Judicial Review, Constitutional Juries and Civic Constitutional Fora

Rights, Democracy and Law

Christopher F. Zurn

Abstract: This paper argues that, according to a specific conception of the ideals of constitutional democracy – deliberative democratic constitutionalism – the proper function of constitutional review is to ensure that constitutional procedures are protected and followed in the ordinary democratic production of law, since the ultimate warrant for the legitimacy of democratic decisions can only be that they have been produced according to procedures that warrant the expectation of increased rationality and reasonability. It also contends that three desiderata for the institutionalization of the function of constitutional review follow from this conception: structural independence, democratic sensitivity and the maintenance of legal integrity. Finally, evaluating three broadly different ways of institutionalizing constitutional review – solely in appellate courts, in deliberative constitutional juries of ordinary citizens and in a combined system of constitutional courts and civic constitutional amendment fora – it argues that the third arrangement would perform best at collectively fulfilling the sometimes antithetical desiderata.

Keywords: constitutional amendment, constitutional juries, deliberative democracy, judicial review

Introduction

Democratic objections to judicial review – that is, to the institutionalized practice whereby statutes enacted through democratically accountable legislative processes are nullified by unelected judges as unconstitutional – are long-standing. In the United States context, such objections are already politically prominent over a decade before

 doi:10.3167/th.2011.5812705

Chief Justice Marshall's famous opinion in *Marbury* v. *Madison* 5 U.S. 137 (1803) that officially inaugurated the practice (Hamilton 1788; Brutus 2003: 501–29), and they have continued through the nineteenth, twentieth and twenty-first centuries.[1] There is also a long-standing history of democratic objections to judicial review in legal and political theory. In the U.S. context, the most prominent worry has been about the 'counter-majoritarian' character of judicial review (Bickel 1986), though other prominent objections have focused upon the inherent paternalism of judicial review (Hand 1958: 1–6).[2] And in the European context, where debates about judicial review have accelerated along with accelerating trans-national legal integration – and especially legal integration in terms of quasi-constitutional norms enshrined in the European Convention on Human Rights – many have argued that legislatures have performed better at protecting the substance of individual rights than judiciaries wielding the powers of review, and have done so without judicial review's procedural costs of arbitrary domination over the rightful legislative powers of the *demos* (Waldron 2006; Bellamy 2007). Unsurprisingly, there is also a long-standing tradition of attempting to redeem the democratic legitimacy of judicial review, both in politics and theory. The voluminous nature and diverse starting points of the theoretical literature defending judicial review indicates that the issues involved are far from settled (e.g., Ely 1980; Perry 1982; Dahl 1989; Dworkin 1996; Rawls 1996).

Yet despite the variety and history of attacks and defences of judicial review in the name of democratic legal and political theory, there has been a relative dearth of institutional imagination coming from democratic theorists in response to the debates – that is, at least until recently. Deliberative democratic theorists in particular have proposed a wide variety of new or newly adapted deliberative mechanisms to augment or replace traditional political institutions, involving the participation of ordinary citizens and designed to augment or assume any number of different political functions including: generating informed public opinion, electing representatives, improving legislative procedures, negotiating the shoals of inter-ethnic and intercultural reconciliation, reforming administrative planning and budgeting processes, overseeing bureaucracies responsible for education, policing, health care, energy production and distribution, environmental conservation and carrying out other traditional state functions.[3] This paper aims to evaluate three institutional proposals inspired by deliberative democracy and intended to carry out all or some of the functions of constitutional review usually assumed by a national appellate

judiciary in nations with strong traditions of rights-based judicial review:[4] Spector's and Ghosh's separate but overlapping proposals for constitutional review carried out by citizen juries (Spector 2009; Ghosh 2010), and my proposal for using citizen juries in altered processes of constitutional amendment (Zurn 2007: 312–41). In effect, these proposals recognize the importance of the function of constitutional review to constitutional democracy, even as they deny that an appellate judiciary should have the exclusive authority to carry out that function.[5]

Whether concerning constitutional review or other traditional governmental functions, such reform proposals are worthwhile, at the most straightforward level, to the extent to which they guide political reform efforts towards better political institutions. But, even apart from direct 'real-world' impact, such proposals are useful at a second level of political theory, for they force us to reflect on and clarify the specific meaning and limits of the political ideals we seek to endorse or reject. In effect, institutional proposals can serve as test benches or Petri dishes for high-level theoretical abstractions. In considering them, theory is obliged to contemplate the ways institutions and decision procedures would change under specific conceptions of preferred ideals and thereby engage in a different kind of investigation than the usual high-level theoretical tests of meaningfulness, consistency, coherence with other ideals and abstract attractiveness. It is worth noting that institutional evaluation also differs from the normal applied tests of practical ideals: namely the consideration of the direct substantive changes in policy and interpersonal relations that would ensue from the realization of the ideals. So, institutional evaluation of the specific conceptions of our ideals lies at an intermediary level between high-level abstract considerations and lower-level considerations of policy outcomes.

This paper is specifically concerned with the ideals of democracy, constitutionalism and democratic constitutionalism and how best to realize them institutionally in connection with constitutional review. It considers three broad proposals for institutions intended to carry out the functions of constitutional review: standard judicial review, constitutional juries of ordinary citizens and a system combining a specialized constitutional courts with reformed constitutional amendment procedures involving civic constitutional fora populated by ordinary citizens. Even if such institutional innovations are thought to be too innovative to be practically feasible in the short-run in well-established constitutional democracies, thinking about them can signifi-

cantly advance debates over the democratic bona fides of judicial review as it currently exists in many nations. Since, in the end, evaluating judicial review is a matter of comparing different ways of institutionalizing constitutional review, having more than two options – either U.S.-style judicial review or no constitutional review whatsoever – not only enriches the debates but also relieves them of their persistent tendency to employ false dilemmas and so ensue in uninformative and stalemated debates.

The paper contends that employing collectively deliberating citizens selected through sortition to carry out constitutional development in amendment assemblies is preferable – from the point of view of democratic constitutional law – to standard forms of judicial review and to concrete constitutional case review carried out by randomly selected citizen juries. Before providing the evaluation supporting that contention, however, the paper articulates a basic normative framework of deliberative democratic constitutionalism, including the standards of democracy, constitutionalism and democratic constitutionalism employed, and explaining the role of constitutional review within that framework. That framework will then enable a clear view of the design mandate and three relevant desiderata to employ when considering how to institutionalize the function of constitutional review: namely, how to design a system of constitutional elaboration that is responsive to the sometimes differing demands of structural impendence, democratic sensitivity and the integrity of a legal system.

Deliberative Democratic Constitutionalism

In order to motivate the problem of how to institutionalize the function of constitutional review, one first needs to see how that is a function necessary to constitutional democracy. And in order to see that, one needs to have some basic idea of the specific conceptions of democracy, constitutionalism and constitutional democracy employed. The basic normative framework within which this paper operates can be characterized as deliberative democratic constitutionalism, and I have argued elsewhere that it provides the most persuasive conceptualization of the ideals embedded in constitutional democracy (Zurn 2007). At the risk of oversimplifying, this section briefly reconstructs the broad outlines of that framework, a framework deeply indebted to the political and legal theory advanced by

Jürgen Habermas over the past twenty years (Habermas 1996, 1998, 2001a, 2006b, 2006c).[6]

Democracy

The moral heart of democracy, I take it, is an ideal of self-rule among free and equal individuals. Democracy is a form of collective decision making amongst individuals, all of whom are to be treated as equally autonomous persons. The problem is then how to have collective decisions that are binding on all members, and yet where those collective obligations still treat each individual as an autonomous moral person – even when the collective decisions require that individual to do something against his or her immediate personal wishes. One will recognize this way of putting the problem as deeply indebted to Rousseau's formulation of the political problem: 'Find a form of association which defends and protects with all common forces the persons and goods of each associate, and by means of which each one, while uniting with all, nevertheless obeys only himself and remains as free as before' (Rousseau 1997: Book I, chapter 6). Not surprisingly, the legitimacy criterion that is the upshot of this way of putting the problem is also Rousseauian: in a legitimate democracy, citizens must be able to regard themselves simultaneously as both the authors of the law and the subjects of the law. If the ideal of democracy is the ideal of collective self-rule among free and equal citizens, then a natural test for whether the collective is treating each as a free and equal individual is to see whether, as an individual, one could regard oneself as giving the collective rules to oneself, as authoring those rules oneself. If so, then one's private autonomy can be understood as consistent with the community's public autonomy: obeying only my own rules I, at the same time, obey our own rules.

Admittedly, this is a very high legitimacy bar to achieve – we might rightly say that it is an unreachable regulative ideal, one that is nevertheless imminently built into our practices of democracy (Zurn 2010). For the ideal of self-rule among free and equal citizens is satisfied exactly when those citizens can see themselves as subject only to laws that they can also understand themselves as having co-authored. The latter criterion is, apparently, only directly satisfied amongst a group when their lawmaking decisions ensue from the full, fair and unforced consensus of all members after free and open discussions among all members. In one sense, much of the variety of democratic theory – at least in the Rousseau–Kant vein stressing self-rule among autonomous individuals – can be understood as differing

ways of approximating the stringent legitimacy criterion in modern, complex societies, where workable political structures cannot possibly arise directly out of face-to-face consensualism on every collectively relevant decision. Rousseau's own civic republican solutions – in essence, finding ways of getting all citizens to share the same mores and think alike before they all directly assemble together to make collective decisions – are not only unfeasible in requiring mass collective assemblies but, more importantly, are frequently in deep tension with individual liberties of conscience and association.[7]

As is now well understood, deliberative democratic theories argue that public deliberation on reasons and arguments relevant to the public interest better realizes the ideal of democratic self-rule than bare majoritarian procedures determining the aggregate preponderance of private desires. Whereas aggregative theories of democracy model the political equality of citizens in terms of the equal impact of individual votes, deliberative theories argue that political equality should be understood in terms of the ability of each citizen to have their publically relevant opinions concerning politically relevant reasons, values and principles to be heard and taken into account in decision procedures. The idea is that if decisions on governmental actions are responsive to the most convincing public reasons articulated by those affected by the policy, rather than responsive to the majority preponderance of identical or overlapping private desires, then citizens will be better able to understand themselves as co-legislators of the laws they are simultaneously subject to. Habermas's version of deliberative democracy, for example, insists on a 'discourse principle' as a general principle of normative legitimacy: 'just those action norms are valid to which all possibly affected persons could agree as participants in a rational discourse' (Habermas 1996: 107).

At first glance, of course, Habermas's discourse principle looks just as unfeasible as Rousseau's direct legislative assemblies of all citizens. To begin with, it requires, as a regulative ideal, full consensus of all those affected by the relevant norms under consideration. This is in some real tension with what Waldron aptly calls 'the circumstances of politics' (Waldron 1999: 101–3). On the one hand, a sober (but not uncharitable) look at the contemporary state of public practical reasoning indicates that we should not expect full substantive agreement across the diverse political views held in modern societies to be forthcoming anytime soon, if ever. Even if we could have the most open, extensive, sincere and exhaustive discussion and evaluation of reasons and arguments on public issues, we should expect that

citizens will continue to have persistent but reasonable disagreements – both because of what Rawls calls 'the burdens of judgment' involved in practical reasoning (Rawls 1996: xxiii–xxx, 36–8, and 54–8) and because of simple value pluralism across citizens. On the other hand, political consociation itself requires citizens to come to decisions on a common framework for action in certain spheres of social life. Even though we witness persistent disagreement arising from reasonable pluralism, we still need to solve our collective action and coordination problems through single decisions on shared frameworks of action and decision.

A legal system paradigmatically allows for the development of authoritative norm frameworks regulating social action, and the law-making processes for a legal system are defined by the procedural rules for determining the content of legal norms that are to regulate common life. For Habermas, therefore, the very general discourse principle of legitimacy quoted above must be operationalized in a legal structure. The result of this is his principle of democratic legitimacy, namely: 'only those statutes may claim legitimacy that can meet with the assent of all citizens in a discursive process of legislation that in turn has been legally constituted' (Habermas 1996: 110). This regulative ideal of democracy addresses the problem set by the circumstances of politics in two ways. First, in articulating a strictly proceduralist test for the legitimacy of legal enactments, it avoids the unrealistic expectation that substantive consensus might eventually arise on reasonably contested political issues in pluralistic, complex societies. Legitimacy hangs solely on whether a law has been enacted in the correct way, not on whether it fulfils some antecedent substantive normative criteria for rightness or goodness. Second, the ideal insists that the correct way of making law must itself accord with the demands of rule through law. Not only must citizens regulate their lives together through the medium of positively enacted and enforced laws, but the laws themselves must be created through legally regulated processes, including the legal structuring of the democratic process itself. That is because authoritative legal processes, structuring both private conduct and the exercise of collective autonomy, make possible a settled, shared framework of decision making for the resolution of those collective action and coordination problems that give rise to the need for politics in the first place. In short, this account of democratic legitimacy addresses the circumstances of politics by insisting on a proceduralist rather than a substantivist legitimacy test to address reasonable, persistent disagreement and on a

constitutionalized set of democratic processes to address the need for a stable collective decision framework.

Constitutionalism

It turns out then that constitutionalism can be most simply understood as the legal structuring of just those procedures that legitimate democratic outcomes. Worthy constitutional procedures will grant such legitimacy, of course, only when we can expect that following them (defeasibly) warrants the expectation that we will get better results than from not following them or from following other procedures. It is here that the epistemic dimension of deliberative democracy comes to the fore. Mutual political conversations, discussions and debates are not valued as ends in themselves, say because they allow citizens to realize themselves through public expressions, but rather because we have reason to believe that higher quality political outcomes will result when decisions are made on the basis of the best available reasons rather than some other basis, such as the aggregative preponderance of pre-political private desires. As Habermas puts the crucial point: 'Democratic procedure makes it possible for issues and contributions, information and reasons to float freely; it secures a discursive character for political will-formation; and it thereby grounds the fallibilist assumption that results issuing from proper procedure are more or less reasonable' (Habermas 1996: 448). Constitutional law – whether written in a text of basic law, cemented in long-standing durable political practices and understandings, or articulated in precedentially developed judicial doctrine – can be grasped then as precisely that shared, settled framework in a given polity that determines the legally regulated procedures for democratic decision making, the following of which legitimizes political decisions.

The next question is apparently what the exact shape and character of those constitutional procedures must be. However, because this very broad question of constitutional design clearly includes more specific questions concerning the proper procedures for constitutional review, I must be careful at this point to avoid begging the question at issue by stipulating too much content. For the purposes of the argument here, I insist only that constitutionalism must include the two elements of fundamental law entrenchment and of fundamental rights.[8] By higher law entrenchment I mean that the system of positive law employs a distinction between ordinary law and fundamental law, where the latter is both harder to change than the former and where the latter specifies certain legal structures, procedures and

institutions for the production and modification of ordinary law. This is not to insist that fundamental law must be formalized in a written constitution, for even if we are dealing with a written constitution much of the fundamentality of constitutional law is maintained, at the end of the day, through settled political practices, institutions and common understandings. Nor is it to insist that constitutional law is or ought to be unchangeable. It is only to insist that there are good reasons for making it harder to change the constitutive rules for ordinary law production than to change the ordinary laws themselves. Although one might stress functional reasons such as stability, consistency, settlement and so on, the Habermasian position sees constitutional entrenchment as a way of ensuring that the necessary procedural conditions for democratic decisions are guaranteed, particularly considering the legitimation weight given to procedures themselves. Of course, given the political condition of reasonable persistent disagreement, we should not expect that a society's given constitutional procedures are immune to reasonable criticism. Thus the constitutional procedures themselves must be open to democratic contestation, renegotiation and change – open, of course, under specified amendment or renegotiation procedures that themselves must be fully open and democratic. Entrenchment means that constitutional change will be harder to effect than change of ordinary law, not that a set of given constitutional procedures should themselves be eternally perduring even in the face of manifest democratic displeasure with them.[9]

I also insist that constitutionalism must include some system of fundamental rights, precisely to protect the private and public autonomy of citizens. On the one hand, clear violations of individuals' private autonomy rights – such as to membership in the legal community, legal protection of one's rights and some set of basic subjective liberties – make it impossible for those individuals to understand their subjection to democratic, enacted laws to be based upon reasoned agreement rather than upon force, fraud, manipulation or bare coercion. On the other hand, clear violations of individuals' public autonomy rights – such as to equal participation in public opinion formation and in political decision-making processes – make it impossible for those individuals to understand themselves as co-authors, with other citizens, of the laws they are collectively subject to. The Rousseauian legitimacy demand that one only be subject to laws one can understand oneself simultaneously as the author of entails the protection of equal fundamental rights securing private and public

autonomy. Although fundamental rights may be secured through substantive constitutional protections, on this account they are understood to be justified as procedural requirements of legitimate collective rule – rather than, say, as the requirements of pre-political natural law or right.[10]

One final point in this programmatic presentation of the ideals of deliberative democratic constitutionalism is the claim that the constituent power belongs ultimately to the citizens themselves. At the end of the day, only democratic forms of constitutional enactment and transformation can warrant the supposition that, to the degree of approximation possible, citizens are governed by laws they have authored. As will be seen presently, although this claim is rhetorically uncontroversial – it operates as a background normative given across a spectrum of diverse conceptions of constitutional democracy and is politically effective, at least in the formal mechanisms of constitutional amendment built into almost all contemporary constitutions – it is far-reaching in its effect, particularly once we turn to the next questions about how to institutionalize the function of constitutional review.

Constitutional Review and the Institutionalization Question

On this proceduralist picture of constitutional democracy, the only warrant for the legitimacy of governmental decisions is that they are the outcome of a specified set of procedures for democratic opinion formation and decision, procedures that have been constitutionally entrenched because we have reason to believe they will lead to better outcomes, given that they are more responsive to the most convincing public reasons articulated by those affected by the decisions than other procedures or no procedures at all. Given the dual circumstances of politics of a need for a common framework for deciding on political matters and the expectation of persistent but reasonable substantive disagreement, political theory, and the practices of constitutional democracy, ought to give up on the natural-law-inspired hope for reliance on substantive moral-political truths guaranteed outside the scope of politics itself.

With the legitimacy weight put upon constitutional procedures, there ought to be some way to check that these 'rules of the democratic game' have been followed. This is precisely the justification for the function of constitutional review: it is a guarantee for just those procedures, the adherence to which confers legitimacy on positive laws. Those procedures will guarantee not only that the proper political processes and institutions have operated in the right way on matters of

law, but also that the system of rights securing individuals' private and public autonomy have been respected along the way. Constitutional review is then a necessary function in a system of constitutional democracy, for it secures the legitimacy of political outcomes by ensuring their procedural conditions.

Having thus justified the general function of constitutional review, it is important to see that nothing yet has been said about how it should be institutionalized or who should carry out the function. In one sense, the function ought to be carried by all potential democratic actors – legislators, regulators, judges, sub-national federal governments, public-sphere participants, voting citizens, constitutional amendment assemblies and so on. All who are engaged in the democratic production and modification of law are equally bound by constitutional procedures. But that simple answer does little to resolve situations where there are good-faith disagreements about exactly what those constitutional requirements mean and entail for specific proposals of policy and legal regime. Does the public autonomy right of free expression allow or prohibit unlimited monetary contributions to political campaigns? Does the private autonomy right of due process in criminal law allow or prohibit preventive detentions of terrorism suspects? And on and on – constitutional procedures are themselves not immune from the pluralism that marks everyday democracy and that requires closure mechanisms like voting rules to put a temporary end to ongoing discussion and disagreement. Furthermore, ordinary observation of politics teaches us that those who are on the substantive losing side of particular closure mechanisms will often attempt to refight the battle by challenging the procedures employed. In addition, such constitutional challenges can either be pointed at the actual procedures employed in making the decision or, more often in practice, at the substantive content of law enacted as violating other constitutional requirements, themselves though to be essential to procedural correctness. Hence a way of institutionalizing the function of constitutional review should promise some way of overseeing the constitutional rules and deciding whether they have been duly followed or not.

Desiderata for Institutionalizing Constitutional Review

Although not yet very detailed, this preliminary specification of the function of constitutional review already indicates the first of three

main desiderata I will propose for its institutionalization. First, whatever institution is responsible for ensuring constitutional procedural correctness, it ought to be structurally independent of the parties involved in the dispute. The idea is a relatively straightforward analogue of the practice in other competitive arenas that the referees responsible for policing the rules of the game should not themselves have incentives for winning nor any special alignment with any of the competing teams. At the very least, then, this desideratum appears to rule out institutional regimes that would locate final or sole powers of constitutional review in the legislative or executive branches of the government (nor in any of the sub-national political units, if there are any). It leaves other possibilities open, however, including: special constitutional courts, or all of the national courts in the process of their ordinary adjudicative work, or special constitutional juries of randomly assigned ordinary citizens, or some combination of these, or other institutions.

The desideratum of independence is the key idea behind various procedural justifications for basing constitutional review in an electorally unaccountable judiciary. For Ely, having the judiciary carry out constitutional review is justified not because of some belief about the special moral competence of judges to be able to discern more clearly fundamental moral truths and paternalistically impose them on a benighted demos. Rather, it is justified only and precisely because judges are unelected and so institutionally well situated as disinterested referees of the rules of the political marketplace, in particular of procedural disputes between (various groups of) electors and the elected (Ely 1980). Similarly, Dahl insists that the paternalistic 'quasi-guardianship' of having electorally unaccountable courts overseeing the constitution can be justified democratically only where those courts maintain exactly those rights that are either essential to or necessary for the healthy democratic functioning of political decision-making processes (Dahl 1989: 176–92). Habermas also endorses placing the function of constitutional review in the judiciary partly on the grounds that its structural position independent of ordinary political accountability renders its rulings on the procedural conditions of deliberative democracy sufficiently impartial (Habermas 1996: 238–86).[11] One difference in their arguments is that while Dahl focuses almost exclusively on the judicial review of procedures that can be directly understood as essential to democracy, Ely also focuses on laws effectuating general exclusions of minorities that may have indirect impacts on political participation. Haber-

mas, having a much richer deliberative understanding of democracy than the pluralist and aggregative models employed by Dahl and Ely, insists that there is a much wider schedule of constitutional procedures required to legitimate democratic decisions including rights guaranteeing not only the public but also the private autonomy of free and equal citizens. At any rate, for all three pictures – to the extent to which specific constitutional provisions are legitimate procedural constraints on democracy – there can be no in-principle objection from democracy to the practice of politically independent courts ensuring that democratic actors follow the rules for legitimate democratic action. One might object here that no court – nor any other body made up of citizens (such as a citizen jury or constitutional amendment assembly, as discussed below) – could be fully and entirely independent of the political process. While this is true in principle, the matter here is one of comparative judgement: are electorally accountable bodies, or unaccountable judiciaries, or panels of ordinary citizens more or less structurally independent from the political dispute over the constitutionally specified processes for the production of ordinary law. The more independent a body, the more legitimate it will be as an impartial referee of the rules of political dispute.[12]

Nevertheless, constitutions are (in part) law and their provisions are legal provisions.[13] This gives rise to a second desideratum for institutionalizing constitutional review: namely, the desire to maintain legal integrity, that is the systematic coherence of the entire corpus of a nation's law. There are a number of heterogeneous issues here, but attention to just four will serve to show how the ideal justifiability of judicially based constitutional review soon runs into problems. First of all, constitutional provisions are not only isolated single requirements but are part of a broader structural system of the constitution as a whole. Second, constitutional provisions are part of an overall legal hierarchy where ordinary law must give way to fundamental law. Third, individual adjudications ought to be consistent with past decisions. Fourth, one function of law, the settlement function (Alexander and Schauer 1997), is served when disputes are authoritatively resolved not only for the litigants at hand, but also in advance for other litigants in relevantly similar situations. These rather prosaic features of legal systems together lead to efforts on the part of constitutional referees to consciously develop rules, standards and principles – doctrine – that can bring some coherence to the various decisions on procedures guaranteeing democracy. The desideratum of

legal systematicity, then, presents us with a tension between ideal theory and the reality of the development of rule systems. Whereas constitutional reviewers ideally should rule simply on the basis of pre-given constitutional content, should simply protect the constitution, constitutional protection inevitably transmutes into positive constitutional elaboration. And no matter what their justification as impartial referees of the rules of democracy, no constitutional reviewing institution – judicial or otherwise – has the legitimate authority to act as a constitutional legislature. The latter, rather, is a function reserved to the constituent power of the *demos* as institutionally structured in specified constitutional amendment procedures.

There are, in fact, further reasons for the troubling but apparently inevitable transmutation of constitutional protection into elaboration.[14] But this is already enough to show the problem for institutional design. Constitutional elaboration is properly a function of the constituent power operating through duly convened constitutional assemblies following specified certification and ratification procedures. In fact, any single government branch, or even all of them together (unless this was the specified form for constituting the constituent power) could not have the kind of legitimate democratic authority to carry out the function of changing the constitution. Nevertheless, if some institution is carrying out the function of constitutional protection, its work product will tend to bleed over into a different function of constitutional elaboration, particularly where the legal integrity values of quick and authoritative settlement of controversies over the rules of democracy and of systematic legal coherence are thought to be important.

It is precisely this tension between the ideal and the real that gives rise to the consideration and assessment of different ways of institutionalizing the function of constitutional review. On the one hand, the procedures which legitimate democratic outcomes must themselves be policed if individuals are to be able to understand themselves simultaneously as authors of the laws they are subject to. On the other, whenever individual institutions take on the policing function they inevitably seem to also take over citizens' collective powers for constitutional authorship. The interest in mitigating this tension leads to my third design desideratum. Whatever institutions are responsible for constitutional protection (and elaboration) ought to have significant democratic sensitivity, that is, they ought to be structurally open to and aware of the various opinions and perspectives of those potentially affected by their decisions. For if norms are justified only when

all affected could agree as participants in collective reasoning processes (to point back to Habermas's discourse principle), then whatever institutions are responsible for constitutional protection will have to take into account the potential effects on all citizens of newly modified or elaborated constitutional norms – and, in line with discourse theory, this is emphatically not something that can be done well by a few persons counterfactually speculating on how they believe others will be affected. Note that, just as I do not define democracy in terms of majoritarian responsiveness, sensitivity is not defined here as responsiveness to majority will – revealed through, say, either mass popular opinion or the policy preferences of the currently dominant coalition of elected officials. Rather, sensitivity involves the responsiveness to reasons of the institution under consideration, where the relevant reasons include the wide panoply of likely policy effects, relevant values and value disagreements, and diverse interests of those potentially affected by the elaboration or change of constitutional rules and principles. Thus with this third desideratum I endorse and underline Frank Michelman's claim that constitutional protection institutions 'would have to include arrangements for exposing the empowered basic-law interpreters to the full blast of sundry opinions and interest-articulations in society, including on a fair basis everyone's opinions and articulations of interests' (Michelman 1999: 60).[15]

Comparing Proposals

We can now turn to comparing various proposals, focusing on the three desiderata as a way of clarifying the issues involved. I focus on three main different institutional proposals: standard judicial review (with a couple of variations), constitutional review juries as proposed by Spector and Ghosh, and a combined system of constitutional courts and participatory constitutional amendment processes.

Judicial Review

Begin with U.S.-style judicial review: that is, where powers for constitutional review of legislation and regulation are invested in courts with appointed judges removable only on breach of 'good behavior', with such powers held not only by a supreme appellate court but diffused to all of the national appellate courts, and where such review is triggered only after the law has gone into effect and effected only in

the course of adjudicating specific litigants' cases and controversies.[16] First, since judges on appellate courts are effectively appointed for lifetime terms revocable only for very serious breaches of personal conduct – and not on account of the specific decisions they make or doctrine they develop – the courts fulfil the first desideratum of independence to a great degree. They are structurally well situated to act as impartial referees of the procedures of democratic lawmaking, including the maintenance of the system of private and public autonomy rights citizens need to have guaranteed in order to understand the outputs of democratic processes as legitimate. Second, there are reasons to think that such a system will also perform very well on the desideratum of legal integrity. Constitutional review is only one among a number of distinct functions that appellate courts regularly perform – even if the highest court in the system has a great deal of discretion over its docket, as the Supreme Court of the United States does, it is unlikely that constitutional review will be a very significant part of its activity.[17] Rather, even the highest appellate court will be concerned with other functions such as ensuring decisional and doctrinal consistency among the various lower normal and appellate courts, ensuring the internal coherence of the system of ordinary national law (including statutory, regulatory and common law), reviewing the performance of government officials for consistency with ordinary national law, and ensuring the consistency of any sub-national legal systems with relevant national law. Given that courts in a diffuse system of constitutional review will be substantially occupied with ordinary appellate adjudication business, we have very good reason to think that they will bring to the exercise of constitutional review the same tools and attitudes that promote legal integrity in the course of carrying out their other judicial functions. They are already attuned to maintaining the internal hierarchy of ordinary law, ensuring the internal consistency of the corpus of law and authoritatively settling disputes in ways that promote the reliance interests of future litigants through clear interpretive principles and doctrinal development.

When we turn to the third desideratum of democratic sensitivity, however, the results are quite different: we should expect a U.S.-style judicial review system to operate quite poorly here, and precisely because it is structurally independent of ordinary mechanisms of democratic accountability. While there may be some intermittent ties between politically expressed democratic opinion formation and the courts – for instance, through a politically controlled process for the

original appointment of judges – this ex-ante constraint is almost beside the point once the seated judges take up novel questions of constitutionality. For here they begin to decide for themselves (given their discretionary docket) which constitutional procedures need protecting, how they should be protected, and what kind of doctrinal elaboration is necessary for their future protection. At this point, the 'full blast of sundry opinions and interest-articulations in society' (Michelman 1999: 60) will have been reduced to dull background noise among the foreground considerations of the legal profile of the present case and relatively technical juristic considerations relevant to the elaboration of a common-law-style system of doctrinal rules. I have argued at length elsewhere that deliberative democratic theory should avoid the seductive idealization of the juridical use of legal reasoning precisely because of the significant disanalogies between the kind of reasons common-law adjudicators attend to and the kind that deliberative democracy thinks ultimately should do the work of legitimating constitutional legislation: namely, principled moral and political reasoning, argument and deliberation amongst a wide selection of the electorate potentially affected by proposed constitutional norms (Zurn 2007: 163–220). To the extent to which judicial review involves a transmutation of constitutional process protection into constitutional process elaboration, and to which it employs methods tone-deaf to the concerns of those affected by the newly elaborated norms, this form of the institutionalization of constitutional review will perform poorly on the desideratum of democratic sensitivity. This is (part of) the truth behind the objection to judicial review as paternalistic: when it creates and enforces constitutional norms against the democratically accountable branches of government, it presumes to substitute its own judgement of what the proper constitutional process should be for that of the broad citizenry, the latter of which is the only fully legitimate constitutional legislator when duly convened to carry out the functions of the constituent power.

One might object here that, in fact, constitutional courts are more sensitive to dominant majority will than this argument allows. For instance, a major strain of research in the U.S. has responded to the supposed 'counter-majoritarian' difficulty by stressing claims that the U.S. Supreme Court does not decide in a political vacuum, but is rather somewhat sensitive to contemporary political pressures of public opinion and the policy preferences of elected officials (Dahl 1957; Graber 2008; Friedman 2010). Such scholarship is surely correct that constitutional courts do not act in a political vacuum; they are at least

somewhat affected by public opinion and surely operate in a structured political environment where they respond in complicated ways to elected officials in the legislative and executive branches (Whittington 2007). However, there are real empirical questions about just how 'majoritarian' in particular the U.S. Supreme Court and lower appellate courts are, and serious conceptual questions about just what it would mean to be majoritarian and how to measure it (Pildes 2010). More importantly for my purposes, the relevant question is not how majoritarian or counter-majoritarian constitutional courts are *simpliciter*. The relevant issues are comparative: are U.S.-style constitutional courts more sensitive than other potential constitutional elaborators, and are they sensitive in the right way? I believe the answer to both questions is no. First, such courts are likely to be much less sensitive to the wide variety of information and reasons relevant to constitutional policy-making than the alternatives considered below of constitutional juries and constitutional amendment fora: they have no formal democratic accountability mechanisms, most of their work is concerned with non-constitutional matters of the internal coherence of the legal corpus, they have comparatively few information-collection mechanisms and capacities, recruitment of members is largely from a nonrepresentative demographic of legal elites and they have no direct interaction with the public or various public spheres. Second, sensitivity to bare majority preferences or to the policy preferences of elected politicians is not the goal of this desideratum. As mentioned above, the issue is whether they are comparatively sensitive to the wide variety of considerations relevant to the legitimate development of constitutional content. Here is strikes me that courts situated at the apex of an appellate judiciary with a discretionary docket and an overriding concern with developing appropriate judicial doctrine in non-constitutional areas of law will not exhibit high degrees of the relevant kind of sensitivity, no matter how deferential or not they are to current political factions or majorities.

Could modifying the institutions of judicial review remove or significantly mitigate these concerns? Consider that the democratic sensitivity deficits have two broad causes: courts' structural isolation from formal democratic inputs (which promotes desired independence) and courts' reliance on technical juristic forms of reasoning (which promotes desired legal integrity). Perhaps, as courts elaborate constitutional norms in the process of protecting democratic processes, they could be induced to become more responsive to democratic inputs by relying, for instance, on deliberative democratic

polling to support their doctrinal developments. This is what Ethan Leib suggests as an addendum to his central proposal for a new popular legislative branch – inspired by James Fishkin's (2009) designs for deliberative opinion poll assemblies – structured around deliberative assemblies of ordinary citizens (Leib 2002). Leib suggests that when the Supreme Court of the United States relies argumentatively on claims about long-standing community traditions and values, it could be empowered to call upon the deliberative popular assemblies to see whether their empirical claims about the actual endorsed traditions of the community are in fact true (Leib 2002: 408–10). This is, however, a pretty tepid injection of democratic sensitivity since, on the one hand, the judiciary is in no way required to defer to or even call upon the deliberative assemblies, and, on the other, the scope of the power is quite restricted to only one particular domain of constitutional jurisprudence concerning a specific form of doctrinal reliance on community standards for individual liberty claims. More importantly, Leib essentially endorses broad powers of final judicial review of the work product of his deliberative popular branch of government – in particular, under the very broad and powerful doctrinal umbrella of equal protection review – thereby in the end simply re-institutionalizing the paternalist problem, albeit it in an interestingly enriched legislative context (Leib 2002: 369). As Eric Ghosh aptly summarizes, Leib's 'proposal is unlikely to seriously challenge judicial review as currently practiced' (Ghosh 2010: 343).

What about a designated, special court solely responsible for constitutional review, attending to potential problems with statutes and regulations in the abstract rather than as they arise in concrete controversies, and ostensibly limited in its power to negative judgements of unconstitutionality, along the lines suggested by Hans Kelsen and widely institutionalized today (Kelsen 1942)? Ideally such an arrangement would ameliorate some of the insensitivity of U.S.-style judicial review introduced by the preponderance of juristic technicalities in the treatment of questions of fundamental constitutional principles. Of course, because the work of such a court is only attending to the constitutionality of ordinary law, rather than mixed in with a number of ordinary judicial functions, and because the members will still be structurally independent of democratic accountability (through suitable recruitment, appointment and removal mechanisms), any forays they make into positive constitutional elaboration will be felt as that much more jarring to the notion that the people must themselves be responsible for creating the fundamental consti-

tutional law they are subject to. Kelsen of course hoped to forestall this by insisting on a strictly negative function, that is, limiting the constitutional court to simply saying 'no' to determinate laws in the light of clear constitutional prohibitions. However, if my arguments above about the inevitable transmutation of constitutional protection into elaboration are correct, then we should expect that this hope will be misplaced and that the court will effectively become a constitutional legislator. There is in fact, substantial evidence to support this supposition. Alec Stone Sweet has shown how, in practice, specialized constitutional courts have increasingly engaged in the positive elaboration of constitutional law as they have developed and deployed doctrinal balancing and rationality tests, especially when they are considering how to interpret and apply broad textual protections of individual rights (Stone Sweet 2000). Hence even if a specialized court's deliberations are not distorted by the particular factual profile and legal issues of the case as they might be in a system of concrete review, the employment of juridical techniques is still a significant impediment to a straightforward consideration of the basic political issues present in constitutional design. Further, even where a specialized court is quite limited to abstract, *a priori* review of statutes, as for instance the French Constitutional Council is limited, it turns out that other supposedly non-constitutional courts, such as the French Council of State, increasingly employ the use of doctrinal constitutional principles for the *a posteriori* review of law as they arise in concrete cases and controversies (Provine 1996). This is quite in line with clear worldwide trends towards the increasing 'judicialization' of questions of political processes arising not only from ordinary courts but also from constitutional courts – developments that are quite hard to characterize as the mere maintenance of a negative judgement on the work-product of politically accountable government actors (Hirschl 2004, 2006). In short, while systems of concentrated abstract review promise to lessen some of the distortions introduced through juristic treatment of constitutional issues, the basic problem of the transmutation of constitutional protection into constitutional elaboration still looms, thus leaving in force worries about the illegitimate assumption of constituent powers through the exercise of judicial review.

Constitutional Juries

From these (overly brief) considerations, it appears that internal modifications of judicial review alone are not sufficient to dispel the paternalist objection to the practice. What about instituting a more

democratic alternative to court-based constitutional review? This is the fascinating idea explored separately by both Horatio Spector (2003: 331–4; 2009) and Eric Ghosh (2010) in their respective proposals for institutionalizing constitutional review in randomly selected juries of ordinary citizens.

Spector envisions a system of constitutional juries, composed of 36–72 randomly selected citizens, called into play by litigants in concrete cases who wish to bypass the normal mode of constitutional review carried diffusely throughout the appellate judicial system. Such constitutional juries would have jurisdiction limited to constitutional questions of individual rights violations, rather than wider authority to rule on constitutional questions of governmental procedures and institutions, and their rulings would be limited to nullifying ordinary law found to be unconstitutional. Verdicts would not have precedential effect for future cases, nor would the juries be empowered to engage in the development of doctrinal standards, rules or other tests for constitutionality. Importantly for Spector, such juries would be required to render not only decisions but also to provide the reasoning employed to reach the decision (Spector 2009: 120–2).

Like Spector, Ghosh proposes a system of constitutional juries (which he calls 'the Citizens' Court') with jurisdiction limited to reviewing ordinary law for individual constitutional rights violations, though he provides more design detail and specificity than Spector. Ghosh recommends juries of about 200 randomly selected citizens willing to participate, where the procedures are modelled on those developed in the applied deliberative democracy literature, and with decisions requiring 60 per cent super-majorities. Further, such constitutional juries would have their docket constituted in part by referrals of individual rights cases from appellate or supreme courts, and in part by recommendations from other citizen juries convened to select cases based on professional recommendations by other panels of randomly selected judges.[18] Importantly for Ghosh – whose recommendations are explicitly framed as a response to felt inadequacies in the Australian system of constitutional review – there would need to be an explicit constitutional bill of rights with broad, open-ended provisions and an expansive schedule of civil, political, social welfare and general justice rights. Constitutional juries would rule on the basis of the bill of rights with wide discretion to consider what counts as an injustice to individuals. However, largely in response to concerns about cost, Ghosh also recommends a number of substantive limitations on constitutional juries. Besides the fact that they would

convene relatively infrequently, the constitutional juries would be actively encouraged to avoid hard cases, that is, cases which 'involve matters which are finely balanced' (Ghosh 2010: 349). Apparently, many constitutional rights violations would simply be handled in other 'cooperative' ways, such as through an ombudsman's review of administrative violations, although it is not clear whether Ghosh envisions such other resolution mechanisms as including the power of statutory or regulatory nullification. Finally, perhaps the most significant limitation on this alternative institution for constitutional review would be that the legislature could, through a super-majority vote of 60 per cent, either pre-emptively shield statutes from the possibility of being reviewed in the first place or abrogate the constitutional jury's decisions after the fact.

For both theorists, the key idea supporting constitutional juries is the way in which the procedures for random selection amongst citizens provides a laudable institutional approximation of political equality. Sortition mechanisms for ordinary citizen juries, when compared with small multi-member courts of appointed legal elites, take much more seriously the core democratic idea of free and equal citizens giving themselves the laws they are subject to. Comparing such juries even to those legislative bodies standardly taken to institutionalize ideals of political equality, Spector rightly points out that electoral representation does not fully model political equality: 'The constitutional jury is a populist institution that takes seriously the idea that we are all equally qualified to take decisions on constitutional matters' (Spector 2003: 333). And Ghosh stresses the long heritage in ancient, renaissance and modern republican political theory of understanding sortition as more democratic in character than the essentially aristocratic character of representation.

Turning to the expected performance of constitutional juries on the three desiderata, it seems to me that they will do well on the first and third considerations about structural independence and democratic sensitivity, but poorly on the second of legal integrity. To begin, it is clear that, in comparison with standard judicial review, such juries promise an equal or greater degree of structural independence from the interested parties in disputes over the constitutional procedures. I say equal or greater for, while juries and judges are similar in not achieving or retaining their positions through electoral accountability, courts are often themselves interested parties with clear stakes in the outcomes of disputes over constitutional procedures – courts are, after all, governmental bureaucracies competing over institutional power

and prerogatives with other governmental bureaucracies.[19] However, the details of both Spector's and Ghosh's proposals to some extent mitigate the effectiveness of this independence. Because both limit the jurisdiction of constitutional juries to individual rights claims, the juries simply will not be able to protect some of the most important constitutional assurances for democratic processes, as these are not easily addressed in terms of individual rights violations. For example, in the U.S., abuses by politicians of electoral districting procedures have proven to be notoriously ill suited to litigation in terms of individual rights violations, even though such abuses have led to electoral distortions that illegitimately shut out some citizens from equal effective participation and representation in ordinary political processes. In addition, it seems that much of the independent constitutional protection power that is promised by constitutional juries is traded away in the details of Ghosh's proposed institutional design. For instance, he envisions that the constitutional juries will significantly lower their potential caseload by simply excluding hard cases. Would this not mean that, for instance, in constitutional disputes pitting principles of political equality against principles of free expression – for example, concerning campaign advertising or libel law – there simply would be no constitutional oversight of the work product of the legislature? And even in easy cases, that is, where the constitutional violations of statutes are quite easy to make out, Ghosh's proposal allows for the legislature to either pre-emptively shield its laws from review or simply abrogate the settled decisions of the constitutional jury. So apparently a statute, for instance, that changed electoral rules in an unconstitutional manner but significantly increased the power of incumbents to remain in office could be made immune to review by the incumbents themselves. And if they did not have the requisite foresight to act pre-emptively, they could simply ignore the decisions of the jury on the basis of a 60 per cent super-majoritarian requirement *ex post*. These conditions do not, to put it lightly, provide an adequate recipe for ensuring the enforcement of those constitutional procedures which are the final warrant for the legitimacy of the work product of the legislature in the first place.

Turning now to the third desideratum of democratic sensitivity, constitutional juries promise a significant increase in such sensitivity over standard judicial review. To begin, the members of constitutional juries, especially in the large numbers envisioned by Ghosh, are simply more representative of the diversity of the citizenry than those legal elites usually selected for the appellate judiciary. And

this is not just a matter of 'looking' more like the electorate, for a broader representation of the citizenry promises epistemic gains in the ability to detect and process the variety of ways in which laws affect those who are subject to them. As Spector puts the point: 'constitutional juries seem particularly apt for treating encroachments on rights that the members of the judicial elite are not likely to endure, and, therefore, are not prepared to reckon with or deeply understand' (Spector 2009: 120). As the work of applied deliberative democrats has consistently shown, these epistemic gains can be significantly leveraged further through careful structuring of the deliberative assemblies themselves (Fishkin 2009). And finally there are good grounds for expecting that constitutional juries will be suitably responsive to reasons, and not simply responsive to the unconsidered immediate opinions and preferences of private individuals. On the one hand, deliberative assemblies are specifically designed to improve the reasons-responsiveness of their outcomes through structured and focused collective discussion, argument and deliberation. On the other hand, constitutional juries for both Spector and Ghosh will need, like judicial panels, to produce reasoned justifications of their decisions.[20] However, the opinions of constitutional juries are responsive to the right kinds of reason – namely, issues of basic constitutional principle as they apply to both scrutinized ordinary laws and the fact situations of litigants – while, as I have suggested, judicial panels in diffuse systems of judicial review may well be over-responsive to issues of legal technicality and under-responsive to issues of basic political principle. In summary, I think we can expect that constitutional juries will be significantly more open than appellate courts to 'the full blast of sundry opinions and interest-articulations in society, including on a fair basis everyone's opinions and articulations of interests' (Michelman 1999: 60).

However, considering the second desideratum of legal integrity – of systematicity and settlement – I surmise that constitutional juries will perform much worse than either concentrated or diffuse systems of judicial review. Unfortunately, a confident statement on this question is inhibited by a set of unanswered questions in both Spector's and Ghosh's articles which, perhaps unsurprisingly, revolve precisely around issues pertaining to the maintenance of the coherence of ordinary and constitutional law and to the effective fulfilment of the settlement function of law. To begin: are constitutional juries actually performing the specific function of the constitutional review of statutes and regulations, or are they simply empowered to render ver-

dicts to protect individuals' constitutional rights in particular circumstances against the actions of particular government officials? It is clear that both Spector and Ghosh focus almost all of their attention on designing constitutional juries to carry out the latter function; that can be seen simply from the way they restrict the juries' jurisdiction to individual rights violations in concrete cases. Spector does clearly envision that such juries will also have Kelsen's negative power to at least annul unconstitutional legislation (Spector 2003: 332; 2009: 117). It must be remembered, however, that to the extent that a parallel system of constitutional review is available in the appellate judiciary, as Spector recommends, the fact that a jury does not annul a statute in a case does not yet settle the question as to whether it will withstand constitutional scrutiny – and the same is true when the judiciary finds a statute constitutional.

Things are not as clear in Ghosh's proposal. On the one hand, it seems that according to his opening definitions, constitutional juries will have strong powers of review (within their jurisdictional mandate): '"Constitutional juries" will refer to juries deciding bill-of-rights matters and "constitutional review" will refer to review, by an independent body, of legislation or executive action for conformity with a bill of rights' (Ghosh 2010: 328).[21] On the other hand, in those sections where he details the actual proposal, the language used to describe the jury's actions is consistently that of 'investigation of some serious human rights violations' and of 'resolving human rights complaints' (Ghosh 2010: 349). Surely these latter phrases refer not to matters of the constitutional control of legislation, but of the constitutional control of specific government actions – a form of control that poses few worries when carried out by even the ordinary judiciary, as this is a straightforward matter of protecting already established constitutional provisions. And one should not forget that even this form of constitutional protection by juries is relatively anaemic given that it is possible for legislatures to effectively ignore their verdicts by super-majority votes either in advance or afterwards. In sum, while both Spector and Ghosh seem to envision constitutional juries being able to annul ordinary law in the name of the constitution, neither of their mechanisms promises much in the way of decisive settlement of the constitutionality of the statute.

Turn now to the questions of whether such juries are bound to follow the contours of previous decisions on similar questions and whether they are bound by judicially developed substantive or methodological doctrine. For Ghosh, juries will not be in any way

bound to make their decisions coherent with previous decisions: 'A Citizens' Court is likely to feel freer in openly departing from earlier decisions, and the open-ended nature of the bill of rights will also lead to less emphasis on textual interpretation' (Ghosh 2010: 351). He also implies that juries will not pay much, if any, attention to precedent, whether methodological doctrine developed for the interpretation of legal texts or substantive doctrine developed through case law interpreting the bill of rights. Answers to these questions are less clear for Spector, particularly as his proposal maintains strong, judicially based constitutional review alongside constitutional juries. On the one hand, his earlier article suggests that juries will need to attend to technical legal questions such as the consistency of proposed verdicts in the present case with past decisions (by constitutional juries and judges) on similar matters. That is why he recommends that juries might request the advisory counsel of law professors in their deliberations (Spector 2003: 332). On the other hand, in his later article, the central model for the activity of his proposed constitutional juries is the treatment of law found in radical practices of jury nullification, as endorsed by Lysander Spooner and others: finding laws simply unjust as applied to the facts of particular situations, jurors nullify laws on a case-by-case basis (Spector 2009: 117). This strongly suggests that constitutional juries, for Spector, are basically unconcerned with the consistency of decisions over time, seeking rather to get the morally correct results in particular cases. I think it fair to say, then, that constitutional juries on both Ghosh's and Spector's models are relatively, and perhaps entirely, unconstrained by concerns about coherence with past decisions, focused rather on getting the outcome perceived by the jury as substantively correct for the particular litigants before them. The worry about this from the point of legal integrity should be clear: whether individuals actually have enforceable constitutional rights against statutory regimes will seem to turn more on the facts of particular cases and litigants, than on any consistently applied reason or principle for decision. Thus it would seem that sympathetic persons are likely to have much greater constitutional rights protection than unsympathetic ones, and this portends a very serious breach with the principle that all citizens deserve equal legal protection. One of the signal advantages of the specifically juridical practice of being bound by past decisions is that it institutionalizes the basic principle that like cases be treated alike. Given the substantial increases in legal indeterminacy associated with those broad, open-ended individual rights guarantees Spector and Ghosh give their constitutional juries juris-

diction over, it is surprising that there is little attention to concerns about decisional consistency across cases.

Finally, there is the question of whether the decisions of constitutional juries will have any precedential effects for the future. As I find no evidence one way or another on this question in Ghosh, I will assume that constitutional juries are not intended to establish principles of decision that are to be binding on future constitutional juries, judicial bodies or ordinary law-making bodies. And if they were so empowered, the legislature's simple super-majoritarian short-circuiting of their decisions would make the power quite weak. Although Spector gives some consideration to the idea of doctrinal development by constitutional juries, he recommends against it at the end of the day: 'constitutional verdicts need not give rise to precedents binding upon the constitutional court or upon subsequent juries. It might be a bad idea to lay down *stare decisis*, even if this policy were logically possible with respect to verdicts' (Spector 2009: 118). From the point of view of legal integrity, the problems here are the same as before: not only are there real threats of inconsistency across various legal decisions concerning the exact contours of constitutional provisions, but there are also serious degradations of individuals' reliance interests in knowing what the state of relevant constitutional law actually is given the absence of any substantial settlement of the issues in ways that can be confidently extended beyond the case immediately incident to the decision.

It is perhaps no accident that Spector and Ghosh both avoid allocating any powers to their respective constitutional juries that might enable them to promote the systematicity and settlement values of legal integrity. For, on the one hand, to do so would be to allow constitutional juries to start to act as constitutional legislators through the positive elaboration of constitutional law along the lines of constitutional jurisprudence. And this would require both theorists to come to terms with the question of whether a randomly selected jury of tens or hundreds of ordinary citizens could legitimately take on the powers reserved for the people as a whole in their exercise of the constituent powers for constitutional authorship. Even if sortition models political equality better than electoral representation, I think there would be something deeply unsettling about allocating to a very small percentage of citizens the power to positively develop constitutional law binding on all citizens.[22] Such an arrangement could not come close to materially approximating the ideal that citizens should be subject only to constitutional law they can understand themselves as the col-

lective authors of. On the other hand, both seem to suppose that constitutional elaboration will occur in other institutions. Spector, recall, maintains ordinary judicial review as a parallel track of constitutional control. And it appears that Ghosh is not recommending significant changes to the existing institutions or practices of common-law style appellate judiciary. Hence I would expect that doctrinal elaboration of constitutional principles would continue apace and unabated along with intermittent injections of citizen review for particular litigants' individual rights claims. Of course, focused as each is on achieving political equality in the adjudication of concrete constitutional rights cases, neither Ghosh nor Spector has designed their proposals to address the problem that I have highlighted here – namely, the way in which constitutional protection transmutes into constitutional elaboration. But ignoring the general dynamics of organizationally developed rule-based systems – their tendency to harmonize diverse applications of rules to novel situations through binding second-order standards and principles – will not make them go away. In fact, I think there is good reason to think that constitutional elaboration will be carried on by actors other than the constitutional juries, and so the worry about the illegitimate assumption of the constituent powers of the people will not be dispelled by constitutional juries. Functional and principled drives towards systematic decisional coherence and authoritative dispute settlement cannot be ignored in legal systems. The fact that such powers are not explicitly allocated to constitutional juries will not stop them from being assumed by other institutional actors responsible for considering the constitutionality of their actions, whether judges, legislators or regulators.

Concentrated Judicial Review and Civic Constitutional Fora

I turn finally to a kind of compromise institutional proposal that I have recommended elsewhere: namely, the combination of a special constitutional court solely responsible for considering the constitutionality of ordinary law, along with a significantly modified and active constitutional amendment process drawing on ordinary citizens and organized along the lines of deliberative democratic assemblies. The proposal allows a specialized constitutional court to take the lead in considering the constitutionality of ordinary law and using standard juridical techniques oriented towards the promotion of legal integrity (Zurn 2007: 274–300). Attuned to worries about the democratic sensitivity of such a court, particularly when it begins to develop constitutional content in the form of doctrine, and concerned about

allocating to electorally dependent politicians unreviewable powers of constitutional development, the proposal also attempts to empower alternative and more active forms of constitutional amendment. The stages of the selection amongst amendment proposals and of their certification for the ballot are driven not through representative legislatures, but rather through successive special panels of randomly selected ordinary citizens structured as deliberative democratic assemblies. Finally, amendment proposals which are successfully selected and certified in the deliberative assemblies would be submitted to all citizens for ultimate ratification, after nation-wide opportunities for collective deliberation focused not on electoral candidates but on the constitutional proposals on the ballot (Zurn 2007: 323–41).[23]

The basic idea behind this composite recommendation is that the real normative worry about judicial review does not concern the mere protection of constitutional provisions by a democratically unaccountable court, but rather the positive elaboration of constitutional content that reviewing courts inevitably engage in order to fulfil the demands of legal integrity. To use a simple example, there ought to be no in-principle democratic objection to an independent court nullifying a law prohibiting some citizens from speaking about political matters because of their disfavoured political views, if in fact there is a clear constitutional provision providing that 'Congress shall make no law … abridging the freedom of speech' (U.S. Constitution, Amend. I) and if that constitutional provision was duly enacted through the specified amendment procedures constituting the people's constituent powers. This is simply to insist that the law the people has given itself in constitutional form remains protected as fundamental and controlling law with respect to legislative statutes. But constitutional review of statutes is rarely so easy, especially where legislatures themselves have internal incentives not only to obey constitutional law but also to further its development. For instance, the simple constitutional provision cited above does not unambiguously tell us whether a statute placing monetary limits on campaign contributions would pass muster. Whatever institution or institutions step in to decide this issue will be effectively assuming the mantle of a constitutional legislator and assuming the constituent power. The idea of having civic constitutional fora – significantly modified constitutional amendment procedures employing citizen juries and wider citizen participation – is to allow for reasons-responsive and democratic modes of addressing concerns about the substance and process of whatever decisions ensue in the further

elaboration constitutional content, whether performed by the judicial, legislative and executive branches or some combination thereof.[24]

A brief consideration of the three desiderata will indicate how, even though all three desiderata cannot be jointly fulfilled to the highest degree, the combined proposal here attempts to conciliate between them in a satisfying balance. First, both specialized constitutional courts and the alternative civic constitutional amendment fora – including both the randomly selected citizens panels at the selection and certification stages and potentially all of the enfranchised citizens at the ratification stage – are sufficiently and structurally independent of the mechanisms of democratic accountability operative in the normal production of ordinary law. They are both institutionally well placed to play the role of referees of the constitutional procedures warranting the legitimacy of the production of ordinary law.

With respect to the third desideratum of democratic sensitivity, the specialized constitutional court component of this proposal will suffer the same defects as those detailed above in the section on Judicial Review. However, to the extent to which civic constitutional fora become accepted and active players in the system of constitutional elaboration, intervening when particular decisions or doctrines are found to be especially problematic, the democratic deficits of a system of purely judicial constitutional review are significantly mitigated. We should expect that errors caused by the insensitivity of courts (and of other constitutional elaborators) will be more easily remedied through civic constitutional fora than in a system of pure judicial review. In fact the arrangement here is, in some senses, analogous to that between courts producing common-law rules and legislatures producing statutes: although the former (like constitutional courts) are allowed to positively elaborate the content of law, this is subject to the oversight of bodies (like civic constitutional fora) with legitimate powers for producing superior law that can override the decisions of the former. One important difference is that the proposal leverages the significant increases that can be had in the quality and quantity of democratic sensitivity – over standard modes of holding representatives electorally accountable – by relying on diverse cross-sections of ordinary citizens and carefully designed deliberative assembly procedures.

Finally, the values of the second desideratum of legal integrity are promoted in two ways in the system. First, the specialized constitutional court is empowered to attend to issues of the internal systematicity of the corpus of law and of the authoritative settlement of

constitutional disputes. Second, the civic constitutional fora themselves are responsible not for deciding specific cases and controversies – as in the proposals for constitutional juries – but rather for producing clear general standards which will be useful for deciding a range of diverse concrete cases in coherent and fair ways. The legal standards laid down in constitutional amendments, after all, are supreme in the system, even if they do not automatically decide all subsequent potential controversies.[25] Of course, there is not as much settlement as one gets in a system of pure judicial supremacy, since constitutional law would be subject to more potential change over time as the different actors in the system react to one another. Nevertheless, in between periods of positive constitutional change, the law is sufficiently settled to fulfil citizens' reliance interests. In short, the proposal is intended to locate the ultimate constituent power where it belongs – with the people themselves – while recognizing the unavoidability of the positive elaboration of legal content in a complex, hierarchically structured system of ordinary and constitutional law.

Conclusion

I have argued that, according to a specific conception of the ideals of constitutional democracy – deliberative democratic constitutionalism – the proper function of constitutional review is to ensure that constitutional procedures are protected and followed in the ordinary democratic production of law, since the ultimate warrant for the legitimacy of democratic decisions can only be that they have been produced in the right way, that is, according to procedures that warrant the expectation of increased rationality and reasonability. I claimed that, from this specification of the function of constitutional review, three key desiderata for the institutionalization of the function followed: structural independence from the standard mechanisms of electoral accountability, democratic sensitivity to the widest range of opinions and interests concerning the likely effects of different constitutional rules and regimes, and the maintenance of legal integrity in terms of the internal consistency of the corpus of law and of the authoritative settlement of constitutional disputes. Finally, in evaluating three broadly different ways of institutionalizing constitutional review – solely in appellate courts, in constitutional juries of ordinary citizens and in a combined system of constitutional courts and civic constitutional amendment fora – I have argued that the ideals of deliberative

democratic constitutionalism would be best realized in the third arrangement, given that it would perform best at collectively fulfilling the sometimes antithetical desiderata. Even if, at the end of the day, this proposal does not prove to be the *ne plus ultra* of institutional design, I offer it in the spirit of democratic constitutionalism itself. For, we owe it to ourselves as citizens to consider whether we can improve the mechanisms for making basic law and so more closely approximate the regulative ideal of understanding ourselves as authors of the laws we are subject to.

CHRISTOPHER F. ZURN is Associate Professor of Philosophy at University of Massachusetts Boston. He specializes in political philosophy, the philosophy of law, and contemporary European philosophy. He has authored *Deliberative Democracy and the Institutions of Judicial Review* and co-edited *New Waves in Political Philosophy* and *The Philosophy of Recognition: Historical and Contemporary Perspectives.* His current projects focus on issues concerning the meaning and institutional entailments of constitutional democracy, and on issues in contemporary critical social theory.

Notes

1. Several U.S. presidents – for example, Thomas Jefferson, Andrew Jackson, Abraham Lincoln, Franklin Roosevelt, and Richard Nixon – have called out the federal appellate judiciary, especially the Supreme Court of the United States, for unwarrantedly asserting supremacy in the interpretation of the United States Constitution. They have argued that because the legislative, executive and judicial branches of the national government are each bound by the Constitution, each branch has the responsibility for seeing to the constitutional exercise of its own allocated powers.
2. As I do not associate democracy with simple majoritarianism, I find the paternalist objection – namely, that judicial review can end up violating the principle of collective self-rule among free and equal individuals – much more problematic than the counter-majoritarian one.
3. There is much literature here; some of the more interesting work in the context of national polities includes: Bohman (1998); Leib (2002); Fung and Wright (2003); Fishkin (2009); Smith (2009); Kahane et al. (2010). Deliberative democrats have not limited their purview within the borders of the nation-state, seek-

ing rather to expand their institutional imagination trans-nationally and globally, for example: Dryzek (2006); Bohman (2007); Habermas (2001b, 2006a).

4. Sometimes the phrase 'judicial review' is taken to refer to a whole range of functions that a judiciary carries out in overseeing the actions of officials for consistency with ordinary law and in policing the administrative production and implementation of regulations. In contrast to these functions of 'weak judicial review', this paper focuses only on the exercise of 'strong judicial review' whereby some judicial organ(s) oversees the production of ordinary law for violations of constitutional provisions and norms. It is this latter case – where electorally unaccountable judges are assigned the function of striking down the work product of the electorally accountable branches of government for constitutional violations – that raises important normative questions about the ideals of constitutional democracy in a particular sharp way. For simplification purposes, I will also focus here on individual rights-based strong judicial review, rather than other exercises of constitutional review concerning governmental structures, subnational political units, foreign policy, and so on.
5. This paper does not investigate proposals by Bellamy and Waldron for abolishing the function of constitutional review altogether. In part this is because I have addressed Waldron's arguments elsewhere (Zurn 2007: 124–62). But more centrally, it is because both of their arguments crucially hinge upon the rejection of aspects of constitutionalism, aspects that appear to me central to the very idea of constitutionalism itself: namely, the idea of constitutional law as hierarchically more important than statutory law, and especially the ideals and practices of constitutional entrenchment, that is, of constitutional law as harder to change than ordinary law. There is not space here to investigate the complicated and very important questions raised by the rejection of these central aspects of constitutionalism *simpliciter*, though these aspects are given some further attention below.
6. While I believe the position summarized here is consistent with that presented in my 2007 book, this reconstruction differs in order of presentation of the argument, and in matters of emphasis. In particular, this paper stresses the ideal of political equality as the core of democracy in a way the book did not, it highlights the notion of reasonable disagreement as internal to the problem of democratic self-rule and it gives an explicitly epistemic interpretation to the ideal of constitutionalism. Finally, this presentation tries to respond to objections to the book that my own positions were, there, hard to disentangle from those of others under consideration.
7. Consider only Rousseau's requirement that each citizen declare fealty to a shared civic religion, on pain of banishment for non-endorsement or death for apostasy (Rousseau 1997: Book IV, chapter 8).
8. I have asserted elsewhere that constitutionalism also includes the elements of the rule of law and the structuring of political institutions and procedures (Zurn 2007: 84–103). I leave aside consideration of these two elements here in order to avoid both lengthy digressions on the meaning of these two elements and begging the question about the necessity of a judicial institutionalization of constitutional review.
9. Habermas often makes this point in a stronger way by insisting that democracy and constitutionalism mutually presuppose one another: constitutional procedures cannot be legitimate without full and fair democratic debate and decision

upon them, and, reciprocally, no exercise of democracy can be legitimate without being procedurally structured to ensure fairness and openness to the reasons, arguments and opinions of all citizens. Of course, this mutual presuppositionality – itself a settled feature of contemporary political discourse – might be thought to lead to a paradox of infinite regress between the requirements of constitutionality and democracy (Michelman 1998). Elsewhere I try to show how the bite of this paradox is dispelled by a proper understanding of the logic of legitimacy claims (Zurn 2010).

10. The distinction between substantive and procedural accounts of legitimacy is treated at greater length in Zurn (2007: 76–80), where it is also pointed out that one and the same theory can be proceduralist and substantialist at different levels of analysis. For example, Rawls' political constructivism is a proceduralist form of justification at the highest level of abstraction, even though it ensues in substantive principles of justice.
11. Habermas also presents two other arguments for judicially based constitutional review, one concerning the proper method for interpreting constitutional rights and the other the separation of powers according to the logic of different forms of practical reason. I have elsewhere called the sufficiency of both into question, and will not rely further on them here (Zurn 2007: 243–52).
12. One version of the objection to the desideratum of structural independence, in terms of claims about the heightened moral expertise of judges (Bellamy 2007: 39–41), is misplaced insofar as neither Ely nor Dahl nor Habermas defend judicial review mainly on grounds of the heightened moral expertise of judges. A different stronger version of the objection starts with questioning the practical salience of the maxim that no one should be a judge in their own case (Waldron 1999: 296–8; Bellamy 2007: 118–20). I believe that even this stronger version is insufficient to call into question the basic idea supporting the desideratum of structural independence, but cannot reproduce the arguments here (Zurn 2007: 141–61, 269–70).
13. I say in part for two reasons. First, in constitutional nation-states without written constitutions, even though much of the deeply settled procedures guaranteeing democratic processes will be found in legal texts – in laws structuring and reinforcing settled political procedures, including laws allocating rights to public and private autonomy to individuals, in judicial precedents establishing and/or reinforcing the same, and so on – much of the entrenchment of democratic procedures will not be achieved by legal texts, but rather by long-standing practices and traditions felt to be relatively inviolable by the participants. Second, these latter non-legally secured settled practices and traditions are essential to effective constitutionalism even in nation-states with written constitutions.
14. In Zurn (2007: 256–64) I discuss the following reasons for such transmutation: the semantic reciprocity between the tasks of justifying and applying norms, the abstract formulations of many constitutional provisions, the importance of under-theorized agreements to constitutional decisions, the increasing number of points of conflict given the ongoing change and development of ordinary law, the interaction between constitutional protection and changing non-textual constitutional structures and settlements, and changes in the social contexts regulated by law.
15. In Zurn (2007: 264–74) I defended seven design desiderata for institutions of constitutional review – legal systematicity, settlement, structural independence,

empowerment, jurisdiction, democratic sensitivity and feasibility – but have simplified the presentation here. I have rethought the need for such complexity, believing now that the three desiderata as I have reformulated them here – combining legal systematicity and settlement, and disregarding issues of empowerment and jurisdiction – are sufficient to assess alternative institutionalizations of constitutional review from the point of view of normative theory. The feasibility of the institutional proposals investigated would require much more investigation than I can provide here.

16. In the technical terms of comparative constitutionalism, U.S.-style judicial review is understood as diffuse, *a posteriori,* concrete judicial review (Brewer-Carías 1989).
17. Using various measures, I estimate that in the U.S., statutory nullifications constitute around 10 percent or less of the yearly work product of the Supreme Court (Zurn 2007: 28, 283).
18. The docket control mechanisms are a bit unclear, however, as Ghosh also says that constitutional juries should themselves have 'significant decision-making power with respect to the selection and determination of cases' (Ghosh 2010: 347).
19. For example, in the U.S. context, it would be hard to understand federal appellate courts as impartial arbiters in disputes between courts themselves and the legislature concerning Congress's textually specified 14th Amendment powers to craft legislation ensuring due process and equal protection to all persons. In fact, the trend of contemporary jurisprudence seems to show that the Supreme Court rather jealously guards its self-assumed powers for judicial review even in the face of the plain text of section 5 of the 14th Amendment favoring Congressional powers: see *City of Boerne* v. *Flores* 521 U.S. 507 (1997).
20. Spector (2009) invokes a 'doctrinal/discursive paradox' to bring into question the rational coherence of any attempt by a multi-member body – whether of judges or jurors – to articulate a single, collectively reasoned opinion concerning the particular dispensation of the case. He nevertheless endorses the production of such supporting opinions for both constitutional juries and appellate courts.
21. He also reaffirms later in the article that 'the Citizens' Court exercises strong review' (Ghosh 2010: 355).
22. This is part of the worry about the paternalism of judicial review expressed memorably by Learned Hand: 'If they [a bevy of Platonic Guardians] were in charge, I should miss the stimulus of living in a society where I have, at least theoretically, some part in the directions of public affairs. Of course I know how illusory would be the belief that my vote determined anything; but nevertheless when I go to the polls I have a satisfaction in the sense that we are all engaged in a common venture' (Hand 1958: 73–4).
23. Constitutional amendment deliberation day is modelled on the proposal for a national deliberation day before normal representative elections put forth by Ackerman and Fishkin (2004). Much more procedural and institutional detail for my proposed civic constitutional fora is provided in Zurn (2007: 323–41). I also endorse other reform proposals for the system of constitutional review that I do not have room to discuss here: self-review panels in legislative bodies and regulatory agencies, various mechanisms for inter-branch constitutional debate and decisional dispersal (such as the Canadian 'not-withstanding' constitutional provision and constitutional provisions that require legislative elaboration), and eas-

ing overly obdurate procedures for passing constitutional amendments. Some of these arrangements – in addition to weak, easily overridden or nonexistent judicial constitutional review – are often associated with the 'New Commonwealth' model of constitutionalism (Gardbaum 2001).

24. This indicates another advantage of my proposal: it does not assume that constitutional law is entirely the product either of formal constitutional text or constitutional jurisprudence. Rather, it takes a much more capacious view of constitutional content and its multiple sites of production.
25. Even given the supremacy of the constitutional text as amended, could a constitutional court nevertheless make an end run around the results of a successful constitutional amendment, say by developing doctrine deviating from its manifest content, or ignoring the amendment's content altogether? Could it go even further by, say, prohibiting the assemblies from meeting or stripping or limiting the otherwise general jurisdiction of constitutional assemblies and amendments? I suppose almost anything is possible in the actual practice of high constitutional politics, but such moves by a constitutional court to assert supremacy over amendment content and processes are not normatively licensed by the proposal here. At the end of the day, the legitimate power to change constitutional content lies in the hands of the constituent power of the people, as duly constituted by the specified mechanisms for constitutional enactment and amendment.

References

Ackerman, Bruce and James S. Fishkin. 2004. *Deliberation Day*. New Haven, CT: Yale University Press.

Alexander, Larry and Frederick Schauer. 1997. 'On Extrajudicial Constitutional Interpretation', *Harvard Law Review* 110: 1359–87.

Bellamy, Richard. 2007. *Political Constitutionalism: A Republican Defense of the Constitutionality of Democracy*. New York: Cambridge University Press.

Bickel, Alexander M. 1986. *The Least Dangerous Branch: The Supreme Court at the Bar of Politics*, 2nd edn. New Haven, CT: Yale University Press.

Bohman, James. 1998. 'Survey Article: The Coming of Age of Deliberative Democracy', *The Journal of Political Philosophy* 6(4): 400–25.

_____. 2007. *Democracy Across Borders: From Dêmos to Dêmoi*. Cambridge, MA: The MIT Press.

Brewer-Carías, Allan R. 1989. *Judicial Review in Comparative Law*. New York: Cambridge University Press.

Brutus. 2003. 'Letters of "Brutus"', in Terence Ball (ed.), *The Federalist with Letters of "Brutus"*. New York: Cambridge University Press, 433–533.

Dahl, Robert A. 1957. 'Decision-making in a Democracy: The Supreme Court as a National Policy-maker', *Journal of Public Law* 6: 279–95.

_____. 1989. *Democracy and Its Critics*. New Haven, CT: Yale University Press.

Dryzek, John S. 2006. *Deliberative Global Politics: Discourse and Democracy in a Divided World*. Malden, MA: Polity Press.

Dworkin, Ronald. 1996. *Freedom's Law: The Moral Reading of the American Constitution*. Cambridge, MA: Harvard University Press.

Ely, John Hart. 1980. *Democracy and Distrust: A Theory of Judicial Review*. Cambridge, MA: Harvard University Press.

Fishkin, James S. 2009. *When the People Speak: Deliberative Democracy and Public Consultation*. New York: Oxford University Press.

Friedman, Barry. 2010. *The Will of the People: How Public Opinion Has Influenced the Supreme Court and Shaped the Meaning of the Constitution*. New York: Farrar, Straus and Giroux.

Fung, Archon and Erik Olin Wright (eds). 2003. *Deepening Democracy: Institutional Innovations in Empowered Participatory Governance*, ed. Erik Olin Wright. The Real Utopias Project IV. New York: Verso.

Gardbaum, Stephen. 2001. 'The New Commonwealth Model of Constitutionalism', *American Journal of Comparative Law* 49(4): 707–60.

Ghosh, Eric. 2010. 'Deliberative Democracy and the Countermajoritarian Difficulty: Considering Constitutional Juries', *Oxford Journal of Legal Studies* 30(2): 327–59.

Graber, Mark A. 2008. 'The Countermajoritarian Difficulty: From Courts to Congress to Constitutional Order', *Annual Review of Law and Social Science* 4: 361–84.

Habermas, Jürgen. 1996. *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*, trans. William Rehg. Cambridge, MA: The MIT Press.

_____. 1998. *The Inclusion of the Other: Studies in Political Theory*, eds Ciaran Cronin and Pablo De Greiff. Cambridge, MA: The MIT Press.

_____. 2001a. *The Postnational Constellation: Political Essays*, trans. Max Pensky. Cambridge, MA: The MIT Press.

_____. 2001b. 'The Postnational Constellation and the Future of Democracy', *The Postnational Constellation: Political Essays*. Cambridge, MA: The MIT Press, 58–112.

_____. 2006a. 'Does the Constitutionalization of International Law Still Have a Chance?', *The Divided West*. Malden, MA: Polity Press, 115–93.

_____. 2006b. *The Divided West*, trans. Ciaran Cronin. Malden, MA: Polity Press.

_____. 2006c. *Time of Transitions*, eds Ciaran Cronin and Max Pensky. Malden, MA: Polity Press.
Hamilton, Alexander. 1788. 'The Federalist No. 78: The Judiciary Department'.
Hand, Learned. 1958. *The Bill of Rights*. Cambridge, MA: Harvard University Press.
Hirschl, Ran. 2004. *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism*. Cambridge, MA: Harvard University Press.
_____. 2006. 'The New Constitutionalism and the Judicialization of Pure Politics Worldwide', *Fordham Law Review* 75(2): 721–54.
Kahane, David et al. (eds). 2010. *Deliberative Democracy in Practice*. Vancouver: UBC Press.
Kelsen, Hans. 1942. 'Judicial Review of Legislation: A Comparative Study of the Austrian and the American Constitution', *Journal of Politics* 4(2): 183–200.
Leib, Ethan J. 2002. 'Towards a Practice of Deliberative Democracy: A Proposal for a Popular Branch', *Rutgers Law Journal* 33: 359–456.
Michelman, Frank I. 1998. 'Constitutional Authorship', in Larry Alexander (ed.), *Constitutionalism: Philosophical Foundations*. New York: Cambridge University Press, 64–98.
_____. 1999. *Brennan and Democracy*. Princeton, NJ: Princeton University Press.
Perry, Michael J. 1982. *The Constitution, the Courts, and Human Rights: An Inquiry into the Legitimacy of Constitutional Policymaking by the Judiciary*. New Haven, CT: Yale University Press.
Pildes, Richard H. 2010. 'Is the Supreme Court a 'Majoritarian' Institution?', *Supreme Court Review*. http://ssrn.com/abstract=1733169.
Provine, Doris Marie. 1996. 'Courts in the Political Process in France', in Herbert Jacob, et al. (eds), *Courts, Law, and Politics in Comparative Perspective*. New Haven, CT: Yale University Press, 177–248.
Rawls, John. 1996. *Political Liberalism*. New York: Columbia University Press.
Rousseau, Jean-Jacques. 1997. '*Of the Social Contract*', in Victor Gourevitch (ed.), *The Social Contract and Other Later Political Writings*. Cambridge Texts in the History of Political Thought. New York: Cambridge University Press.
Smith, Graham. 2009. *Democratic Innovations: Designing Institutions for Citizen Participation*. New York: Cambridge University Press.
Spector, Horacio. 2003. 'Judicial Review, Rights, and Democracy', *Law and Philosophy,* 22(3–4): 285–334.
_____. 2009. 'The Right to a Constitutional Jury', *Legisprudence* 3(1): 111–23.
Stone Sweet, Alec. 2000. *Governing with Judges: Constitutional Politics in Europe*. New York: Oxford University Press.

Waldron, Jeremy. 1999. *Law and Disagreement*. New York: Oxford University Press.

_____. 2006. 'The Core of the Case against Judicial Review', *Yale Law Journal* 115: 1346–406.

Whittington, Keith E. 2007. *Political Foundations of Judicial Supremacy: The Presidency, the Supreme Court, and Constitutional Leadership in U.S. History*. Princeton, NJ: Princeton University Press, 41–5.

Zurn, Christopher F. 2007. *Deliberative Democracy and the Institutions of Judicial Review*. New York: Cambridge University Press.

_____. 2010. 'The Logic of Legitimacy: Bootstrapping Paradoxes of Constitutional Democracy', *Legal Theory* 16(3): 191-227.