will join the majority opinion without having read the dissent, which is usually sent weeks, if not months, after the majority opinion is circulated.[47] Since this process does not strive for unanimity, the US Supreme Court has a high rate of dissents and concurrences.

This pervasive disagreement among the US Supreme Court has a profound impact on deliberation within civil society. Actors seize on disagreements within the Court to legitimise resistance to judicial opinions either in the form of non-compliance or in attempts to pass new laws that either directly defy or push the boundaries of the judicial decision. Dissents and concurrences are cited on websites, newsletters and briefs, in lower court opinions and in congressional speeches.[48] As Mendes recognises, the US Supreme Court is attuned to this phenomenon and in the past has wisely strived to reach unanimity in explosive civil rights cases to prevent Southern resistance and mobilisation against desegregation. The USA is distinct in its high politicisation of the law and the constitution. Indeed, one of the central planks of the most important grass-roots political movement, the Tea Party, is to restore the Constitution.

On deliberation, the German Constitutional Court drastically contrasts with its US counterpart. The German Constitutional Court has extensive collegial deliberations, conducted with the goal of reaching a consensus whenever possible. The entire Court signs the opinions and there is no indication of who was the initial drafter. The internal norms of the Court are strongly against dissent. Indeed, judges may even choose not to publish the fact that they dissented. From 1971, when dissents were first allowed, through to the end of 2011, there have been only 146 published dissents.[49] Even though they wield greater power and use it in a more aggressive manner than the USA, German Constitutional Court decisions are less likely to foster external deliberation.

In response to a judicial decision, German political actors' space for deliberation is cramped. They can only quote the one opinion rather than the multiplicity of concurrences, dissents and jurisprudences available in the USA. Yes, judicial opinions are quoted to support a position, but this reflects judicialisation rather than meaningful deliberation. Actors quote judicial decisions to appease the Court before it decides on the next issue.[50] This is consistent with the widely held view that the German Constitutional Court is supreme arbiter over the Constitution. Rudolph Smend, perhaps one of the most important thinkers in laying the foundations for the legitimacy of the Court, stated, 'The Basic Law is now virtually identical with its interpretation by the Federal Constitutional Court.' Indeed, judicial review is far less questioned in Germany than in the USA.[51]

Thirdly, Mendes argues that the claim of a trade-off between internal and external deliberation is causally under-demonstrated. The trade-off idea puts forth two causal claims and Mendes is sceptical of both. The first causal claim is that internal deliberation will lead to consensus. Yet, Mendes defines deliberation partially as an attempt to find consensus. The judge should have 'a default preference for compromising instead

47. Rehquist, ibid.
48. See Ferejohn and Pasquino, above n 42, at 1697.
49. D Kommers and R Miller *The Constitutional Jurisprudence of the Federal Republic of Germany* (Durham, NC: Duke University Press, 3rd edn, 2012) p 29.
50. A Stone Sweet *Governing with Judges: Constitutional Politics in Europe* (Oxford: Oxford University Press, 2000).
51. Kommers and Miller, above n 48, p 38.

https://doi.org/10.1111/lest.12102 Published online by Cambridge University Press

of concurring or dissenting, a willingness to locate points of conflict and dissolve them'.[52] Is it not reasonable to assume that an attempt to reach consensus is more likely to reach it than no attempt at all? Based on this reasonable assumption, Mendes himself argues that collegiality among judges is 'a magnetic needle that pulls toward convergence'.[53]

The causal claim between dissents and public deliberation is the more difficult one to discuss. But at the very least it is a plausible claim in light of US and European experience, and it requires a fuller response than Mendes gives. Reasonably, Mendes' account of the instrumental benefits of deliberation is based on claims that are 'plausible'. Doesn't the assertion of the instrumental disadvantages of deliberation reach this same standard?

CONCLUSION

Constitutional Courts and Deliberative Democracy is a thoughtful and rigorous work that makes an important contribution to how we understand and evaluate the deliberative performance of constitutional courts. Readers will find much elucidation in its discussion of institutional design and the ethic of a deliberative judge.[54] However, despite some gesturing towards it, Mendes does not fully address the relationship of courts' deliberations to those of other political institutions and the public sphere. We are stuck with a near full-throated Dworkinian theory of judicial interpretation and a striving for unanimity. The two combined are likely to stifle deliberation and aggravate conflict outside of courts. Mendes draws upon the literature of deliberative democracy. Ultimately, however, his ideal constitutional court is deliberative, but not democratic.

52. Hübner Mendes, above n 1, p 131.
53. Ibid, p 130.
54. Ibid, pp 122–139, 142–175.

https://doi.org/10.1111/lest.12102 Published online by Cambridge University Press