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RESEARCH ARTICLE

The deliberative right to constitutional silence

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Abstract

I champion a deliberative right to constitutional silence. It entitles individuals to reflect upon the arguments and reasons in favour or against changing or re-interpreting constitutional content under proper conditions. After reflecting on the place of silence in intellectual history and its features and virtues, I define the right to constitutional silence. It has four components: salience, time, reflection and publicness. Next, I discuss its grounds. I argue that it is an institutional legal right that citizens have in a deliberative constitutional democracy. This entails that, while there is a moral case for the right to silence, I here circumscribe my argument to the province of legality and constitutionalism. I finish discussing matters of institutionalisation. I offer three suggestions: two proposals about content and one about procedure. First, the right to silence applies primarily to deliberations about 'thin' constitutional matters found in preambles and introductory sections of constitutions. Second, it warrants public intervention in matters of public discourse of constitutional import, to avoid private power from interfering with the people's sphere of constitutional reflection. Third, I adapt a proposal made elsewhere and suggest that a non-decisional interpretive mini-public could be a place to implement the right to silence.

Keywords: deliberative constitutionalism; deliberative democracy; deliberative rights; silence

Introduction

These pages champion a deliberative right to constitutional silence (hereafter, the right to silence). The right entitles individuals to remain silent and reflect upon the arguments and reasons in favour of or against changing or re-interpreting the fundamental norms of their polity under proper conditions. It also places obligations on the state to set up deliberative procedures in ways that guarantee that such conditions obtain. It gives citizens a quiet room to think, space to apprehend and internalise the sense and meaning of their constitutional deliberations and their outcomes.

Understanding the value of silence and its status as a constitutional deliberative right matter in times of noisy, polarised and populist politics, abusive of non-deliberative instruments of direct democracy around the world.[1] The content and meaning of

[1]Writing in 2007, Kaufmann, Büchi and Braun affirmed that '[o]ver the past 25 years participatory democracy has experienced an enormous boom. More than half of all referendums ever held in history fall

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constitutional rights, principles and values is not easy to ingest, especially when presented as part of a shared project. That process of ingestion may prove especially difficult when the things one must grapple with, deliberate and decide about are abstract concepts, such as democracy, rights, freedom, equality and citizenship, when there is little 'conversational context' against which people can talk,[2] reason and decide. To do so, citizens need to deliberate under proper conditions. Absent those conditions, citizens are likely to fall prey to forming their opinions and preferences, putting their own interests at risk, to favour partisan loyalty and ideology over rational argument, or – quite pertaining to the argument advanced here – to make rushed and uninformed decisions about important matters with long-term consequences.

One such condition is the right to silence. Hence, I seek to open a new debate over a large gap in deliberative and constitutional theory. It is not, it should be said at this point, about the right to free speech, its nature and scope, about what counts, and what does not count as speech and what things can and cannot be said, in which context. Important as those matters are, I reflect about the conditions under which citizens may deliberate and think when what is at stake are constitutional matters, and about how deliberative procedures themselves imply the existence of a right to silence when they are employed to settle them.[3] And, while concomitant, my approach says nothing about the former concern. At least, not here.

My first audience is, then, deliberative theorists, for whom the notion of a right to silence is novel and outside their traditional understanding of democracy as an ongoing process of debate,[4] as talk-centric.[5] We know a good deal about the political, epistemic, moral or educational value of listening and discussing.[6] However, while there is a budding literature questioning the logocentrism that characterises political theory,[7] rejecting the equation of silence with absence, treating silence as 'a phenomenon in its own right' and underscoring that deliberation requires room for listening and reflecting,[8] we know little about the value of silence for institutional design, close to nothing about the value that silence may have for deliberation, virtually zero for deliberation at the level of constitutional law and nothing about its status and features qua constitutional deliberative right.[9]

into this period'. *Guidebook to Direct Democracy in Switzerland and Beyond* (Benteli Hallwag Druck A.G., 2007) 199.

[2]The term is Marmor's. Andrei Marmor, *The Language of Law* (OUP, 2014) 149.

[3]On this I follow Mary F. Scudder, *Beyond Empathy and Inclusion. The Challenge of Listening in Democratic Deliberation* (OUP, 2020).

[4]Amy Gutmann and Dennis Thompson, *Democracy and Disagreement* (HUP, 1996) 12.

[5]Simone Chambers, 'Deliberative Democratic Theory' (2003) 6 *Annual Review of Political Science* 307, 308.

[6]For example, Carlos S. Nino, *The Constitution of Deliberative Democracy* (YUP, 1996); Amy Gutmann and Dennis Thompson, *Why Deliberative Democracy* (PUP, 2004); José Luis Martí, *La República Deliberativa* (Marcial Pons, 2006) 191–228.

[7]See the third issue of Volume 24 (2021) of *Critical Review of Social and Political Philosophy*, and Mónica Brito Viera, 'Representing Silence in Politics', (2020) 114 (4) *American Political Science Review* 976.

[8]Mónica Brito Vieira, 'Silence in Political Theory and Practice' (2021) 24 (3) *Critical Review of Social and Political Philosophy* 289, 290; Scudder (n 3) 5.

[9]Gray has argued for a right to silence in a democratic system. I agree with him that such a right 'is a necessary complement to voice empowerment', and institutional design should address the 'interpretive dilemma of silent citizenship'. Yet, while I share the spirit of his proposals (in particular regarding abstention in elections and tacit consent in representative processes), his analysis leaves the realm of constitutional

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Accordingly, my discussion will also interest constitutional theorists. Reflecting on silence is novel for them, who have generally addressed the notion from the perspective of 'self-censorship' or as an invitation to 'tying our tongues about sensitive questions' to produce democratic effects.[10] Others have tried alternative tacks, for example, arguing for the benefits of deciding not to decide some contentious constitutional issues here and now but later, through legislation.[11] However, there is no discussion in this literature or constitutional theory more generally about the role of silence as a deliberative right.

And so, I contribute to filling this important gap, and I submit that silence has a positive deliberative dimension that is not exhausted by the removal of constitutional topics from public discussion. It is an active reflexive practice of thinking quietly about those constitutionally salient matters and their eventual outcomes that is warranted, as a matter of right, by the very features and rules of deliberative constitutionalism. Put differently, deliberative procedures at the constitutional level entail that individuals will have the right to reflect in silence during some stages of the process and, by implication, that the state is mandated to structure those procedures accordingly in response to that entitlement.

I proceed as follows. I carve out room for my argument within the relevant scholarly literature by first expressing a caveat. While towards the end I ponder how to translate principles into institutions, I first invite readers to think of deliberative rights generally and the right to silence specifically, primarily as an individual right, not as a prerogative of institutions. Thus, I begin with prefatory remarks about how current concerns with institutionalisation tend to overshadow the normative aspects prominent in deliberative theory in moments prior to the declaration of its philosophical maturity and the ensuing institutionalist focus. In short, deliberative democratic theory was once less concerned with dialogue between institutions and more with the normative foundations of deliberation. The right to silence is informed by those goals, which need to be placed under the spotlight again (see Section 'Prefatory remarks: a right for individuals, a duty for the state').

After reflecting on the place of silence in intellectual history, and its features and virtues for individual and collective knowledge, I define the right to constitutional silence (Section 'The right to silence'). It is a deliberative entitlement of individuals to certain conditions under which they may think properly about constitutional matters. It has four components: 'Constitutional salience', 'Time', 'Reflection' and 'Publicness'. Briefly put, this means that the right to silence can be wielded when matters of constitutional import are discussed in deliberative procedures, securing enough time to allow citizens to think silently on the issues at stake in deliberative processes, for the purposes of reflecting about how their preferences can be made compatible with public interests.

Next, I discuss the grounds of the right to silence. I argue that it is an institutional right that citizens have in a deliberative constitutional democracy. It is a positive legal right that is grounded in the features of constitutionalism and deliberative democratic theory. Its analysis is then part of deliberative rights theory and deliberative constitutionalism. This entails that, while there is a moral case to be made elsewhere for the right to silence, I here

politics unaddressed. Sean W. D. Gray, 'Silence and Democratic Institutional-Design' (2020) 4 (3) *Critical Review of International Social and Political Philosophy* 330–45, 331.

[10]Stephen Holmes, 'Gag Rules or the Politics of Omission', in Jon Elster and Rune Slagstad (eds.), *Constitutionalism and Democracy* (CUP, 1998) 202.

[11]Rosalind Dixon and Tom Ginsburg, 'Deciding not to Decide: Deferral in Constitutional Design' (2011) 9 (3–4) *International Journal of Constitutional Law* 636.

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circumscribe my argument within the province of legality and constitutionalism (see Section 'A legal right').

I finish by discussing matters of institutionalisation (see Section 'The institutions of deliberative silence: three suggestions'). I offer three suggestions: two proposals about content and a third proposal about procedure. I present them, it should be noted, as having heuristic value. Details of their potential implementation will vary. Concerning content, first, I submit that the right to silence applies primarily to the most salient and basic frameworks upon which constitutional law rests and regulates citizens' shared life; what Tushnet calls 'thin' constitutional law.[12] These are found primarily in preambles and introductory sections of constitutional charters. Second, the right to silence entails public intervention in matters of public discourse likely to have constitutional import, to prevent private power from interfering with the people's sphere of constitutional reflection. I centre the discussion on the bearings the right to silence may have on traditional and social media, but it does not exclude the possibility that other areas of public discourse may be affected by the right to silence. Third, about procedure, I adapt a proposal made elsewhere.[13] I suggest that a non-decisional interpretive mini-public included in procedures for constitutional change could be a place for the right to silence to be implemented. These suggestions are heuristic and meant to be adaptable to different practices and institutional arrangements (Section 'The institutions of deliberative silence: three suggestions').

The final part takes stock and concludes (Section 'Conclusion').

Prefatory remarks: a right for individuals, a duty for the state

Deliberative democracy is a political ideal whereby all those persons potentially affected or subjected to collective decisions have a say about those decisions, debate in a civilised manner, challenge each other's views and decide in such a way that the outcome is not the result of whim, force or fraud, but a distillation of the best reasons offered in favour of the best claims available.[14]

The right to silence I champion here is a part of this ideal. Yet, before I show how, it is necessary to offer some critical remarks about the current state of deliberative theory, because some ideas informing the project that acted as regulative ideals in earlier stages of its evolution are somewhat overshadowed by today's focus on institutions, and need to be once more brought to the forefront if deliberative democratic innovations are to honour the reasons why they are championed in the first place.

It was once declared that deliberative theory reached its coming of age.[15] This led scholars and practitioners to think of turning the ideal into working institutions and to declare the birth of both an 'institutional' and 'institutionalised' turn.[16] This was the most natural thing

[12]Mark Tushnet, *Taking the Constitution Away from the Courts* (PUP, 1999). In a similar vein, Levy speaks of 'value-deliberation'. Ron Levy, 'Shotgun Referendums: Popular Deliberation and Constitutional Settlement in Conflict Societies' (2018) 41 *Melbourne University Law Review* 1237.

[13]Bello Hutt, Donald (2021), Deliberative, republican, and egalitarian institutional alternatives for popular constitutionalism, *Revista Derecho del Estado* (48), 183–214. https://doi.org/10.18601/01229893.n48.07.

[14]I subscribe to this ideal. See Bello Hutt, D. (2018), Republicanism, Deliberative Democracy, and Equality of Access and Deliberation. *Theoria*, 84: 83–111. https://doi.org/10.1111/theo.12138.

[15]James Bohman, 'The Coming of Age of Deliberative Democracy' (1998) 6 (4) *The Journal of Political Philosophy* 400.

[16]Matt Ryan and Graham Smith, 'Defining Mini-publics', in Kimmo Grönlund, André Bächtiger, and Maija Setälä (eds.), *Deliberative Mini-publics. Involving Citizens in the Democratic Process* (ECPR Press, 2014) 9.

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to do, given that the philosophical watermarks the project reached thanks to thinkers such as Habermas, Elster, Cohen, Bohman and others, provided it with strong normative philosophical underpinnings.[17] Such theoretical developments were inspired by radical notions of democracy that attempted to connect collective decision making with the actual individuals affected by their outcomes.[18] They included, for example, the definition of a deliberative democracy as 'an association whose affairs are governed by the public deliberation *of its members*',[19] the notion that this ideal 'has egalitarian implications that must be satisfied in ways that are manifest *to its citizens*',[20] they entail that public deliberation 'requires some form of manifest equality *among citizens*, and shapes the identity and interests *of citizens*',[21] that citizens 'share the view that the appropriate terms of association provide a framework for or are the results of *their* deliberation',[22] that it is the *members* of the association who have 'diverse preferences, convictions, and ideals concerning the conduct of *their own lives*',[23] that *they* regard public deliberation as the source of legitimacy,[24] that *they* recognise one another as having deliberative capacities 'required for entering into a public exchange of reasons and for acting on the result of such public reasoning'.[25] One need only recall Habermas's application of his discourse theory to law and democracy to see the role that deliberation among individuals plays in the construction and legitimation of democratic orders. Only those statutes 'that can meet with the *assent of all citizens* in a discursive process of legislation that in turn has been legally constituted' may claim legitimacy.[26] The message is clear: institutions and their arrangements are subservient to citizens' rights.

However, barring some important exceptions,[27] the focus is rather different now. It is bent towards institutions. Of course, such institutionalist developments have been valuable and impressive. It has taken place in different domains. Thus, commentators have focused on a diversity of institutions and innovations such as mini-publics, consensus conferences, citizens juries and deliberative polls.[28] This in turn has led social scientists to develop new methods to improve our knowledge of whether citizens

[17]See, for example, André Bächtiger and Jürg Steiner, 'Introduction' (2005) 40 *Acta Politica* 153; Simone Chambers, 'Measuring Publicity's Effect: Reconciling Empirical Research and Normative Theory' (2005) 40 *Acta Politica* 255; Robert Goodin, 'Sequencing Deliberative Moments' (2005) 40 *Acta Politica* 182; Davy Janssen and Raphaël Kies, *Online Forums and Deliberative Democracy* (2005) 40 *Acta Politica* 317; Jürgen Habermas, 'Concluding Comments on Empirical Approaches to Deliberative Politics' (2005) 40 *Acta Politica* 384.

[18]On deliberative democracy as a radical project see Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (MIT Press, 1996) *xlii–xliii*, 136, 373, 471.

[19]Joshua Cohen, 'Deliberation and Democratic Legitimacy', in James Bohman and William Rehg (eds.), *Deliberative Democracy* (CUP, 1997) 67. My emphasis.

[20]Ibid., 69. My emphasis.

[21]Ibid., 69. My emphasis.

[22]Ibid., 72. My emphasis.

[23]Ibid., 72. My emphasis.

[24]Ibid., 73. My emphasis.

[25]Ibid., 73. My emphasis.

[26]Habermas, *Between Facts and Norms* 110 (n 18). My emphasis.

[27]The most important recent ones are Cristina Lafont, *Democracy without Shortcuts: A Participatory Conception of Deliberative Democracy* (OUP, 2019) and Roberto Gargarella, *The Law as a Conversation Among Equals* (CUP, 2022).

[28]See, for example, André Bächtiger, Maija Setäla, and Kimmo Gröndlund, 'Towards a New Era of Deliberative Mini-Publics', in Kimmo Grönlund, André Bächtiger, and Maija Setälä (eds.), *Deliberative Mini-publics. Involving Citizens in the Democratic Process* (ECPR Press, 2014) 224; James Fishkin, 'Deliberative Democracy in Context: Reflections on Theory and Practice', in Kimmo Grönlund *et al.* (eds.),

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deliberate, how much and under which conditions.[29] Moreover, one can observe a shift from normative philosophy to social sciences in the so-called systemic turn in deliberative democracy, whereby scholars took up Habermas' idea of a two-track legal and political system,[30] and Jane Manbridge's concept of 'everyday talk',[31] to argue that deliberative theory should not limit itself to the study of deliberations taking place at the individual level or in concrete sites. It should instead adopt a macro or systemic perspective and understand democracy as a system formed of different parts and sites engaging in political contestation and discussion about political preferences, interests, emotions and so on.[32]

Constitutional theory has moved in similar institutionalist directions. For example, these developments are visible in the so-called 'dialogical' approaches to constitutionalism[33]; theories applying the insights of deliberative theory to the study of how the institutions of government interact, what prerogatives are assigned to each, which should hold the final word in determining what counts as constitutional, according to which parameters and so on.

This admittedly impressionistic story seeks to provide some context for the contention that in moving from philosophy to social sciences, deliberative democratic theory has shifted its focus from individuals to institutions and that this shift has implications for how one conceives of deliberative rights, and specifically, the right to constitutional silence.

The right to silence is one that cannot so easily be predicated of institutions. Although it bears on how we might design them, it is a right held by individuals with relative independence from the deliberative duties and prerogatives held by political institutions. Actual citizens benefit from having the chance to think in silence, which invites us to rethink the institutionalist trends described earlier. This means that reasoned persuasion trumps the actors' institutional position as a criterion for decision makers to arrive at decisions. This is central for a deliberative constitutionalism centred on creating conditions for good arguments about fundamental matters. And so, I side with Goodin's call 'to ease the burdens of deliberative democracy in mass society by altering our focus from the "external-collective" to the "internal-reflective" mode, shifting much of the work of

Deliberative Mini-publics. Involving Citizens in the Democratic Process (ECPR Press, 2014) 27; Ryan and Smith, *Defining Mini-publics* (n 16).

[29]Most prominently, though not exclusively, through the application of so-called Discourse Quality Indexes. See Marco Steenbergen, André Bächtiger, Markus Spörndli, and Jürg Steiner, 'Measuring Political Deliberation: A Discourse Quality Index' (2003) 1 *Comparative European Politics* 21; Bächtiger and Steiner; Jennifer Stromer-Galley, 'Measuring Deliberation's Content: A Coding Scheme' (2007) 3 (1) *Journal of Public Deliberation*. For a survey of this vast literature, see Bello Hutt, (2018) Donald: Measuring popular and judicial deliberation: A critical comparison, *International Journal of Constitutional Law*, 16 (4), 1121–1147, https://doi.org/10.1093/icon/moy085. For a more recent approach not included in that survey, see André Bächtiger and John Parkinson, Mapping and Measuring Deliberation. *Towards a New Deliberative Quality* (OUP, 2019) ch 6.

[30]Habermas, *Between Facts and Norms* (n 18) 304–8.

[31]Jane Mansbridge, 'Everyday Talk in the Deliberative System', in Stephen Macedo (ed.), *Deliberative Politics. Essays on Democracy and Disagreemen* (OUP, 1999).

[32]Mansbridge *et al.*, 'A Systemic Approach to Deliberative Democracy', in John Parkinson and Jane Mansbridge (eds), *Deliberative Systems: Deliberative Democracy at the Large Scale* (CUP, 2012).

[33]For example, Peter W. Hogg and Allison A. Bushell, 'The Charter Dialogue Between Courts and Legislatures (Or Perhaps the Charter of Rights Isn't Such a Bad Thing After All)' (1997) 35(1) *Osgoode Hall Law Journal* 75; Peter W. Hogg *et al.* 'Charter Dialogue Revisited-Or "Much Ado About Metaphors"' (2007) 45(1) *Osgoode Hall Law Journal* 1.

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democratic deliberation to within the head of each individual'.[34] The argument that follows should be read in light of that concern.[35]

The right to silence

This section reflects on the value of silence in deliberation, defines the deliberative right to silence and fleshes out its constitutive elements.

The deliberative right to constitutional silence is an institutional right to temporarily remain silent about constitutional essentials in ways that allow citizens to have the time and space to address them properly and publicly through deliberation, resisting institutional and societal impulses to hastily make up their minds and decide about them. As I argue next, it derives from the very structure of deliberative procedures when they are triggered to decide upon matters of constitutional import. Accordingly, it places obligations on citizens and the state. On citizens, as they acquire the duty to use the time and space provided for by the right in reflective, public and accountable ways. On the state, as it becomes obligated to set up procedures in ways that make silent thought possible.

Given that deliberative democracy is for good reasons concerned with talk, before I discuss the elements of a right to silence, I should consider silence itself first and it matters. Scholars rightly emphasise the value of rational argument, speech and discourse for safeguarding fundamental rights.[36] But alongside this focus on talk and speech, silence is typically conceived of as the opposite of communication and traditionally denigrated as a form of political action.[37] As Brito Vieira points out, our culture is logocentric such that speech becomes the medium and the subject of political action and silence its exception: '[i]n reflection of this fact, democratic politics has come to be understood and – indeed – to be designed as the politics of voice'.[38] She concludes that this paradigmatic place occupied by speech in political theory and agency has reduced the place of silence to an oxymoron. And there is a cost, in her view: 'it unduly narrows our understanding of political agency and the practical options envisaged when looking to redesign democracy for inclusion'.[39]

I agree. Silence is not merely an exception to deliberation. The reason is simple (though not trivial): not all talk is good talk. The main tool in constitutional deliberation is political language, and politics and language stand in a complex relationship. The complexity of language not only enables peace and collaboration, but it also creates disagreements and conflicts.

Consider some examples from the history of political thought. Thucydides knew that the first victim in a civil war is our moral vocabulary; its first consequence the corruption of language.[40] Aristotle too was aware that we can describe a cautious man as cold blooded

[34]Robert Goodin, *Reflective Democracy* (OUP, 2003) 169.

[35]I have drawn attention to one salient aspect of this institutionalist focus by arguing that systemic approaches may be at odds with a republican conception of individual freedom in Bello Hutt, D. E. (2021). Political Freedom in a Deliberative System: A Republican Case Against Holistic Evaluations. *Archiv für Rechts-und Sozialphilosophie*, 107(2), 167–184.

[36]Alison Young, 'Dialogue, Deliberation and Human Rights', in Ron Levy *et al.* (eds), *The Cambridge Handbook of Deliberative Constitutionalism* (CUP, 2018) 134.

[37]Kennan Ferguson, 'Silence: A Politics' (2003) 2 *Contemporary Political Theory* 49–65, 50–54.

[38]Brito Vieira (n 8) 290.

[39]Ibid. Also, Theo Jung, 'Silence as a Mode of Political Communication: Negotiating Expectations', (2003) 18 (3) *Contemporary Political Theory* 424–47, 426.

[40]Thucydides, *History of the Peloponnesian War* (Penguin, 1974) ch III.82.

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and treacherous, a stupid man as honest, someone thick skinned as good tempered.[41] Also in the modern period, figures like Hobbes and Rousseau were wary of our capacity for speech. Hobbes thought that naming is not only the political action par excellence, but also a seed for conflict. For Hobbes, although words are counters by which the wise reckon, they are also the 'money of fools',[42] trumpets of war and sedition.[43] Rousseau too thought that our capacity for naming, for interpreting and for having linguistically sophisticated understandings of the world, also turns us into imbeciles.[44] In sum, our distinct capacity for language is also the stuff that brings about war, conflict, difference, individuation, vainglory, *amour propre*, inequality and oppression. Hobbes thus conceived of the State as a much-needed authority on definitions,[45] and Rousseau imagined a just society as a silent one.[46]

Yet, the problem is more complex. As it happens, Hobbes also thought that the State was made of words,[47] and Rousseau allowed for the possibility of deliberation in constitution making under proper conditions. While constitutions may be difficult to agree upon, and while people may be misled during the discussions leading up to their enactment,[48] the Genevan admitted that constituents must avoid talk *unless* they find themselves under ideal conditions for debate.[49] Deliberativists agree.[50] This is why they have traditionally described deliberative democracy as an ideal that embodies stringent principles and conditions, such as full inclusion, respectful exchange of views and arguments and a willingness to change one's perspectives, preferences and viewpoints in light of better arguments; with good reason, these principles and conditions have been championed as part of 'ideal speech situations', 'unlimited communities of communication' or 'ideal deliberative procedures'.[51] Accordingly, procedures must be set up to frame discussion so that not just any expression of public discussion counts as deliberation. Conditions must be met for deliberative procedures to express the rights and obligations that participants ideally have for them to accept the results of the procedure, even if they fall short of the ideal mark.

[41]Aristotle, *The Art of Rhetoric*, H. Lawson-Tancred (ed.) (Penguin, 1992) ch I.9.

[42]Thomas Hobbes, *Leviathan* (CUP, 1996) or *The Matter, Forme and Power of a Common Wealth Ecclesiasticall and Civil* (CUP, 1996) 29.

[43]Thomas Hobbes, *On the Citizen* (CUP, 1998) ch V, 5.

[44]Jean-Jacques Rousseau, 'Discourse on the Origin of Inequality Among Men', in Donald A. Cress (ed.) *Basic Political Writings* (Hacket, 1987) 45.

[45]Fernando Vallespín, *Política y verdad en el Leviatán de Thomas Hobbes* (Tecnos, 2021).

[46]Nadia Urbinati, 'Representation as Advocacy' (2000) 28 (6) *Political Theory* 758, 764; *Representative Democracy* (UCP, 2006) 113.

[47]Philip Pettit, *Made with Words Hobbes on Language, Mind, and Politics* (PUP, 2008).

[48]Jean-Jacques Rosseau, 'The Social Contract', in Victor Gourevitch (ed.) The Social Contract *and other Later Political Writings (CUP*, 1997) 59.

[49]Ibid.

[50]See Jon Elster, 'The Market and the Forum: Three Varieties of Political Theory', in James Bohman and William Rehg (eds.), *Deliberative Democracy* (CUP, 1997; n 14).

[51]Respectively, Jürgen Habermas, 'Discourse Ethics: Notes on a Program of Philosophical Justification', in *Moral Consciousness and Communicative Action* (Christian Lenhart and Shierry Weber Nicholson, Trans.) (Cambridge: MIT Press, 1990) 43–115; *Justification and Application. Remarks on Discourse Ethics* (C. P. Cronin, Trans.) (Cambridge, MA and London: MIT Press, 1993); Joshua Cohen, 'Deliberation and Democratic Legitimacy', in James Bohman and William Rehg (eds.), *Deliberative Democracy* (Cambridge, MA and London: The MIT Press, 1997) 67–92.

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I argue that silence is one such condition. It is instrumental for thinking and reflecting upon what one has learnt when participating in deliberative interactions, particularly when stakes are high, for example, as I discuss next, when the outcome of deliberations is constitutional.

Silence also allows us to know ourselves and connect with others. It is a mode of communication, '[rather than an] acoustic state predicated of spaces, objects or people'.[52] I side with Jung, who distinguishes 'being silent' from 'the uses of silence' as a mode of communicative action. The distinction entails that silence is not simply a conversation stopper, but a form of relating to something or someone in particular.[53] Ferguson has also persuasively argued that silence can be constitutive of personal identities and an enabler of communities,[54] for it is usually when silence overcomes noise that we are faced with the need to understand ourselves and others. We first must reconcile with ourselves, of course. It is in those few interstices of peace when we face the court of reason probably in its most demanding facet. In silence, there is little escape from honesty. One may fool others; it is harder to fool oneself.[55] Ferguson draws on Nietzsche's *Thus Spoke Zarathustra*, but I believe Shakespeare said it best: 'When to the sessions of sweet silent thought/I summon up remembrance of things past'.

The sonnet reminds us that silence is often a relentless judge. It is a court in session that sends us down memory lane confronting us with the worst aspects of our life. Silence makes us remember, as the remainder of the sonnet suggests, all that we sought but failed to reach or achieve, makes us waste time in painful reveries, cry for lost friends and relive grievances. It is a privileged avenue for self-knowledge.[56] To ingest – the verb is Ben Jonson's – and to internalise experience in the viscera of one's spirit,[57] is to remember in silence.

However, there is more to silence than individual remembrance and grievance. It is also social.[58] Silence makes us think about others. Towards the end, Shakespeare's sonnet breaks with the harshness we are put through when reminiscing and affirms that silence makes us think about things that matter to *us*, things *we* hold dear. And so, friendship overtakes grievance and others rescue us from ourselves: 'but if the while I think on thee dear friend/all losses are restored and sorrows end'. It is the recognition of others that allows us to recover what our past has taken from us or prevented us from doing, saying or achieving. Losses, as the Bard insists, are not forgotten but restored. Sorrows end. Friendship, not loneliness.

Silence is also something willed – not something that passively happens to us. It can be sought out and chosen. Yet, deliberative democrats have traditionally held the view that silence is problematic even when it is chosen, because such choice is taken as a political or even as anti-political.[59] Moreover, they have stressed that it may not always be welcome and that it should be avoided when imposed by uncontrolled circumstances.[60] The first

[52]Jung (n 39) 428.
[53]Jung, Ibid.
[54]Ferguson (n 37) 59.
[55]Although admittedly not impossible, due to the psychological phenomenon of cognitive biases.
[56]Ferguson (n 37) 59.
[57]George Steiner, *Grammars of Creation* (YUP, 1990).
[58]Ferguson (n 37) 60.
[59]Brito Vieira (n 7) 977.
[60]Adam Przeworski, 'Deliberation and Ideological Domination', in Jon Elster (ed.) *Deliberative Democracy* (CUP, 1998).

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indication of this concern is visible in the 'all potentially affected principle', which underscores inclusion as a criterion for legitimacy.[61] Norms emerging from deliberative procedures can demand obedience only if those who are affected by them have a say in their creation. Conversely, when individuals are excluded and, thus, mere addressees of decisions adopted by others, they are dominated.[62] And the attitude towards this has been to demand more talk, to increase the number of sites for talk, as Brito Vieira correctly affirms, 'from vote, to special group influence, to deliberative fora'.[63]

These attitudes derive from the traditional understanding of silence as a agential. However, the different perspective here adopted leads us in a different direction, one that pays attention to the possibility that self-chosen silence could be instrumental for avoiding domination, not merely for silencing others against their will.

The need for silence is also reflected in various institutions of constitutionalism. One notable example is the use of mechanisms guaranteeing that ordinary, everyday politics remain quiet about important matters. This is exemplified by conceptions of fundamental rights understood as 'preserves' or 'domains of the undecidable'.[64]

However, my suggestion here is different. I see silence neither as a ban on deliberation nor as a curb on it, but as a guarantee of its proper functioning.[65] It is a way of coming to terms with the fact that the citizens' political preferences and opinions on constitutional matters are shaped and influenced even in the absence of talk. Just as John Cage's composition *4:33′* suggests that under certain institutional conditions music happens even when what is interpreted and performed is an empty score, a right to constitutional silence should acknowledge that preference formation and influence is anything but gone when individuals stop airing their arguments, preferences, reasons and so on.[66,67] This combination of constitutional salience, along with the recognition of the ubiquitous nature of constitutional politics, warrants the implementation of institutional avenues that facilitate silence, allowing individuals to form preferences, interests and opinions on constitutional matters under proper conditions.

In conclusion, silence can be desirable and sought out. I now examine the four elements of a right to it when constitutional matters are at stake. These components refer, respectively, to the domain within which the right emerges and can be wielded, to the conditions that it creates for its holders to think about constitutional matters and to its function and limits, that is, constitutional salience, time, reflection and publicness. Whence the right emerges and what are its grounds, is tackled in the Section 'A legal right'.

[61]Habermas, *Between Facts and Norms* (n 18) 107.

[62](n 14)

[63]Brito Vieira (n 7) 977.

[64]Respectively, Ernesto Garzón Valdés, 'El consenso democrático: Fundamento y límites del papel de las minorías' (2000) 12 *Isonomía* 7 (*cotos vedados*, in the original); Luigi Ferrajoli, *Principia iuris. Teoria del diritto e della democrazia* (Laterza, 2012) 822.

[65]Holmes, Gag Rules (n 10).

[66][Author]. In the same vein, also discussing Cage, see Ferguson (n 37) 62.

[67][Author].

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Constitutional salience

Citizens have a right to silence when stakes are high. And so, the right to silence entitles individuals to institutional conditions under which they may give reflective answers to questions of constitutional import. Given their legal and political hierarchy, and given the effects of their implementation, application and change, citizens affected by them should have some room to think without haste. They need space to ruminate about possible interpretations of current constitutional arrangements or about whether different ones are in their best interests, whether there is enough evidence supporting them, whether they map onto their moral and political values and so on. There may be several other areas where silence is relevant and beneficial and where it could be demanded by citizens, but matters of constitutional salience are safe candidates for its application. Put differently, a right to silence is implicit when constitutional matters are at stake. While silence may be instrumental for debating and deciding on all sorts of matters falling outside the domain of constitutionalism, it does not follow that participants to those debates will have *a right* to it. By contrast, a right to silence built in deliberative procedures when matters under discussion have constitutional import.

But what counts as constitutional? One possible answer is to say that everything that is in the text of the constitution. However, this is debatable,[68] because constitutions often address matters typically considered within the realm of ordinary politics. This complicates the institutional design of the right to silence. Such a design would have to be sensitive to changes in constitutional substance that may not be explicitly considered by the legal system and vice versa. Perhaps the more obvious case of a legal system prone to create confusion of this sort is the Westminster model of constitutionalism, where Parliament is, prima facie, sovereign to change any aspect of the legal system, irrespective of its normative hierarchy. However, we also find it in continental legal systems. Consider Chile's regulation of the general prohibition of retroactive legislation, which is not in the Constitution but in the Civil Code, a piece of ordinary legislation. This is certainly a matter of constitutional import. So, one could reasonably ask whether that provision falls within the province of ordinary legislation and therefore outside the scope of application of the right to silence.

Admittedly, this requires attention. However, we should not cast an overarching doubt over the notion that constitutions generally entrench matters central to the proper and fair functioning of a polity and to the rights and duties of the individuals that are part of it. These two examples illustrate a difficulty, but they do not prove that there is no distinction between constitutional law and other legal sources. This is clear in the Chilean prohibition of retroactive legislation, where there is a written constitution and higher law curbing the exercise of ordinary legislation to change the civil code. However, even in the Westminster model of parliamentary supremacy there are matters in relation to which Parliament must meet higher justificatory thresholds if it decides to change them.[69] For this reason, as shown by the institutional proposals elaborated in the Section 'The institutions of deliberative silence: three suggestions', the abstract nature of the claim that constitutional salience is a condition or requisite for exercising the right to silence does not rule out the suggestion that some parts of a constitution are clear candidates for its application.

[68]Carl Loewenstein, *Verfassungslehre* (Mohr Siebeck, 2000).
[69]Martin Loughlin, *The British Constitution. A Very Short Introduction* (OUP, 2013).

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All in all, I should err on the side of caution. I argue that the right to silence is applicable to the most fundamental and abstract parts of a constitution. While the examples show that there is no clear-cut answer to what counts as constitutional, there should be little doubt as to what counts as 'thin' constitutional law. That is, 'the fundamental guarantees of equality, freedom of expression and liberty'; formulas about what 'ordinary citizens need to recite when we try to figure out what free expression or equality requires'.[70] These are framed at such an abstract level that they rarely settle concrete cases on their own. The notion provides us with a heuristic for the design of the institutions that would put the right to silence to work.

My discussion in Section 'The institutions of deliberative silence: three suggestions' is guided by this heuristic, which grounds the claim that the right to silence applies, at least, to discussions about preambles and introductory chapters of a constitution, where this dissonance between what is constitutional and what is not is less likely to emerge.

The idea of constitutional thinness helps to clarify one possible source of confusion, namely that constitutionally prescribed silence can stifle decision-making processes at the constitutional level by the institutions of government. This is not the case. First, because what formal institutions do regarding the 'thick' constitution is not within the range of application of the right to silence. Remember that the thick Constitution 'contains a lot of detailed provisions describing how the government is to be organized – for example, a provision stipulating that the president "may require the Opinion, in writing, of the principal Officer in each of the Executive Departments, upon any Subject relating to the Duties of their respective Offices"'.[71] In my view, these aspects are still left for formal institutions to decide upon.

Several features define constitutional thickness, but one stands out in the context of my discussion, namely the attitude of citizens towards the provisions comprising it:

> *Public indifference.* The thick constitution's provisions do not thrill the heart. They do not generate impassionate declarations – except perhaps among constitutional scholars – about how the Constitution provides essential protections for human liberty.[72]

Thus defined, the right to silence is hardly applicable here. And so, formal institutions of government may continue deciding as they usually do, with the sole difference that citizens' deliberations about preambles and introductory parts of the constitution will place representatives in a position to consider those discussions and their upshots. As I argue in Section 'Where and when?', this division of labour is important for institutional design. All in all, it would be wrong to describe it as an impediment to the proper functioning of government institutions that are meant, in any case, to be limited by what *the people* mandate them to do.

Time

Constitutional matters are salient, not urgent. And the right to silence is attentive to the difference.

[70]Tushnet, *Taking the Constitution* (n 12) 11.
[71]Ibid.
[72]Ibid., 10–11.

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Constitutional thinness will imply that decisions adopted via procedures where the right to silence is applicable are unlikely to resolve urgent, concrete disputes. As mentioned earlier, it is circumscribed to provisions that typically establish the foundations of the political community they govern; constitutional provisions prescribing, for example, the form of the State, explicit commitments, such as the German constitution's explicit commitment to democracy, or provisions stating that a state is a republic or a constitutional monarchy and so on. They have in common that while they are not directly applicable to matters of constitutional justice in need of immediate or urgent reparation – no injustice will be clearly solved, let alone repaired, by the sole invocation of any of the said provisions – they ground those norms, principles and policies that are. As Waldron explains, '[s]omething might be a principle of our constitution – something that captures its spirit and that might be highlighted in a comparative analysis – but it still may not really be of much use within the legal system (e.g., in settling cases)'.[73] Yet, insofar as they ground more directly applicable norms, principles and rules, they bear on their meaning and are likely to influence the ways they are applied to concrete cases in the long term. The right to silence does not, then, preclude debates about matters of constitutional justice in concrete cases. Rather, it is a way of thinking about the role that thin constitutional principles play in the long-term evolution of 'thicker' aspects of the constitution.

To illustrate a different way in which constitutional matters can be important and not urgent, consider Jacobsohn and Roznai's study of constitutional revolutions. They show that revolutionary changes in constitutional identity are not necessarily tied to 'the specific occasion of a constitution-producing political event' – thunder and lightning – [and] fire' (Exodus 19:16).[74] By contrast, 'constitutional revolutions are paradigmatic displacement[s], however achieved, in the conceptual prism through which constitutionalism is experienced in a given polity'.[75] The interpretation of some parts, sections or clauses of a constitution brings about slow but important changes in the meaning of the entire constitutional text and practice. Accordingly, Hungary, Germany, India and Israel are presented as archetypes of 'constitutional revolution[s] occurring without the invocation of an extraconstitutional constituent power'.[76] The cases illustrate that constitutional identity can facilitate as well as hinder 'dramatic changes in systemic level configuration', that it can change little by little, step by step and that the 'process by which such change occurs may have revolutionary implications'.[77]

The main takeaways from these findings are, first, that citizens will need a good deal of time in silence to think about what they have debated, what their preferences are and will be because of those deliberations, how those preferences affect the content of their constitutional commitments and so on. Second, that there is little reason to think, then, that every reason, argument, justification and so on will be readily available to all those potentially affected by a future decision. As Jacobsohn and Roznai stress, constitutional time can be slow and are often the result of retrospective reflection.[78]

[73]Jeremy Waldron, *Thoughtfulness and the Rule of Law* (HUP, 2024) 236.
[74]Gary Jacobsohn and Yaniv Roznai, *Constitutional Revolution* (YUP, 2020) 5.
[75]Ibid., 19.
[76]Ibid., 8, 61.
[77]Ibid., 104.
[78]Ibid., 13.

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Reflection

Remember that in Shakespeare's sonnet, silence is a court in session. And like any court procedure, it is about pondering, arguing and justifying. Qua deliberative right, the right to silence takes this seriously, for deliberative theory is concerned with the correct formation of moral and political preferences.[79] Thus, deliberative procedures should be sensitive to reasons 'advancing proposals, supporting them, or criticizing them'.[80] Public debate, the publicity guaranteed by the deliberative procedures through which we explain and champion our claims to others, provides the incentives for us to think why we prefer one option over the other and whether and how others will consider those preferences as acceptable reasons. Moreover, under proper conditions, such processes put individuals in a position to revise, adapt and potentially renounce their preferences should their fellow debaters reject them for reasons they themselves ought to express in return. Should those conditions obtain, more legitimate, morally correct or better-informed decisions shall ensue.

Deliberative democrats claim that deliberation is an open and ongoing decision-making process of expression and transformation of preferences and interests through rational discourses among free and equal individuals.[81] These citizens have different preferences, values, interests and rights and different deliberative sites and contexts bring different standards to bear on each of these categories. Deliberativists then point to the 'need for ongoing discussion of moral disagreement in everyday life'.[82] Accordingly, no topic is by default off the table, no norm undebatable, no decision, value or principle immutable.[83]

However, there may be potential tensions between the demands for openness and ongoingness when deliberation has constitutional import.[84] Reasoning and justification are complex and sometimes strenuous tasks, which may need some time to stop and think.[85] Nor do those demands square well with some values traditionally associated with constitutionalism, and which constitutions have attempted to secure through the implementation of rigid amendment procedures. While deliberativists embrace constitutionalism,[86] constitutionalism still pulls in the direction of rigidity

[79]Félix Ovejero, 'Teorías de la democracia y fundamentaciones de la democracia', (1996) 19 *Doxa* 309, 340–1.

[80]Joshua Cohen, 'Deliberation and Democratic Legitimacy' (n 19) 74.

[81]Jon Elster, 'Introduction', in Jon Elster (ed.) *Deliberative Democracy* (CUP, 1998); Ron Levy and Graeme Orr, *The Law of Deliberative Democracy* (Routledge, 2017) 22; Gutmann and Thompson, *Why Deliberative Democracy* (n 6) 7, 26, 45, 97.

[82]Ibid., Gutmann and Thompson 12.

[83]Chambers, 'Measuring Publicity's Effects' (n 17) 259; Gutmann and Thompson, *Why Deliberative Democracy* (n 6) 110–18.

[84]For example, Conrado Hubner Mendes, *Constitutional Courts and Deliberative Democracy* (OUP, 2013) 21.

[85]John Dryzek, 'The Forum, the System and the Polity: Three Varieties of Democratic Theory' (2017) 45 (5) *Political Theory* 610, 613.

[86]Nino, *The Constitution of Deliberative Democracy* (n 5); Habermas, *Between Facts and Norms* (n 18); Jon Elster, 'Deliberation and Constitution Making', in Jon Elster (ed.) *Deliberative Democracy* (CUP, 1998); Hoi Kong and Ron Levy, 'Deliberative Constitutionalism', in André Bächtiger *et al.* (eds.), *The Oxford Handbook of Deliberative Democracy* (OUP, 2018) 626; John J. Worley, *Deliberative Constitutionalism* (2009) 2 *Brigham University Law Review* 431; Chiara Valentini, 'Deliberative Constitutionalism and Judicial Review: A Systemic Approach' (2022) 47 *Revus* 1.

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and predictability.[87] A prominent reason is that citizens need to be able to plan their lives in advance with some certainty and without arbitrary interferences.[88] For this, some restrictions on constant constitutional change are typically seen as desirable.[89]

The right to silence is attentive to both desiderata. And so, it insists that openness to constitutional change must be governed by reason and argument. Now, this entails that neither deliberative ongoingness nor constitutional inflexibility is intrinsically valuable, but instruments for proper reflections on important matters.

'How' to decide must be sensitive to 'what' is at stake. Consider recent events in Chile's constitutional process that started with the 2019 social outburst and ended with the rejection of a second draft constitution proposed by an expert committee. Even if the first constitutional assembly mandated to write a constitutional text was democratically authorised and representative of large sectors of the population, the final text was in the end submitted to yet another referendum, urging citizens to express all their preferences, beliefs, arguments, agreements and disagreements, in a thumbs-up–thumbs-down fashion. The constitutional assembly was given merely 1 year to both discuss and agree on the rules of its internal functioning and to draft the text. This reflected more urgency than importance. Thus, the initial social consensus that the current constitution needed to be replaced with a democratic one was fragmented and hardly recognisable anymore. In addition to that, the media, political parties and politically active individuals increased the rhythm and intensity of their involvement in the process to influence it merely in the direction of their own interests. Some even spoke of a digital 'guerrilla' that distorted the chances – on the one hand, for the convention to operate in a deliberative manner, and on the other hand, for the citizenry to be informed and form their opinions correctly.[90]

Counterfactuals prove little, but one wonders about the direction things may have taken if there had been less urgency and better conditions for better reflection in the Chilean constitutional process. As the case shows, these controlled institutional environments securing ideal conditions for discussion, are hardly found or replicable in the wider informal public sphere. To the extent that they are found, it is most likely not the result of design, but rather chance. Institutionally implemented silence can be instrumental for avoiding some pernicious effects of what otherwise could be too much discussion, too hasty. Absent proper conditions, citizens find it hard to identify relevant information for the acquisition of justified true beliefs about political issues,[91] they are

[87]Bello Hutt, Donald. (2020). The deliberative constitutionalism debate and a republican way forward. *Jurisprudence*, 12(1), 69–88. https://doi.org/10.1080/20403313.2020.1785259; Ibid., Valentini.

[88]For example, Joseph Raz, 'The Rule of Law and its Virtue', in *The Authority of Law: Essays on Law and Morality* (OUP, 1979) 220; The Law's Own Virtue (2019) 39 (1) *Oxford Journal of Legal Studies* 1; Thomas Christiano, *The Rule of the Many: Fundamental Issues in Democratic Theory* (OUP, 1996) 20; Cass Sunstein, *Legal Reasoning and Political Conflict* (OUP, 2018) 123.

[89]Raz, 'The Rule of Law' (n 76); *The Law's Own Virtue* (n 88).

[90]Patricio Durán and Thomas Lawrence, 'Guerrilla digital contra la convención constituyente', CIPER (2021) Retrieved from Ciper Chile: https://www.ciperchile.cl/2021/09/13/guerrilla-digital-contra-la-convencion-constituyente/.

[91]See, for example, Walter Lippmann, *Public Opinion* (Transaction, 1991) 22, 148. The definition of political knowledge as justified true beliefs is an application of Jonathan Ichikawa Matthias Steup's (2017) tripartite analysis of knowledge. 'The Analysis of Knowledge', in Edward N. Zalta (ed.), *The Stanford Encyclopedia of Philosophy* (Summer 2018 Edition), <https://plato.stanford.edu/archives/sum2018/entries/knowledge-analysis/>.

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likely to become rationally ignorant,[92] lose interest in public matters,[93] fall prey to cognitive biases of different sorts[94] and move towards the extreme of otherwise moderated positions because they are inclined to debate mostly with others who think alike.[95]

Mind you, this is not a call for avoiding discussion. It is a call to think; a reminder that deliberation may be more successful under proper conditions; that defective discussion may be worse than having none.[96] It is also a reminder that when individuals are given a chance to think quietly before talking, their preferences can be more nuanced and the result of freer reflections.[97]

Publicness

I must be adamant that individuals are entitled to some silent room *to think*. That is, qua individual right, the right to silence entails a correlative duty of using that room for thinking about the meaning of the constitution they deliberate about. It is not just a negative liberty not to be bothered or, adapting Constant's wording, to merely enjoy their private independence.

The right to silence does not entitle one to withdraw from public discussion, but to think about constitutional and, therefore, public matters. Of course, keeping public track of how a right is exercised in *foro interno* is hard and to a large extent undesirable. Demands for serious thought about constitutional matters must co-exist with and be balanced against due respect for the inviolability of one's consciousness.

Therefore, the right to silence must be pondered against other rights. However, it also means that it will impose certain duties on citizens to think about certain questions in certain terms. Its purpose is not merely to consider how the constitutional matters at hand may benefit individual interests or self-interested preferences. Instead, it is to reflect on whether one's considerations about what is constitutional are aligned with the public interest. To borrow from Walt Whitman, the right to silence should be exercised so that when individuals think of themselves, they at the same time think of 'the word Democratic, the word En-masse'. Put differently, individuals may, of course, use silence for purposes different from those intended in the deliberative process, but this does not mean that these uses are covered by the right to silence. Individuals may use and abuse opportunities created by rights in all sorts of ways, but it does not follow that their use and abuse is necessarily warranted by the rights in question. Property rights, for example,

[92]Ilya Somin, *Democracy and Political Ignorance: Why Smaller Government Is Smarter* (Stanford, 2013); Michael Delli Carpini, Fay Lomax Cook, and Lawrence Jakobs, 'Public Deliberations, Discursive Participation and Citizen Engagement: A Review of the Empirical Literature' (2004) 7 (1) *Annual Review of Political Science* 315.

[93]The classic statement of this problem is Constant's contrast between the liberty of Ancients compared to that of Moderns. More contemporary elaborations can be found in Anthony Downs, *An Economic Theory of Democracy* (Addison Wesley, 1997) and Joseph Schumpeter, *Capitalism, Socialism and Democracy* (Routledge, 2003).

[94]Jon Elster, *Sour Grapes* (CUP, 1983) 109; Joshua Cohen 'Reflections on Deliberative Democracy', in Thomas Christiano and John Christman (eds.), *Contemporary Debates in Political Philosophy* (OUP, 2009) 78.

[95]Cass Sunstein, 'The Law of Group Polarization' (2002) 10 (2) *The Journal of Political Philosophy* 175; David Schkade *et al.*, 'When Deliberation Produces Extremism' (2010) 22 (2–3) *Critical Review* 227.

[96]Elster, 'The Market and the Forum' (n 48) 115.

[97]Sunstein, 'The Law of Group Polarization' (n 95).

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create possibilities for owners to use their property in all sorts of ways. The owner of a knife may use it in several imaginable ways, but her right certainly does not cover the action cutting someone's throat or breaking in someone's house.

In the context of the right to silence, there is a difference, then, between private and public preferences and interests.[98] A person has an interest in something if that something brings about or promotes her well-being; she has an interest in something if she has a reason to prefer that something. While preferences have a volitional character, interests motivate, explain or justify preferences. Some preferences are alien to the public sphere, but their pursuance may be legitimate insofar as they are not offered as reasons for collective decisions. However, some preferences – public and private – can be underpinned and warranted by public interests.

The right to silence asks individuals to reflect upon how their constitutional commitments, principles and values relate to their preferences and how those preferences can be compatible with or be expressive of constitutional, and therefore public, interests. Of course, mere silence is not enough for securing that individuals will think in this way. My expectation is neither that individuals will be forced to think in certain terms nor that they will have to adjust their thoughts, preferences and interests to some preordained specific set of contents. It is rather that given that the right to silence emerges in the context of deliberative procedures about constitutional matters, participants will know that the procedure incorporates the chance for them to enjoy a certain quiet time when discussing these issues for certain collective purposes before adopting justified decisions. This may not, of course, be enough for some to ask themselves about something other than how a constitution can benefit them and no one else. However, there are nevertheless reasonable expectations that the procedure will motivate them to do so in analogous ways to how publicity gives hypocrisy a civilising force.[99] Just as the public nature of deliberative procedures compels individuals to consider others' perspectives, even if for self-interested reasons, a silent moment introduced by well-designed procedures can encourage public-minded thinking.[100]

Turning this ideal into something feasible hinges, to a large degree, on institutional design. However, before I get into that, I must show that the right to silence is not merely a moral desideratum, but a legal right and an institutional feature of deliberative procedures when they are employed to decide matters of constitutional salience. To that discussion I now turn.

A legal right

My preceding reflections are normative in both a moral and legal sense. I see no principled objection in presenting them thus,[101] but here I circumscribe my argument to the legal domain. Yet, given that the right to silence has not been explicitly recognised anywhere institutionally,[102] there could be reasonable doubts as to whether I am smuggling moral

[98]I develop this distinction more extensively in Bello Hutt, Donald (2022). Rule of Law and Political Representation. *Hague J Rule Law* 14, 1–25. https://doi.org/10.1007/s40803-021-00163-5.

[99]Elster, 'Deliberation and Constitution Making' (n 74) 103.

[100]Ferguson (n 37) 59.

[101]On this, I follow Jeremy Waldron, 'Introduction', in Jeremy Waldron (ed.) *Theories of Rights* (OUP, 1984) 7.

[102]As mentioned at the outset, Gray (n 9) also champions a right to silence, but with a different focus than mine in this article.

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considerations into a legal analysis. However, no. The right derives from the very tenets of the law of deliberative democracy and constitutionalism, and it will be present, even if implicitly, in a deliberative constitution as a matter of positive law. And so, while the argument for deliberative constitutionalism is admittedly normative in both moral and political senses, the potential deliberative rights granted to individuals in hypothetical deliberative constitutionalism polities will emerge from the institutions, rules and duties present in their decision-making procedures.

Put differently, the right to silence is an institutional, not a natural right.[103] This means that practices, procedures, rules, conventions and norms 'can introduce rights and correlative duties for those who live under them'.[104] That is, rights emerge 'in virtue of being established by a system of rules, be those rules conventions, norms, laws or whatever' they are identified by the very rules that support them, validated 'by the good that those rules ensure' and they are enforced, 'where enforcement is necessary, by the sanctions that the rules would trigger for offenders'.[105]

This bears on my problem here, as it allows me to reflect on the origins and grounds of the right to silence. The right to silence derives from the rules constituting the practices, procedures, rules, conventions and norms of deliberation when it is meant to address matters of constitutional import. Deliberative constitutionalists avow that deliberation must permeate constitutionalism and vice versa. And so, while the rules of constitutionalism must be informed by deliberative goals, deliberative democracy must mould itself to the specificities of constitutional arrangements and principles. As Levy and Kong avow, in a deliberative constitutionalism, there is a relationship between law and deliberation, and between deliberation and law.[106]

It follows that discussions in a deliberative constitutionalism cannot be about just anything. They regard the most important legal, political and moral aspects of a given polity. Their content conditions what is to be discussed through deliberative democratic arrangements, in the same way that agendas condition any discussion. As Kong and Levy indicate, '[l]aw – especially constitutional law – extensively colours and channels democratic decision-making'.[107] In other words, changes in constitutions must meet rather stringent argumentative thresholds.[108] This requirement has traditionally been instantiated through the implementation of rigid amendment procedures. However, in a deliberative constitutionalism, constitutional salience is embodied in how arguments are to be presented, listened to, weighed, pondered, accepted or rejected as grounds for eventual decisions. Topics influence how those matters are dealt with by shaping processes of deliberation that are sensitive to the importance of what is at stake.[109]

Rights and procedures are to some extent two sides of the same token. Freedom of expression, freedom of conscience, a right to justification, equality of political influence

[103]The distinction is Philip Pettit's in *The State* (PUP, 2023) 225–63. And as Pettit rightly affirms, the institutional/natural distinction is compatible with other taxonomies accounting for the nature of rights. It is, most prominently, compatible with discussions about the merits of the will theory or the interest theory of rights (2023, p. 253).

[104]Ibid., 253.

[105]Ibid., 253.

[106]Ron Levy and Hoi Kong, 'Introduction', in Ron Levy *et al.* (eds.), *The Cambridge Handbook of Deliberative Constitutionalism* (CUP, 2018) 3–4.

[107]Ibid., 4.

[108]David Lyons, 'Utility and Rights', in Jeremy Waldron (ed.) *Theories of Rights* (OUP, 1984) 114.

[109]Levy and Kong, 'Introduction' (n 106) 4.

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and other rights and freedoms are not just instrumental to deliberative designs. Rather, they instantiate the very goals of the procedure.

A rather paradoxical proof of this relation between procedures and rights is found in an important problem internal to deliberative democracy, namely that it requires the fulfilment of certain prerequisites without which there is little reason to defer to its results. These preconditions include freedom and equality in the process of discussion and decision, absence of insular minorities, respect for basic rights and freedoms and so on. Now, as it has been pointed out by Nino, the critique says that 'if we make provision of all these resources preconditions for [deliberative democracy], there will be very few questions for democracy itself to answer'.[110] Put differently, if you want to deliberative about how to achieve equality, your deliberative procedure will have to guarantee that participants are one another's equals. However, if the procedure does indeed treat everyone as equals, chances are that the result the procedures aspires to has already been achieved. Although this is not the place to discuss solutions to this paradox, its existence suggests something important for my purposes here: that deliberative procedures are structured as rules that require and that instantiate rights of a certain kind for them to be deliberative procedures in the first place. In a nutshell, deliberative institutions rest on institutional deliberative rights.

In the context of deliberative democracy and constitutionalism, this means that that rules meant to structure processes of deliberation at the constitutional level will vary in different places, but they will most likely include selection methods able to track representative samples of the population affected by the outcome of the debate, the implementation of moments and material conditions for participants to prepare for discussions, spaces for deliberators to learn about what is at stake in the process as well as about the different positions different parties and representatives have about such topics.[111] After this learning process, participants should have time and space to discuss, question what they have learned and present their own views on the matter moderated by impartial chairpersons in charge of steering questions and discussions so that participants see themselves inclined to justify their assertions using public reasons.

This sketch hints at the type of rules necessary for achieving better, fairer, more inclusive outcomes; outcomes that are expressive of the features of a deliberative procedure when discussions have constitutional import. Those rules will be sensitive to the politically exceptional character of constitutional change and to the fact that such eventual changes affect the polity as a whole. And so, for those rules to operate, they will have to grant entitlements of a certain kind to participants in the deliberative process, not because these rights are natural or pre-political, but because the procedure must include them for it to be a constitutional deliberative procedure in the first place. They will, at least, be expressive of the right to equal treatment and the representational rationale underpinning, for example, random sampling. They will also have to be expressive of a right to sufficient material conditions for proper deliberation without which participants will not be able to express the best versions of their preferences and arguments.[112] They will also be sensitive to the time and conditions necessary for understanding and

[110]Carlos S. Nino, *The Constitution of Deliberative Democracy* (Yale University Press, 1996) 139.

[111]Caroline Hendriks, '*Consensus Conferences and Planning Cells. Lay Citizen Deliberations*', in John Gastil and Peter Levine (eds.) *The Deliberative Democracy Handbook. Strategies for Effective Civic Engagement in the 21st Century* (Jossey-Bass Inc. 2005); Kimmo Grönlund et al. (eds.) (n 26); Ryan and Smith, Defining Mini-publics (n 16).

[112]I have referred to these dimensions as 'equality of access and deliberation'. See (n 14)

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honouring the content, scope and importance of constitutional matters under discussion. Moreover, for the reasons stated earlier, they will also give participants a chance to isolate themselves from noisy interference, so that they will be able to comprehend and internalise in their own terms the content of the discussion when procedures of constitutional change are activated.

The institutions of deliberative silence: three suggestions

The implementation of a right to constitutional silence will admit many forms. As it happens, some current political institutions promote silent thought for the purpose of reflecting properly. The main one is what in election law is referred to as election silence, blackout periods or campaign silence; moments before elections during which there can be no political campaigns, speeches by election contenders or public advertisement by political parties. These periods are meant for citizens to take a step back and to think about the programmes that different candidates have presented to them during election periods without any background noise hampering their chances to reflect. However, they are typically brief, often lasting only 24 hours before election day. However, their existence and widespread institutional use indicate that our political institutions already employ silence for improving decision-making. Ackerman and Fishkin also perceive the value of silence when, in their design of deliberation day, they give preferred places in a queue to those speakers who have previously remained silent.[113] Of course, participants may have reasons other than a desire for careful reflection when they choose to forgo their turn to speak. However, that desideratum can also count as a reason accounting for why these participants may choose to be quiet during some discussions. Gray also proposes abstention in elections, tacit consent in representative processes and iterative voting procedures designed to avoid 'false appearance of consensus on issues where serious disagreement persists'.[114]

However, more is needed. While I have no quarrel with these proposals, they are not directed at addressing the constitutional matters that pertain to the right to silence. In this section, I elaborate three suggestions. While I conceive of them as having heuristic value and while they do not exhaust all possible alternatives, they are attentive to the characteristics and goals of silence in constitutional deliberative procedures: they give individuals silent time to reflect on public matters of constitutional import. And so, I present them here as a way of starting a conversation about how to turn silence into a working institutional practice for constitutionalism.

The first proposal highlights the importance of preambles and introductory chapters of constitutions. I suggest that the content of these sections can function as agendas for silent thought inserted at some point in a deliberative procedure of constitutional change. The second suggests that the right to silence warrants public intervention on the media to the extent that the press and digital platforms are more driven by market imperatives than by an obligation to inform and improve public discourse. At least during certain periods of time when thin constitutional law is at stake, the law of deliberative constitutionalism should guarantee reflective, silent thought against noisy media interference. The third is an adaptation of an institutional design I have proposed elsewhere that could put the first two suggestions into operation.

[113]Bruce Ackerman and Fishkin (YUP, 2004) 27.
[114]Gray (n 9).

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Introductions and preambles

Silence can enhance reflection on 'thin' constitutional matters such as constitutional democracy, social democracy and principles such as equality, freedom, dignity and so on. The list of these institutions and values is long and in need of constant revision. What, then, is silence about; what is it for?

The complexity of this question suggests that specific, one-size-fits-all institutions are not advisable. Yet, there are two general aspects of constitutions that make them suitable to act as agendas for constitutional silence: introductory chapters or sections and preambles. While there may be 'thin' constitutional content in sundry parts of the constitutional texts, these two groups of sections are almost exclusively framed and written as such. I think of them, so to speak, as constitutional food for silent thought – material upon which individuals may reflect to guide eventual deliberations and decisions by formal political institutions regarding the meaning or potential meaning of thicker provisions of a constitution. That is, sections where fundamental principles are stated in prose and where narratives about the bonds and commitments accounting for the creation and the shared history of a country are spelled out, where expectations about a country's commitment to the rights and liberties of their citizens are made explicit in non-legal language and so forth.

I use the term 'introductory chapters' to describe a common feature of constitutions whereby they establish whence political power emanates, the nature and form of the State, the form of government, the limits of sovereignty and so on. These features serve as grounds for 'thicker' principles and rules such as the prerogatives of each branch of government, amendment mechanisms and so on. Different charters use different names and titles. For example, fundamental constitutional principles (Italian Constitution, Colombian Constitution, section II of the German Constitution), the basis of institutionality (Chilean Constitution), preliminaries (Spanish Constitution), basic principles of the form of government (Swedish constitution) and so on.

Regarding preambles, they are opportunities for deliberative silence, for while their content is traditionally snubbed as legally irrelevant,[115] their content touches on hard-core values that bear on how political institutions interpret legal sources. That content includes, for example, narratives about how the political community is brought about and for what purposes (United States, Canada, Switzerland, Russian Federation, Germany), about national historical bonds (Russian Federation, Portugal), about the need to overcome past injustices (South Africa, Portugal), commitments to democratic principles (Sweden, Russian Federation, Portugal, Colombia, Spain), to safeguarding and/or promoting basic liberties (Portugal, United States, Spain, the UK's Magna Carta, South Africa), respect for future generations (Switzerland), justice and/or fairness (Colombia, South Africa) and peace (Germany, Colombia).

Given their open-endedness, preambles are a good opportunity for putting constitutional matters in the minds of citizens with less legalese and lawyerly vocabulary than the one employed by formal legal institutions and whose meaning is typically decided by formal institutions, especially by courts. Preambles are perhaps the parts of constitutional texts that are most clearly framed as if they had been written by ordinary citizens in the

[115]This tendency, however, is being resisted. See, Liav Orgad, 'The Preamble in Constitutional Interpretation' (2010) 8 (4) *International Journal of Constitutional Law* 714. But, see, Pablo de Lora, *Los derechos en broma. La moralización de la política en las democracias liberales* (Deusto, 2023).

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first-person plural. This feature turns them into material for citizens to ask themselves 'what do *we* mean here?'

Of course, such meaning can and will probably be polysemic. Preambles and introductory sections purposely use ambiguous language, and chances are that little agreement will emerge from reflecting on their content. However, there are advantages to this when, as I make clear in the Section 'Where and when?', I do not expect citizens to make actual decisions when thinking about these sections, but to think silently about them and deliberate properly. And for that, there are some advantages to ambiguous language, instrumental as it may be. As William Empson put it,[116] an ambiguity

> is not satisfying in itself, nor is it, considered as a device on its own, a thing to be attempted; it must arise in each case from, and be justified by, the peculiar requirements of the situation. On the other hand, it is a thing which the more interesting and valuable situations are more likely to justify.

And constitutional matters of the kind included in preambles and introductory chapters certainly are, legally, morally and politically, interesting and valuable.

Silent reflection about those sections should result in interpretations of a whole constitutional project that informs the rest of the more specific parts of a constitution. Those interpretations should lead formal political institutions to give meaning to 'thick' constitutional clauses in specific cases and to read the constitution as enacted and reflected upon by the people themselves in terms of the most basic commitments expressed in these early sections of their charter as interpreted by the citizens themselves.

Private and public silence

The right to silence is an individual deliberative right. As such, it entitles citizens to conditions under which they may reflect quietly on salient constitutional matters. It calls on others not to interfere with the actions and decisions individuals take to think clearly, while also imposing a duty on individuals to engage in thoughtful reflection when conditions permit.

However, citizens will hardly find room for reflection in a time where information and the press are not just public tools and institutions for citizens to form apt opinions on public issues, but, respectively, a consumer good and a business model. I will not provide an overview of all the criticisms against the commercial press here.[117] It is enough to note the widespread agreement that the commercial media's portrayal of itself as a democratic institution does not adequately reflect its responsiveness to market incentives. As such, it treats information, truth, facts and so forth, as instruments for the profit that sustains them. They will find it more difficult to form and express well-formed opinions, desires and reasons if social and mass media reduce attention spans and bombards readers,

[116]William Empson, *Seven Types of Ambiguity* (The Dead Authors Society, 1930) 235.

[117]The most comprehensive survey of this literature I know of is Rubén Marciel's unpublished doctoral dissertation. 'El derecho ciudadano a la información: la promesa democrática del periodismo' (Pompeu Fabra University). Some of the most influential criticisms along these lines include, among others, Jürgen Habermas, *The Structural Transformation of the Public Sphere: An Inquiry into a Category of Bourgeois Society* (MIT Press, 1991); John McManus, *Market Driven Journalism: Let the Citizen Beware?* (Sage, 1994); Edwin Baker, *Media, Markets, and Democracy* (CUP, 2001); Edward Herman and Noam Chomsky, *Manufacturing Consent: The Political Economy of the Mass Media* (Pantheon, 2002).

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viewers and listeners with text, image and sound in such rapid sequence that by the time they have formed opinions, topics will have changed and moved on to something else.

Current press and social media models of information go against the grain of proper thought. In these environments, individuals are increasingly forced to rapidly make up their minds about many topics at the same time, and immediately have opinions and express attitudes towards them, without having the chance to think things through. Elizabeth Spiers put this eloquently:

> Sitting with uncertainty is hard, especially when social media has primed us to expect perfect real-time information during traumatic events and to want instantaneous answers and resolution. Moral certainty is an anchor we cling to when factual certainty is not possible. And the faster we express it, the more certain we appear. The most righteous among us post – and do it immediately.[118]

Private ownership of mass and social media also allows some individuals to frame the timing of the discussions – when they shall take place or when they may be postponed. This means that whether some topic or other is taken as constitutionally urgent will not depend on the reflective consideration of the public, but on the preferences and interests of media platforms.

The right to silence warrants the imposition of constraints on those persons and institutions holding power to influence public opinion. These include limitations on the use of certain instruments during times meant for individuals to reflect silently. In any case, the fact that silence is a deliberative right implies that it does not warrant the limitation on freedom of the press, but rather its functioning as a business model rather than as a public service. In fact, one could argue that by establishing conditions for proper thought and deliberation, it strengthens the right to freedom of speech and freedom of the press by imposing more demanding criteria than the market's on the type of information that could count as constitutionally relevant. The institutionalisation of this difference is compatible with different policies, such as the prohibition of private campaign funding, public distribution of time for political adverts and a prohibition to the private media, just like the one imposed on political parties, of advertising political messages addressed to those in charge of thinking and deliberating about the constitutional process during the times in which the right to silence is activated. The appropriate timing and context for activating this obligation still require further discussion.

Where and when?

Where – which deliberative procedure of which institution – and when – which moment of the procedure – is institutional silence to be implemented will vary in different places and contexts.

Elsewhere, I championed a proposal that includes a progressive combination of institutions, aiming at giving the citizenry the opportunity to determine what a constitution means,[119] inspired by an egalitarian republican conception of freedom as non-domination. It is a complex proposal that integrates several traditional representative

[118]Elizabeth Spiers, '*I Don't have to Post About My Outrage. Neither Do You*', The New York Times, October 17, 2023.

[119](n 13)

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institutions and courts under a weak model of constitutionalism, together with the creation of what I then called an interpretive mini-public.[120] I here must omit discussions about the role of courts, parliament and weak constitutionalism and focus on the interpretive mini-public. It is there that the implementation of the right to silence makes more sense.

Briefly put, my suggestion is that deliberative constitutionalism should include contestatory institutions giving citizens the role of invigilators of law through the possibility of recursion and contestation, so that the direction of government can be steered through their potential reaction to its policies. However, it is not enough. Rights can be protected not only by reaction but also by active argumentation and justification in the legislative domain. It is safe to say that while this demand is rarely met in parliamentary practice, it is also safe to assume that there are no institutional or normative obstacles to demanding better reason exchange from representatives than what we witness today.

Now, demands for better justification at the representative level apply to the citizenry as well. The citizens themselves should be given a chance to have a say and influence political decisions when constitutional issues are at stake. I will describe the design I have championed before with a slight modification, considering what we now know about the value of silence for deliberative constitutionalism. The idea consists of a representative mini-public tasked with interpreting the preambles and introductory sections of a constitution, deliberate about them, think quietly about them, deliberate once more and write a report expressing how participants understood the content of those sections and submit it to representatives charged with making a final decision. These representatives will not be allowed to make final decisions before they receive the report, and without taking its content into consideration explicitly in the law, they pass to change the constitution. During some part of this procedure, the mini-public should be allowed to think quietly.

One important aspect of the mini-public I envision is its non-decisional character. This means that participants are summoned, first, to deliberate, to ask themselves about the meaning of the preambles and introductory chapters of the constitution, particularly when processes of constitutional change have been triggered, through a procedure that gives them room to think about these matters. Second, they should be aware that their deliberations and their results do not constitute a decision in a strong sense of the term. Thus, participants deliberate about the meaning of their commitments as expressed in preambles and introductory sections. The procedure should conclude with the administration of a final survey, whose results will then be transcribed and transmitted to their representatives, who, in turn, are mandated to take them into account in the justifications they provide for their decisions, which are binding. Representatives should incorporate these results explicitly in the Bill meant to change the constitution and offer reasons as to how and why they accept them or reject them. They may not agree with the interpretations made by citizens in the mini-public or with their arguments. However, they are charged with the duty of explicitly considering them in their deliberation and in the justification of their decision.

It is during the operations of such a mini-public that I envision the implementation of the right to silence. Regarding how, I am sympathetic to some version of a deliberative poll that, as per my considerations about the role of public and private media, is insulated from noise and pressure and meant for participants to read, talk and think about preambles and

[120](n 13)

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introductory sections, with the inclusion of a reasonable period of silence after initial deliberations and before they have to write the report. Just how much time can, again, vary. However, this is a practical reason that citizens are engaged in, so there is no magic or sacrosanct specific time period to be proposed. Depending on the topic, we could be talking months or even years. We know 1 day is insufficient and that 10 years may be excessive. However, the recent Chilean experience suggests that 1 year for the entire process is not enough either. Silence is a right, not merely a procedural requirement institutional designers can toy with. It is an individual right, a part and parcel of deliberative constitutionalism, and, as such, it should be respected so that constitutional outcomes can claim legitimacy.

Conclusion

I have championed a deliberative right to silence, suggested possible areas where it can be reasonably wielded and sketched an institutional design by which it can be implemented. These are all first steps in the direction of a rather unexplored area. However, the area is fertile. Deliberativists have rightly emphasised the value of talking. However, we must bear in mind, as I have argued earlier, that deliberative democracy and constitutionalism are projects meant to emancipate individuals, not institutional agendas implementing talk for talk's sake. One can talk a lot without saying anything and sometimes staying quiet is a social practice. Deliberation is concerned with the correct formation of legal, moral and political judgements, not simply with talking. Silence can serve as a valuable instrument for achieving these purposes as part of deliberative processes themselves.

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