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Right to a Referendum, or Duty to Deliberate? Rethinking Normative Entitlements to Secession

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Abstract

When should groups within a state be owed a process, such as a referendum, that can enable their secession or greater internal autonomy? Much of the prior normative literature has overlooked the constitutional theory context of this question. Autonomy movements raise a "constitutional legitimacy crisis" in which the core question is what a constitution's normative foundations are or should be. Firm answers remain elusive. The parties tend to make selective and circular ("normative bootstrapping") claims, which are neither sound nor practically persuasive to the other parties to a dispute. Thus this article, firstly, relies on the constitutional legitimacy crisis lens to explain why disputes over autonomy movements are largely intractable under existing approaches; and, secondly, identifies a promising species of solution to the problem. Departing from both "primary right" and "remedial right only" theories, the article endorses a duty to deliberate. This duty relies on deliberative democratic procedures (e.g., "mini-publics," "deliberative referendums," and "deliberative negotiation"), applied to autonomy movements' various phases, to decide how and whether autonomy movements should progress. Such an approach may offer a sounder and more practically effective approach to resolving autonomy-related constitutional legitimacy crises.

Keywords

autonomy; deliberative democracy; duty to deliberate; referendum; secession

1. Introduction

When should groups within a state be owed a process, such as a referendum, that can enable their secession or greater internal autonomy? When the literature on this normative question first arose, a polarity emerged. One camp endorsed the primary right of a group to pursue autonomy so long as a majority within the group

desires it (Gauthier, 1994; Glaser, 2003; Margalit & Raz, 1990; Wellman, 1995). Another camp, concerned with the stability of the international state system, promoted the more restrictive "remedial right only" approach, whereby groups may only seek autonomy to "defend themselves from serious injustices, as a remedy of last resort" (Buchanan, 1997, p. 136; see Buchanan, 2003).

These debates proceeded, however, against an unrecognised background of constitutional practice and theory. Autonomy movements raise a "constitutional legitimacy crisis" (Appleby et al., 2023). In this type of crisis, the core question is what a constitution's normative foundations are or should be. Firm answers remain elusive, particularly under the dominant pattern of constitutional argumentation, which I will call "normative bootstrapping." In this pattern, a given value is said to be at the foundation of a constitutional order, and the constitutional order in turn is said to presuppose this foundation. Kelsen (1945/1961) among others endorses such an approach. Yet external support for its selective and circular claims is often limited. The soundness of the approach is thus doubtful (Shivakumar, 1996), and bootstrapping claims may struggle in practice to persuade the other parties to a dispute. Many constitutional legitimacy crises indeed remain intractable for some time (e.g., a period of decades).

This constitutional background is important for understanding disputes over autonomy claims. As we will see, the parties are often unaware of how the background frustrates efforts at resolution. Most scholars, too, overlook the constitutional overlay as a complicating factor and fall into standard bootstrapping patterns. Some recognise versions of the problem (Moore, 2019; Weinstock, 2000, 2001). However, their contributions stop short of unpacking the problem or detailing a solution. My aims in this article are, firstly, to use the constitutional legitimacy crisis lens to explain why disputes over autonomy movements are largely intractable under existing approaches; and secondly, to identify a promising species of solution to the problem.

Departing from both primary right and remedial right only theories, I endorse a duty to deliberate. This procedural duty eschews any single set of substantive guiding principles and adopts, instead, a deliberative democratic approach to questions of how and whether autonomy movements should progress. All putative constitutional values should be weighed and considered on a basis of equal inclusion and adequate information in a process of collective deliberation. By largely avoiding normative bootstrapping, this approach may offer a sounder and more practically effective approach to resolving autonomy-related constitutional legitimacy crises.

The article proceeds as follows. Section 2 shows how constitutional legitimacy crises prompt distinct forms of normative bootstrapping. Section 3 applies this analysis to prior academic debates about autonomy entitlements. Section 4 then outlines the duty to deliberate. The argument presented in this part is ambitious and generally made in broad terms, leaving some particular strands and implications to be explored in future research. However, the section considers certain key details, such as how to deploy deliberative democratic procedures (e.g., "mini-publics," "deliberative referendums," and "deliberative negotiation") at autonomy movements' various phases. It also addresses objections, including the suggestion that a duty to deliberate may revive worries about instability in the state system, and that the duty itself may be subject to the bootstrapping objection. Section 5 concludes.

2. Constitutional Legitimacy Crises and Intractability: Normative Bootstrapping

This section considers the structural features that tend to make constitutional legitimacy crises intractable under standard approaches. In a constitutional legitimacy crisis, the parties' claims are "bootstrapping" if the claims assert a foundational normative value, which once asserted purports to provide the basis for the assertion. This becomes problematic when two or more parties in the crisis each view the values underlying a constitution markedly differently, and where there is no single practically authoritative view of how the disagreement should end. Each party to the dispute cites a single foundational value or set of values as dispositive of a substantive constitutional dispute and excludes reasonable alternative claims to normativity.

Some claims of this type are relatively straightforward. For example, constitutional "contract" theory might be asserted as the singular foundational value leading to a conclusion that Catalonia may not currently seek independence unilaterally (Bar, 2019, pp. 976–977; Williams et al., 2017, pp. 51–53). That is, Catalans who voted in the referendum to endorse the post-Franco 1978 Constitution implicitly may have consented—by a contract with other Spanish citizens, who also voted—to remain part of the unitary state. However, leaders of the Catalan independence movement dispute that contract theory provides the only normative guide to the case, citing for instance the democratic right of self-determination as an alternative basis (Guibernau, 2014, pp. 7–9).

Indeed, constitutional theory and practice in a given jurisdiction may incorporate an array of competing or overlapping values as foundational to the constitution (or constitutions). These may include:

- Formal enactment of the constitution by a body understood by many as legitimate (Weber, 1921/1972, p. 130).
- Constituent power and similar theories conceiving of states or peoples as entities with entitlements and existences in their own right (Colón-Ríos, 2020).
- Collective security against internal and external threats (Hobbes, 1651/2010).
- Contracts, real or hypothetical, among groups (Bar, 2019, pp. 976–977; Bossacoma Busquets, 2024, p. 125).
- Socialism (Bui, 2023).
- Confucianism (Bui, 2023).
- Longstanding practice, creating an entitlement to its continuation (Livingstone, 2023).
- Prior occupation, especially by an Indigenous group (Appleby et al., 2023).
- Divine enactment, cited even in broadly liberal constitutions (e.g., Australia's Constitution and Parliament of the UK, 1900, preamble).
- Popular sovereignty (or "democratic constitutionalism"; Blokker, 2016).
- Stability (Buchanan, 1997, 2003).
- Rights and freedoms (Bossacoma Busquets, 2020, p. 126).
- Peace (Buchanan, 1997, 2003).

Rather than stake out a position on Catalan or other autonomy movements, by highlighting the normative ambiguity of constitutional foundations I aim to illustrate constitutional legitimacy crises' core problem. Simple, selective answers deny constitutions' foundational complexity. In the Catalan case, unresolved matters include how well contract theory applies to the facts. After dictator Francisco Franco's death in

1975, and before voting to endorse the 1978 Constitution, did Catalans have sufficient opportunity to deliberate about secession? Was consigning Francoism to the past their more immediate priority (López Bofill, 2019, pp. 952–954)? And should a contract in any event rigidly bind future generations (Williams et al., 2017, p. 132)? In a marriage contract, for instance, the parties each enjoy ongoing autonomy to dissolve the union (at least after a period of deliberation; Gauthier, 1994, p. 371).

Some forms of normative bootstrapping are more difficult to discern. These involve two or more steps of argumentation. In these forms too, however, ultimately a given value or set of values is selectively asserted, unsupported, as the constitution's foundation. Some complex bootstraps rely on empirical arguments: that a given constitutional value should dominate in light of particular tangible benefits subject to proof. For instance, in Bougainville, New Caledonia, Québec, Scotland, and other societies, opponents of autonomy frequently mounted economic arguments against autonomy, seeming to view these as dispositive, or nearly so (e.g., Young, 1999, pp. 47–50).

However, authors of empirical works occasionally forget that constitutional choices are empirico-normative: they have mixed empirical and value aspects, the latter of which involve subjective choices and valuations. Arguments from economic value can omit or obscure questions about which values should matter in the first place, and how much. In Bougainville, despite the economic risks involved, 97.7% of ballots cast favoured secession (Regan et al., 2022, p. 68). Voters simply may have valued independence more than economic performance. In such a case, as Gauthier (1994, p. 366) puts it, "cultural [benefits] outweigh the productive losses."

Other forms of multi-step bootstrapping rely on authoritative institutions to settle the value contests underlying a constitutional legitimacy crisis. However, this may only shift the locus of the crisis. No single institution may be viewed as authoritative by all sides, nor as able to issue an effectively binding resolution. In circular fashion again, the approach relies on itself for support: only a legitimate body can determine which body can legitimately answer the question. For example, in 2000, the Parliament of Canada purported to use the Clarity Act to impose fair rules on Québec leaders' use of sovereignty referendums. The unilateral assertion of legitimate authority attracted reasonable criticism, not least from separatist leaders (Monahan, 2000, p. 6). Governments in the UK and Spain made similarly one-sided decisions to disallow referendums outright in Scotland and Catalonia, respectively.

Domestic courts have also purported to serve as umpires of disputes over autonomy movements, for instance in the Supreme Court of Canada's Reference Re Secession of Quebec (1998). The Court declared that "any attempt to effect the secession of a province from Canada must be undertaken pursuant to the Constitution of Canada, or else violate the Canadian legal order" (Reference Re Secession of Quebec, para. 104). However, the Court was not firm on this point, noting that a clear affirmative vote in Quebec for secession "would call on the participants to work to reconcile" (Reference Re Secession of Quebec, para. 104) their positions via negotiation. Indeed, given its authorisation by the state and under the extant Constitution, it is uncertain that the Court's decisions alone should count—or that they could settle a constitutional legitimacy crisis effectively. A crisis may fester if a court purporting to serve as an umpire lacks credibility among members of the autonomy-seeking group. In many cases, only a third party (domestic or, more likely, international) trusted by each of the parties can serve as an effective umpire (Moore, 2019, p. 635).

A key reason why normative bootstrapping enjoys at best weak validity or persuasive capacity is that, by referring to itself for support, a bootstrapping argument arbitrarily ignores a broad range of potential normative alternatives. Any value that a party cites must first be "public," in the Rawlsian sense of being reasonably open to endorsement by differently situated groups (Rawls, 1996). However, in a constitutional legitimacy crisis, an additional burden arises: any argument about constitutional value foundations is unsound, and might not be heeded by others, if it fails to explain why this value and no other should dominate the constitutional order. In Reference Re Secession of Quebec (1998, para. 32), for example, the Court took it upon itself to identify four values as foundational to the Canadian constitutional order (federalism, "constitutionalism and the rule of law," democracy, and respect for minorities), omitting any number of alternatives.

To be sure, a selective claim may be persuasive in effect if dissent seems futile against a state whose authority appears beyond challenge. On the other hand, historically such appearances (e.g., in pre-independence colonies such as India, Ireland, Kenya, and "Rhodesia") turned out to be mistaken. The durability of purely power-based persuasion is often uncertain. A central government's actions to suppress an autonomy movement may fail to change group members' beliefs in the movement's justice or desirability, and may indeed prompt even some lukewarm supporters to join the autonomy movement (López Bofill, 2019, p. 956).

In sum, in a constitutional legitimacy crisis, the usual divisions and disputes that we find among groups are aggravated and rendered more intractable. The structure of a constitution, the foundations of which are ambiguous and open to contestation, prompts—or even appears to necessitate (Kelsen, 1945/1961)—self-supporting arguments of questionable validity or persuasive capacity.

Importantly, however, the fact that a constitution's foundations are ambiguous does not mean that questions about foundations must be avoided. Indeed, they cannot be avoided; constitutional structures entail foundations. The challenge is how to acknowledge the complexity of such foundations and maintain a sense of humility, which also acknowledges the legitimacy and foundational place of other values. Section 4 will outline the proposal for a duty to deliberate about constitutional foundations via inclusive deliberative democratic processes. Yet first, in Section 3, we see that bootstrapping value claims, so common in public rhetoric, also feature in academic theories of autonomy rights.

3. Normative Bootstrapping in the Remedial/Primary Right Debate

Both poles in the longstanding debate over secession tend to overlook the need for inclusive deliberation to provide an answer. A number of authors in the field nominate their own substantive value selections that, they argue, should determine the recognition of group autonomy movements. Miller (1997), for one, focuses on criteria including group distinctiveness, avoidance of deleterious impacts on third-party minority groups, and distributive justice. Bossacoma Busquets (2024, p. 121), in turn, outlines substantive factors underpinning a qualified right to secede from the EU, including stability, accommodation of plural nationalisms, and promotion of compromise. Let us focus, however, on Buchanan's seminal remedial right only theory as a first main example.

3.1. Remedial Right Only Theory

This theory, again, recognises a right of people to secede to protect themselves from serious injustices, such as threats to the "physical survival of [group] members" and "violations of other basic human rights," or the "unjust" taking of "previously sovereign territory" (Buchanan, 1997, p. 36). In support of the remedial right only position, Buchanan applies four normative criteria to try to show its superiority as compared with the primary right to secede. The criteria are "moral realism" (i.e., the claim is both realistic in practice and "morally progressive," meaning that it improves on the status quo); "consistency with well-entrenched, morally progressive principles of international law"; "absence of perverse incentives"; and "moral accessibility" (i.e., suggestive of public reason, the claim "should not require acceptance of a particular religious ethic or of ethical principles that are not shared by a wide range of secular and religious viewpoints"; Buchanan, 1997, pp. 41–44).

Another of Buchanan's over-arching concerns, although not clearly identified with any of these criteria, is societal stability. Buchanan (1997, pp. 44–45) is impressed that the remedial right only theory:

> [P]laces significant constraints on the right to secede, while not ruling out secession entirely….Given that the majority of secessions have resulted in considerable violence, with attendant large-scale violations of human rights, and massive destruction of resources, common sense urges that secession should not be taken lightly.

Thus after noting that "there is … considerable confusion about what sorts of considerations ought to count for or against a theory of the right to secede" (Buchanan, 1997, p. 32), he sets out to resolve this confusion for us. The criteria he adopts are each plausible. Yet why these and no others are adopted is unsaid. Buchanan's criteria are subject to the usual ambiguity: the normative criteria to be applied to resolve a constitutional legitimacy crisis are the very matters in dispute.

For example, the stability criterion establishes a hierarchy of this value over others, such as the affective importance of "encompassing groups" to self-identity, as cited for example by Margalit and Raz (1990, pp. 444–450). Buchanan ultimately makes a value choice that overlooks the insoluble normative ambiguities at the roots of constitutions. He justifies the remedial right only approach as posing less of a threat to the existing international state-based order—a value rooted in claims about stability's benefits, which in turn may better protect individual rights and political participation (Buchanan, 1997, pp. 40, 47). Whether it is stability, democracy, or rights that chiefly animate Buchanan's view, we may question whether these value choices ought to be set in stone for all future cases.

Part of the problem is that the choices are couched in the language of statistical regularities. But, as noted in Section 2, the implicit normative content in tendentious empirical work may be subtle, hidden behind assumptions about appropriate data use—such as when it is appropriate to generalise. Even if Buchanan's summary of past cases of secession resulting in violence is generally accurate, important contrary cases have arisen in places such as Québec, Scotland, Catalonia, and Bougainville, where autonomy-seeking activities have been largely free of violence for decades or longer (Dzutsati, 2022; Moore, 2019, pp. 635–636). Buchanan's generalisation yields a rule that would deny primary autonomy rights across the board, despite the marked dissimilarities among societies with autonomy movements.

The fault in retrospective, one-size-fits-all reasoning is further evident in Buchanan's useful, yet questionably applied, principle of avoidance of perverse incentives. Perverse incentives, he writes, will tend to "hinder the pursuit of morally progressive strategies for conflict resolution" (Buchanan, 1997, p. 43). For example, under the primary right approach, "a state that wishes to avoid fragmentation [might] resist efforts at federalization" (Buchanan, 1997, p. 43), since provinces and autonomous regions may have the power to hold referendums. In Buchanan's hands, the principle of avoidance of perverse incentives becomes another plank in support of a remedial-right only rule.

Yet this same principle can point the other way. For instance, during the referendum campaign for an Indigenous "Voice" in Australia (a constitutionally enshrined advisory body securing a measure of Indigenous autonomy), some Indigenous people expressed a concern that the reform would foreclose more robust forms of Indigenous sovereignty or even secession. This claim had arguable merit (cf. Lino, 2023) in light of the remedial right only approach, which international law apparently adopts (Bossacoma Busquets, 2024, p. 123). That approach potentially incentivises substate groups to scuttle internal measures that would ameliorate their own disadvantage, if they reason that such measures would lower their chances of achieving the larger prize of outright independence.

Thus in Buchanan's work we see how generalised, retrospective, and empirically-based argumentation can sometimes yield inflexible substantive principles that are perhaps driven by the author's own value selections. Of course, many empirical studies usefully suggest (if only approximately, without any ironclad guarantees) how and whether a given normative rule may function in practice. My aim here is not to malign empirical work, but only to cast doubt on the use of tendentious empirical premises that—for example, by overlooking wide exceptions or overgeneralising—seem to promote a given, selective set of values.

Buchanan's work may usefully suggest value options and lines of argumentation. However, claims to have identified all relevant normative or empirical factors—across all future cases of secession, no less—are difficult to support. Given the deeply ambiguous and contentious nature of constitutional legitimacy crises, such work may fail to acknowledge other pertinent foundational values, or to understand the depth of sentiment that people attach to these assorted values under particular circumstances.

Values have contexts, conditions, and effects that can be ascertained and informed by rational debate and empirical investigation. Yet at root, their valuation (the degree to which people should care or be swayed by a given value) is subjective, not a matter for either authors or empowered elites to approach unilaterally and wholly technocratically. Moreover, a single-answer rule based not on deliberation over the case at hand, but on a collective and retrospective reading of historical cases, should be avoided. Deliberations in which public values are applied to cases at hand may lead to distinct outcomes in assorted cases. Deliberations must remain prospective and be undertaken on the basis of case-specific details.

3.2. Primary Right Theory

Primary right theorists, as we saw, accept the democratic principle of a right to pursue autonomy without significant reservations. In some versions of the primary right view, if a majority wishes to see the group achieve autonomy, this can be tested and expressed in a referendum (López Bofill, 2019, p. 950). More generally, primary right theories embrace principles of self-determination or democracy as preeminent or "central" constitutional value foundations (Moore, 2019, p. 624).

Some primary right theorists acknowledge a version of my criticism above, in Section 2, of arguments that nominate just a limited selection of substantive values as constitutionally foundational. Moore opposes one-size-fits-all substantive answers to autonomy problems; her "gesture [toward a] pluralist understanding of the fundamental normative values" involved leads her to focus on democratic procedures for settling autonomy disputes (Moore, 2019, p. 624). Weinstock (2000) also criticises certain substantive theories and favours a "procedural" solution. Bofill (2019) identifies a type of hubris in seeking to set out a limited and rigid set of substantive factors that should apply in the Catalan case. All of these authors embrace ongoing procedures in lieu of (or in addition to) a fixed constellation of substantive criteria.

However, these authors have not engaged with the legitimacy crisis overlay that aggravates autonomy crises and frustrates the search for a settlement. Each too, perhaps as a result, does not explore solutions beyond broad procedural and democratic approaches. Not every process, and not every form of democracy, is suited to solving constitutional legitimacy crises. Aggregative democracy—the kind of democracy we usually think of—prioritises power by relying on rule by a group that happens to be in the majority. However, leaning on such power alone may only aggravate, rather than solve, an autonomy crisis: in this model the dominant group may simply push for its preferred substantive solution to the crisis.

Democratic solutions to constitutional legitimacy crises fall into the usual pattern of bootstrapping in a broader sense, too, by embracing a process that elevates democracy above other values. Granted, democracy cannot be omitted from any reasonable account of contemporary governance in liberal societies. One cannot balance values through armchair reasoning, nor by consulting narrow bands of colleagues; value choices require a process of genuine input from those affected in the wider public. This means that we must ask what the people in a democracy actually think—which values they select as preeminent, and under what circumstances. On the other hand, as stressed above, democracy is not the only foundational constitutional value. Even democracy has a degree of importance relative to other values, and dependent on the circumstances.

The process of value selection therefore requires, in addition to democracy, deliberation that is structured to be informed, wide-ranging, flexible, and inclusive of wide identities or viewpoints and their distinct related values. There are hints of this idea in past works. Bossacoma Busquets (2017, pp. 117–122), while focusing on substantive factors determining the right to secede, gestures briefly toward deliberative procedures of negotiation and references "sincere cooperation" and "reflection" in the post-referendum negotiating process. Moore (2015, pp. 129–134) writes of the need for "ongoing reciprocal cooperation over time," invoking Rawlsian language of public reason—albeit chiefly as a limit on the kinds of substantive reasons that autonomy debates should raise. Bossacoma Busquets (2020, 2024, p. 122) also relies on Rawls, yet not to outline a process of secession, but rather to ground the qualified right to secede in the first place.

There remains no developed account of deliberative democratic procedures suited to managing autonomy movements. Building on broad references to democratic and procedural solutions in other works, the next part outlines the duty to deliberate in response to concerted autonomy movements. A deliberative democratic process is democracy plus other values. In principle, therefore, it may be suited to avoiding normative bootstrapping and addressing the constitutional legitimacy crises that autonomy movements present.

4. The Duty to Deliberate

In response to a group autonomy movement, all affected parties have a normative duty to deliberate. As we saw, in a constitutional legitimacy crisis the parties should acknowledge and contend with values and reasons other than their own. This requires a deliberative democratic process that engages members of the putative autonomy-seeking group and the state (and any other groups significantly affected) in ordered contestation over the values underlying the constitutional order(s). The process may be used to work out which particular values are the most salient and also the weightiest in a particular constitutional context.

I will turn to some institutional possibilities to achieve these broad ends shortly. First, however, note the range of specific deliberative democratic procedural requirements that follow from the broad duty to deliberate:

- Inclusivity: All affected parties, and in turn all (public) values that the parties view as relevant, should be included in deliberations (Levy & Orr, 2016, p. 22).
- Reason-giving: Mutual reason-giving is required of participants (Gutmann & Thompson, 2004, p. 100).
- Consequentiality: Deliberations should influence final decisions (Dryzek, 2010).
- Specific application: Deliberations should consider "actual conditions on the ground" (Levy et al., 2021, p. 167) and how or whether any broad values asserted apply to the context at hand.
- Well-informed: The process should also provide participants with relevant information (e.g., basic features of mooted reforms; Levy & Orr, 2016, p. 22).
- Facilitation and umpiring: Facilitators and umpires are each notionally independent third parties (e.g., from a disinterested country or a trusted international organisation) empowered to oversee deliberations. Trained facilitators are critical to "setting the discussion tone and establishing ground rules that shape how participants talk and share ideas during deliberations" (Dillard, 2013, p. 218). An umpire has farther-reaching powers and functions, more like those of a court. When needed, the umpire may, after hearing from the parties, issue an authoritative decision in a dispute (Levy & O'Flynn, 2024).

Notice the significance of the duty to deliberate as an alternative to both the remedial only and primary right theories. The duty implies no presumption either against or in favour of holding a referendum. As we saw, both presumptions are problematic. The remedial approach arbitrarily limits the path to autonomy since it is triggered only when severe abuses occur. Conversely, the primary right theory focuses on democratic majoritarianism as the trigger to a referendum. Yet as we also saw, on its own democratic majoritarianism may omit a range of further relevant values.

In addition to this, the primary right theory leaves open how we might know when the popular appetite for autonomy is sufficiently widespread and deep to trigger a referendum. Fleeting expressions of majority sentiment may be insufficient. As we will see, in the absence of deliberative institutional support, such expressions may be inaccurate or may lack the deliberative rigour that should be a prerequisite for constitutional change.

In place of a blanket rule either in favour of or against a referendum, then, the duty to deliberate requires a deliberative democratic process in which multiple relevant constitutional values, as well as factual details, are considered and weighed in the instant case to decide whether the path to autonomy should be followed.

Importantly, however, how these broad guidelines apply in practice depends on the various sequential phases of an autonomy movement.

4.1. Deliberative Duties at Each Phase

4.1.1. First Phase: Community Mobilisation

The function of the first phase should be to gauge whether popular support for autonomy is prima facie sufficient to proceed toward a referendum. A key complication is that the capacity for institutionally-supported deliberation is limited at this phase, which is decentralised across the public sphere. Hence the term "prima facie sufficient": later steps will be needed to test the breadth and depth of popular support.

Although the capacity for institutionally-supported deliberation is limited here, the duty to deliberate still has important implications. The duty requires state actors to avoid unduly curtailing the breadth of discussions regarding autonomy. States have often suppressed expressive and associational freedoms relating to autonomy movements. Group leaders have in turn exerted social pressure and even violence to suppress internal dissent against autonomy movements. The duty to deliberate in the first phase entails non-coercion. Popular expression, discussion, and associational activities (e.g., party meetings) by which group leaders peacefully seek to mobilise support for autonomy reforms must be protected. The forms in which these activities ultimately manifest must also be protected (e.g., votes or public consultations carried out by substate legislatures, whether in a binding fashion or otherwise; and informal alternatives such as large-scale petitions, peaceful mass protests, or repeated and reputable opinion polls indicating apparent support for autonomy).

However, preserving expressive and associational freedoms does not in itself amount to promoting deliberative democracy. Expression and association alone—absent specific institutional grounding and support for deliberation—are "pre-deliberative" (Elstub, 2006, p. 313). As yet unknown is how widely held and deeply committed support for autonomy is within the group. An apparent movement for autonomy may principally be an elite project, rather than a wide popular mobilisation. Both empowered elites in government and group leaders often hold markedly more maximalist, polarised, and entrenched policy positions than do ordinary citizens (Colombo, 2018). Such elites also tend to dominate public discourses, possibly leading to overestimations of the popular support for autonomy (Levy et al., 2021).

Also importantly, indications of support for autonomy in the first phase still provide little genuine sense of the variety of arguments for or against autonomy. A chief insight of deliberative democracy theory is that the mere aggregation of individual views into bare majorities does not exhaust the requirements of democracy. Asked to consent to a constitutional change, citizens must at a minimum be able to consider the costs and benefits of the decision, including its impacts on others. Deliberation is thus necessary to ensure that any apparent popular consent for autonomy amounts to considered and informed consent. For instance, polls often gauge, at best, top-of-the-mind positions rather than considered, informed, and inclusive views of policy problems (Fishkin & Luskin, 2005, p. 287).

Hence, in the first phase popular expression and association should be guaranteed in order to provide an initial sense of whether or not an autonomy movement should proceed. But any prima facie indications of popular support for autonomy must be tested in a more rigorous deliberative democratic setting in the next phase.

4.1.2. Second Phase: Deliberative Democratic Consultation

In the second phase, deliberative democratic processes should take on board, test, and weigh assorted views and values of the autonomy movement, and of the constitution(s) more broadly, to form a more reliable picture of the scope, depth, and nature of support. After such consultation, the support may appear to be more or less widely shared, and more or less strongly held. Moreover, understandings of the substantive contours of such support (e.g., values and other reasons group members cite in favour of or against autonomy) may become more comprehensive. In this process, even the prior question of how to determine whether a value is foundational (e.g., as a purely normative matter, or as a descriptive inquiry about prevailing practices in the jurisdiction) may be considered.

While a range of institutional models for deliberative democratic consultation are available, it will be useful to keep the mini-public model in mind to concretise the current discussion. Mini-publics are randomly selected, demographically representative assemblies of lay citizens who undergo extensive learning and undertake mutual deliberation before issuing policy recommendations. Mini-publics are increasingly common globally and have been evaluated in extensive and largely (though not uniformly) laudatory empirical and normative literatures (see Curato et al., 2021, for an overview). Notably, in comparison with partisan legislators, mini-publics tend to avoid polarisation (Fishkin & Luskin, 2005, p. 109), and in comparison with leadership by expert elites, they attract significant popular trust (Germann et al., 2024). Mini-publics can also help to crystalise a sense of the "underlying values" that citizens wish to see instantiated by constitutional reforms, as well as how such values interact with each other and with the reforms (Curato et al., 2021, pp. 73–79, 88).

A main reason for their extensive global use is the potential for mini-publics to combine, in the same body, deliberative rigour with democratic representation (albeit of a particular, descriptive kind). As noted in relation to phase one, non-elites generally hold less fixed or forceful sentiments toward constitutional reform projects than do elites of various kinds. However, and importantly, relying on deliberative democratic consultation in phase two means that we need not rely on such blanket generalisations. A main objective of deliberative democratic consultation is to determine, with a higher degree of confidence and detail, whether or not popular opinion in a given case clearly favours taking steps toward autonomy; and if so in what ways, under what circumstances, and to what ends.

Phase two deliberative democratic consultation can be tasked with deciding whether or not to commence phase three—the holding of a referendum—and if so, what constitutional options should be put to referendum voters. If the consultative process declines to recommend an autonomy referendum, it may yet recommend new constitutional or legislative arrangements short of autonomy. In an important variation on standard designs, a mini-public at phase two might include only members of the putative autonomy-seeking group among its deciding members. If we take rights to autonomy seriously, then the people whose choices should matter most are members of the autonomy-seeking group (Gauthier, 1994, pp. 361–362). This

modification sets up a theoretical dilemma, however, and a practical difficulty as it may limit the normative breadth of the body's deliberations (I return to this dilemma in Section 4.2.3).

Since the duty to deliberate may not culminate in a referendum, we see here again that the duty differs significantly from many primary right theories' implicit guarantees of a referendum. The duty provides that only considered and clear majority support for autonomy should trigger a referendum. The duty does not take the notion of support lightly and instead focuses on the quality and degree of support and on the interests of all parties—including citizens outside of the autonomy-seeking group (subject to conditions to be discussed).

4.1.3. Third Phase: Deliberative Referendum

If a referendum runs, it too must be significantly deliberative. Referendums are often viewed as poorly deliberative and at best superficially representative of societal views. However, while such criticisms are broadly accurate, they overlook the burgeoning literature on "deliberative referendum" design (Levy et al., 2021; see Chambers, 2018, pp. 305–306), which outlines a range of improved referendum procedures and a promising (if still mixed) emerging record of practice. Deliberative referendum design methods may include:

- Public information: A number of proposals suggest how to make trusted and balanced information widely available to voters (e.g., el-Wakil, 2017, pp. 71–72; Renwick et al., 2020). One demonstrated option uses a mini-public to provide a prominent source of information about substantive referendum issues; when trusted, such information may counter low knowledge and misinformation about complex reforms (Chambers, 2018, pp. 309–310; Knobloch et al., 2014). Voters may even be asked to complete tutorials written by a mini-public (Levy et al., 2021, p. 80).
- Regulation of speech: A number of jurisdictions limit manifestly untrue or divisive speech (e.g., hate speech), especially during election or referendum campaigns. Well-tailored laws curbing misinformation have generally avoided judicial invalidation (Levy et al., 2021, p. 82).
- Ballot design: Preliminary ranked-choice questions may require voters to nominate which values should drive the reform debate, and multi-option questions can indicate the costs and benefits of distinct reform options. These models aim to prompt purposive, informed, and holistic reasoning while avoiding simplistic policy binaries (Levy et al., 2021, pp. 69–71).
- Special voting requirements: Supermajority (e.g., 55%) or timed-double majority (i.e., two successful majority votes across a set interval) voting may avoid constitutional changes based on weak or ephemeral popular support (McKay, 2019; Weinstock, 2000, p. 261).

Deliberative interventions cannot yield perfect deliberation; they aim, instead, toward incremental improvement (Bächtiger et al., 2018, pp. 2–3). Whereas some referendums have clearly been poorly deliberative (e.g., Brexit; Offe, 2019), others have benefitted from deliberative designs (e.g., Scottish independence; Tierney, 2013). Importantly as well, despite the usual complexities of constitutional reform, at the core of autonomy debates are values such as cultural distinctiveness, independence, and group or individual equality—intuitive matters that often resonate with and are broadly understood by voters (Levy et al., 2021, p. 81).

4.1.4. Fourth Phase: Deliberative Negotiation

After a clear affirmative vote for autonomy, a duty to negotiate is already an established expectation. In Reference Re Secession of Quebec (1998, para. 92), the Court referenced duties of the federal and provincial governments to negotiate with Québec following a clearly affirmative outcome in a future secession referendum. Apart from some of the suggestive language from Bossacoma Busquets (see the following bullet points), however, this duty is yet to be conceived as deliberative. The duty of deliberative negotiation is a critical innovation at this phase.

Deliberative requirements are distinct in the fourth phase, firstly because negotiations after a referendum must engage at a sustained level with wide technical arcana. Final negotiations must cover new constitutional arrangements, bilateral and multilateral international agreements, financial and resource distribution, and much else. In this late phase, then, a main task is to apply and accommodate previous value choices in technically sound ways, relying on developed expertise (e.g., in constitutional design and economics). Without entirely excluding the possibility, mini-publics may generally be ill-suited to such negotiations. They may be unable to address the multiple, "overly technical" (Beswick & Elstub, 2019, pp. 960–961) matters often running in parallel during final negotiations.

A second complication is that in the fourth phase, the other main objective is to reach a mutually acceptable final agreement, yet the capacity for such agreement is often limited. Leading an emerging literature on "deliberative negotiation," Warren and Mansbridge (2013, p. 86) observe that zero-sum clashes of preferences or interests are often inevitable. Applied deliberation addresses complexities such as distributions of wealth, resources, armed forces, and debts. In these areas, the parties' positions are often rivalrous rather than amenable to "win-win" accommodation (Mansbridge et al., 2010, pp. 69–72).

Theories of deliberative negotiation respond by recognising that even though substantive disagreement is inevitable, institutional mechanisms can potentially promote civil, other-regarding, and flexible reasoning. Importantly, such deliberative desiderata (to the degree they are met) may help to create conditions in which substantive deliberations do not merely reflect the parties' respective power positions, but rather the parties' needs. Deliberative negotiation procedures should encourage the parties to make representations to each other about their distinctive histories and how various negotiation outcomes may affect their interests. It is in this main sense that the post-referendum duty to negotiate should be recast as a duty of deliberative negotiation. Several design features may incrementally improve the deliberative quality of negotiations:

- Umpiring and facilitation: These are again necessary to ensure that negotiations address the parties' diverse viewpoints. If the parties cannot agree on a substantive outcome, an umpire should ultimately provide one while seeking to accommodate the parties' perspectives.
- Link to prior phases: The parties or umpire should expressly advert to value preferences endorsed earlier in the deliberative democratic consultation and deliberative referendum phases.
- Closed-door meetings: To minimise grandstanding by party representatives, meetings should intermittently run without the media or public in attendance (Kostovicova & La Lova, 2024).
- Consequences for breach of duty: There should be incentives to comply with the duty to deliberate (or to follow the directives of the umpire). If either party to a conflict significantly breaches the duty to deliberate, that party should not gain a benefit from doing so. For example, Bossacoma Busquets (2024,

> p. 117) argues that autonomy-seeking groups should be able to achieve their ends unilaterally if central governments will not negotiate in good faith. Equally, an autonomy-seeking group's aspirations should be blocked if group leaders substantially stymie deliberative negotiations.

The institutional options at each phase raise numerous further questions that no single article can address; work to elaborate more fully on institutional prescriptions, and key problems and questions, should be ongoing. However, in the next section, I discuss several key objections.

4.2. Objections

4.2.1. Autonomy Bias

The first key difficulty is that states may resist a deliberative duty if they think it will help groups achieve autonomy more readily. This echoes Buchanan's worries above (see Section 3.1). However, on the whole, it is not clear that the duty to deliberate would advantage either autonomy-seekers or extant states, nor therefore that the duty's effects on autonomy movements would be other than neutral. To explain, recall that phase two tests prima facie indications of support for autonomy. This phase imposes hurdles that autonomy movements must clear, which only relatively widespread, informed, and durable movements may achieve in practice. Hence, though the duty to deliberate is not limited to remedying severe abuses of substate groups, neither does it equate to an unfettered primary right. At each phase, the duty may in principle improve the capacity of autonomy's supporters and opponents to present distinct arguments about autonomy. This is an important answer to Buchanan and others concerned with state instability.

Another way to see why deliberative democratic processes may not bias outcomes toward autonomy is to recall that the usual bootstrapping claims in autonomy-focused constitutional legitimacy crises are often unpersuasive and thus unable to arrest such crises anyway. As we saw, in some places where central governments have suppressed autonomy movements, backlash and increased support for autonomy resulted. Deliberative democratic claim-making may offer a means to bring a crisis to a stable, mutually agreed end—whatever that end may be.

4.2.2. Deliberative Democracy as Bootstrapping

An important conceptual question is whether deliberative democratic procedures are open to the same criticisms that I directed at bootstrapping claims above (see Section 2). As we saw, bootstrapping claims about constitutional foundations rely on themselves for support. Such claims may be unpersuasive partly for this reason. Another reason may be their arbitrary selectivity: they provide no rationale to explain why this value and no other should be foundational. Yet, a process that identifies many putative value foundations might also be open to charges of bootstrapping: rather than a single foundation, the duty to deliberate might generate many foundations, each simultaneously open to charges of bootstrapping.

A first possible rejoinder is that in the process of deliberation about value foundations, participants are meant to articulate how the multiple values discussed interact, interrelate, and mutually support (akin to Dworkin's, 1996, p. 119, metaphor of the geodesic dome, relying in turn on Rawls's, 1971, p. 49, notion of reflective equilibrium). Thus arguably the value foundations lean on each other, rather than on any single further value that is more foundational than each of them.

However, a second and more satisfactory response is that, as deliberative democratic procedures broaden discussions of constitutional foundations, the duty to deliberate addresses the key problem, noted in Section 2, of arbitrary selectivity. Deliberative democratic procedures, properly designed, do not arbitrarily exclude any values important to a given group (e.g., the prior occupation value supporting Indigenous claims). This normative feature of deliberative democracy procedures potentially has pragmatic implications. As we saw, repeated studies have shown that deliberative democratic procedures are more likely to attract the social legitimacy needed to bring a legitimacy crisis to an agreed end (e.g., Germann et al., 2024). One reason for this seems to be that their inclusive procedures are perceived as relatively impartial and fair, rather than as serving or reinforcing the power of a single societal faction (Levy, 2010, p. 834).

To be sure, the literature has long acknowledged that deliberative democracy is not value-free (Bächtiger et al., 2018, pp. 2–8; Chambers, 2018, p. 306). However, the essence of deliberative democracy is, as we also saw, its commitment to accommodating, weighing, and vetting an almost open-ended list of normative values. While the process itself affects value choices, its objective is consistent with the aim of this work: to approach disputes over constitutional normativity in as capacious a manner as possible.

4.2.3. Inclusion of Non-Group Members

Finally, as we saw, mini-publics have extensive and generally strong track records. Including members from multiple groups is central to the bodies' effectiveness. Mini-publics have seen diverse lay and expert participants tackle matters of common concern, even in deeply divided societies (Pow & Garry, 2023). Yet a mini-public that deliberates about autonomy must be of a rarer type populated by members of the autonomy-seeking group alone. An authentic right to pursue group autonomy should not be subject to veto by other groups, as may be the result if members of other groups are directly included in the mini-public. Of course, there will usually be a diversity of views within the group itself (e.g., about the wisdom of pursuing autonomy). Yet the difficulty is that if a mini-public includes members of only one group, this may stymie inter-group deliberation.

Some mini-publics and similar bodies have addressed this dilemma by taking account of diverse groups' views, even while investing final voting power (i.e., the power to endorse a given policy recommendation) only in members of the autonomy-seeking group. An example is the series of Regional Dialogues leading to the Voice referendum in Australia. These deliberative democratic consultations allowed only Indigenous people to vote on a final recommendation. The Dialogues heard, however, from a diversity of perspectives, developing and evaluating a set of reform recommendations that clearly engaged with the concerns of the wider, non-Indigenous Australian public (e.g., calling for legally and politically feasible reform; Appleby & Davis, 2018). A similar model of diverse consultation beyond an autonomy-seeking group, yet with consequential voting limited to that group, can feature in the duty to deliberate about autonomy movements more generally. Additionally, a parallel, non-binding deliberative democratic body (e.g., a separate mini-public) could be composed of members who are (mostly) not part of the autonomy-seeking group; this additional body may aid deliberation across the wider population.

Referendum voting poses similar dilemmas. In some cases, both the autonomy-seeking group and the wider population have been permitted to vote in autonomy referendums. Yet this has led to the inevitable defeat of some proposals (e.g., Australia's Voice referendum and New Caledonia's independence referendums). Again,

taking autonomy rights seriously, referendums should not permit a binding vote by people from outside the autonomy-seeking group. But since such people are affected, they must be entitled to participate in some way—for example, as expert advisors at phases two and three, and through the noted parallel advisory process.

5. Conclusion

In this article, I have used the constitutional legitimacy crisis lens to explain why disputes over autonomy movements are often intractable under existing approaches. Constitutional legitimacy crises aggravate deep divisions and may last for decades, or longer. Neither primary right nor remedial right only theories seem adequate to resolve such crises. I have set out an alternative: the duty to deliberate. This duty relies on deliberative democratic procedures to govern the progress of autonomy movements across several phases. The approach appears to promise a sounder and more practically effective way to manage autonomy-related constitutional legitimacy crises.

Of course, no single academic commentary can lay out every contour of a novel normative requirement. The duty to deliberate raises many questions, beginning as we saw with whether the parties to a constitutional legitimacy crisis will choose to deliberate. A reasonable sceptical position would have it that powerful parties in particular are unlikely to do so. To be sure, setting out a normative duty is not meant to describe current practice, but to set out "a standard toward which to strive" (Bächtiger et al., 2018, p. 2). Yet, in any case, at least some scepticism may be misguided. For example, we saw that some referendums have run largely deliberatively, based on careful institutional design; and that a duty to negotiate—if not to deliberate—is already an emerging expectation. Sometimes at least, the most sceptical assumptions do not materialise.

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