Chapter 9
Democratic Constitutional Change: Assessing Institutional Possibilities

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Abstract This paper develops a normative framework for both conceptualizing and assessing various institutional possibilities for democratic modes of constitutional change, with special attention to the recent ferment of constitutional experimentation. The paper's basic methodological orientation is interdisciplinary, combining research in comparative constitutionalism, political science and normative political philosophy. In particular, it employs a form of normative reconstruction: attempting to glean out of recent institutional innovations the deep political ideals such institutions embody or attempt to realize. Starting from the assumption that contemporary constitutional democracies are attempting to realize the broader ideals of deliberative democratic constitution (ideals outlined briefly in the first section), the paper proposes an evaluative framework, comprised of six criteria, for assessing various mechanisms of constitutional change. It argues that democratic forms of constitutional change embody six distinct ideals—operationalizability, structural independence, democratic co-authorship, political equality, inclusive sensitivity, and reasons-responsiveness—and that these ideals can be used to gauge the normative worth of different mechanisms for carrying out such change. The framework is developed with reference to recent constitutional developments (e.g., in Venezuela, South Africa, Colombia, Bolivia, and Iceland) highlighting distinct criteria and showing how they appear to capture the general direction of institutional innovation. The paper conjectures that the set of six criteria yield the best normative reconstruction of the crucial ideals embodied in the constitutional change mechanisms of contemporary constitutional democracies, and so, ought to be used for purposes of evaluating institutional design proposals.

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9.1 Introduction

This paper aims to develop a normative framework for conceptualizing and assessing various institutional possibilities for democratic modes of constitutional change. Given the ferment of constitutional experimentation witnessed across the globe—especially over the last quarter century—now is a propitious time for developing such a framework. For the purposes of political philosophy and political theory, I hope such a framework can deepen our broad understanding of the meanings of democracy, of constitutionalism, and of constitutional democracy. I am particularly interested in the prospects for a specific conception of constitutional democracy I label 'deliberative democratic constitutionalism' in order to stress two commitments in particular: to *democratic* processes of constitutional development, adoption and ongoing transformation, and, to a *deliberative* interpretation of democratic procedures.[1] For purposes of political practice, I hope the framework elucidated here can provide assessment criteria applicable to proposals for new institutions for constitutional change, as well as provide a bit of 'fire in the belly' to struggles to transform more ossified regimes in the direction of democratic and deliberative constitutionalism—as opposed, say, to juridical or aggregative forms of constitutionalism.

The basic methodological orientation of the project—of which this paper is a part—is interdisciplinary, combining research in comparative constitutionalism, political science and normative political philosophy. In particular, the method is a form of normative reconstruction: attempting to glean out of the diversity of constitutional institutions the deep political ideals such institutions embody or attempt to realize. Rather than starting from pure normative content about abstract ideals, principles or values, reconstruction begins with evidence provided by actual constitutional institutions in democratic systems. Attendant to both historical and more recent institutional innovations, it attempts to reconstruct the normative content such innovations are driven by in such a way that we can get a clearer conception of the specificity of the sub-ideals and principles of constitutional democracy. Finally the normative content reconstructed out of the institutions can be used reflexively for critical evaluation of those very institutions when they don't or can't live up to their normative promise. With such an approach I hope to avoid objections to typical normative theory as presenting merely an abstract utopia, developed out of *a priori* considerations of political philosophy and aiming to dictate reality in light of utopian ideals.[2] The proof is in the pudding however: only if the proposed reconstruction both accurately illuminates the ideals motivating actual institutional

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[1] I have developed this conception elsewhere, leaning heavily but not exclusively on Jürgen Habermas's political philosophy (Zurn 2007).

[2] I share the methodological antipathy of both Sen and the critical theory tradition to grand ideal theory developed first out of abstract intuitions and thought experiments and only secondarily applied to an ostensibly fallen reality (Habermas 1996; Honneth 2014; Sen 2009). In the end, political theory must attempt to put the various tensions between facts and norms to productive use.

innovations and provides normatively worthwhile guidance for thought about the institutions of democratic constitutional change will it be worth eating.

Of course, the demands of the reconstructive method are enormous, since one would need to show for each specific conception of an ideal invoked that it is embodied in real political institutions and that it best captures the tendencies of overall institutional history. Because of space and exposition constraints, this paper will not follow the order of presentation—nor present the requisite level of evidence—one would expect from the reconstructive method. The plan is rather to give first, in Sect. 9.2, a thumbnail sketch of the broader ideals of deliberative democratic constitutionalism I believe are at the core of the institutions of modern constitutional democracies. While this paper merely assumes these broad ideals as sufficiently established through reconstruction of actual political reality, I will briefly indicate the general kinds of reasons I take to support them. Then in Sect. 9.3, the paper turns to its main work of articulating an evaluative framework, comprised of six criteria, for assessing various mechanisms of constitutional change. I argue that democratic forms of constitutional change embody six distinct ideals—operationalizability, structural independence, democratic co-authorship, political equality, inclusive sensitivity, and reasons-responsiveness—and that we can use these ideals to gauge the normative worth of different mechanisms for carrying out such change. I put forward this framework in a conjectural mode: as a set of reconstructive hypotheses about the crucial ideals that are embodied in the institutional designs of constitutional democracies. While these hypotheses are developed through a series of case studies which appear to capture the direction of institutional innovation, the full establishment (or disconfirmation) of each would require much more empirical work. The final Sect. 9.4 is less than conclusive, ensuing rather in a set of open questions that a framework such as this would need to address.

9.2   Ideals of Deliberative Democratic Constitutionalism

9.2.1   Basics of the Normative Framework

This paper simply assumes the attractiveness of a particular conception of political normativity labeled 'deliberative democratic constitutionalism.' The basic idea here is that political arrangements are legitimate to the extent to which they approximately realize in and through their institutions that normative conception. For the purposes of this paper, that conception insists on a number of points. First, constitutional democracy is the preferred form of political arrangement. Second, democratic procedures must be constitutionally secured, that is they must be more secured against being changed by current political actors than the first-order policies those actors decide upon through using those procedures. Third, the constitutionalized procedures must themselves, nevertheless, be alterable through democratic means. And fourth, both the ordinary democratic procedures which are constitutionally secured and the procedures for democratic alteration of the constitution must be

systematically linked to and dependent upon open, inclusive and diverse public spheres of debate and deliberation that foster wide participation across multiple sites and result in high-quality processes of knowledge and opinion formation.

While I cannot adequately argue for this conception here—let alone provide the reconstructive evidence such arguments would require—it may help to get a sense of some of the reasons behind claims that will be key once we turn to institutional possibilities for constitutional change. Thus I will explicate and briefly indicate arguments in favor of some of the conception's building blocks: co-authorship, proceduralism, democratic constitutionalism, and structured deliberation. With these more abstract and philosophical points in hand, we can turn to the institutions of constitutional change and evaluative criteria arising from them in the next section.

9.2.2   Co-authorship

I assume that political arrangements must be democratic (among other qualities) in order to be legitimate. To be democratic, more specifically, political arrangements must—somehow or other and to a greater rather than a lesser degree—allow those persons subject to a polity's laws to understand themselves simultaneously as the co-authors of those laws. This idea was first most clearly articulated in Rousseau's conception of freedom as autonomy: in order to be both free and under laws, one must in some sense be the author of those laws one is subject to (Rousseau 1997: Book I, chapter 6). But if individuals are to live with others, with the same laws applying to all, then individuals can only be free to the extent to which they can understand themselves as giving themselves their own laws in a collective process of co-legislation. To be sure, this is a demanding ideal and it is not immediately clear which political arrangements could possibly approximate it in reality. But it seems to me that this conception captures the core of the notion of what self-rule could mean in a context of a polity, a context of many selves whose interactions require a common framework of rules. Furthermore, it gives the clearest articulation of the reason why democracies alone put the value of political equality at their center. Individuals must be not only equally subject to the laws—as the rule of law tradition insists—but they also must have equal authority over the creation, modification and extinction of those very laws. Otherwise they are subject to laws they themselves have had no hand in co-authoring: they are rather heteronomous, politically unfree, subject to the will of others.

9.2.3   Proceduralism

One happy solution to the problem of collective co-authorship of common rules would simply be for all subjects to already agree on almost all matters relevant to political decisions before they enter into a process of co-authoring law—in other

words, full pre-existing agreement on fundamental values, on the proper priority relations between such values, on the proper policy applications of those values, on the correct ways to understand and assess relevant social facts, and so on. Rousseau himself seemed to endorse this solution but, in consequence, ended up arguing that only a tiny republic could possibly be democratic: where all can be known to one another, where generations of education and civic training have gotten all thinking along the same lines, and, where certain authoritarian policies—a political censor of information, culture and education, a public religious test, and so on—ensured the maintenance of extensive collective agreement on matters of political substance. That distinctly is not the world we live in, nor I think, a world we should hope for. As thinkers from Weber to Berlin to Rawls have stressed, modern complex societies evince a buzzing blooming variety of substantive opinions on political matters, and importantly, since that diversity is the product of well functioning practical reason, we should not expect all of that disagreement to be dispelled over time.

Given then the circumstances of politics as we know them then—the need for collective decisions and persistent reasonable disagreement on matters of political substance—and given our commitment to democratic co-authorship as a key criterion of legitimacy, there is little hope that citizens' substantive agreement with the outcomes of political processes could be a reliable source for the legitimacy of the political arrangements.[3] In short, a substantialist understanding of democratic legitimacy simply does not seem possible, that is, one that gauges the moral worthiness of the outcomes of democratic processes against some determinate substantive ideals that are independent of the procedures used to arrive at the decision. Citizens of contemporary pluralistic societies simply can't be expected to agree on such substantive standards. Hence only a proceduralist understanding of legitimacy seems possible, where the moral worth of the outcome of the political process hangs on the fact that the correct (or worthy or reliable or …) procedures have been followed in producing the decision. In the face of reasonable but persistent disagreement where we nevertheless need to make collective decisions, only suitably democratic procedures could warrant the legitimacy of outcomes, outcomes that will not agree with the substantive views of all citizens. The procedures of democratic co-legislation then hold out the promise for citizens to be able to understand themselves as the co-authors of laws they are simultaneously subject to, and so as both free and in consociation.

9.2.4   Entailments of Proceduralism

The next obvious questions are: which procedures are the correct (or worthy or reliable or …) democratic procedures and why? Eschewing any ambitious attempt to answer those questions through the articulation of a full political philosophy here,

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[3] Here I follow Waldron's convincing articulation of the circumstances of politics (Waldron 1999, 100–103).

we can note some clear procedural entailments of what has been said so far. To begin, suitable procedures and their institutional realizations will need to ensure the *political equality* of citizens. This means that all citizens must have some significantly equal opportunities to influence, in some way or another, the lawmaking process.

Furthermore, the scope of democratic lawmaking cannot be restricted only to policy decisions or to matters of who will represent their interests in such policy matters. Rather, the political equality of citizens must extend beyond matters of immediate policy, to *all fundamental matters* of the basic laws themselves. Citizens cannot understand themselves as co-authors of the law if their powers do not extend to all of the law, including the law that structures the basic political arrangements—the constitutional arrangements—within which ordinary lawmaking happens.

The exercise of democratic political equality must be, however, more than a one shot deal. Popular sovereignty cannot be exhausted in one originary, revolutionary moment, allowed only to be exercised by the great men of the past. In part this is due to an essential fallibility built into the idea of democracy—the persistent possibility that the political process may have failed to properly account for essential considerations in making past decisions—and in part due to the political equality of individuals which must extend across generations—political equality is not reserved only for our ancestors. These points entail the essential *revisability* of co-authored law: there are to be no aspects of the current legal regime and the political arrangements it structures that are structurally walled off from future reconsideration.

Finally, however, because the proceduralist conception of democratic legitimacy puts so much normative stress on procedures, basic procedures that structure the political process itself are special. They set the ground rules for collective decision-making itself. Thus there is an in-principle distinction between ordinary lawmaking and fundamental lawmaking, between the workings of constituted powers and the constitutional structuring of those powers, between the operation of political processes and the procedural structuring of those processes themselves. Hence democratic proceduralism requires some kinds of formal and / or institutional separation between those exercises of political co-authorship that are functioning according to extant rules and those that are changing those very rules. In short, it requires some form of *constitutionalization* of democracy. Although I can't argue for it here, I believe this criterion is best met in a formal distinction between fundamental and ordinary law and an institutional securing of that distinction through moderate forms of entrenchment, that is, moderate ways for making that fundamental law more difficult to change than ordinary law. Revisability entails that even constitutional essentials should not be impossible to change in the future.[4]

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[4] This conception thus rejects hard, unchangeable entrenchments as evident, for instance, in the German Basic Law's Article 79, section 3 with respect to fundamental individual rights guaranteed in Articles 1 through 20. See further Sect. 9.3.4 below.

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9.2.5   Democratic Constitutional Democracy

The conception of legitimacy presented so far insists that political regimes must be, to coin a phrase, democratic constitutional democracies. That is, they must positively structure procedures for realizing democracy, namely the political equality of citizens interpreted as the equality of individuals in a process of co-authoring the laws they are simultaneously subject to—hence *constitutionalized* democracy. But at the same time, those very constitutional structures must themselves be open to democratic change—hence *democratic* constitutionalism. That means, I would suggest, that any institutions or procedures responsible for carrying out processes of constitutional change must be open to and available for the constituent power of citizens in the here and now. And this requirement becomes even more pressing once we see that constitutional systems are not stable clockwork-like mechanisms that continue to run in the same way perpetually. Rather, any constitutional system will itself be subject to modification and elaboration over time as the constitutional principles and institutions go to work on the ordinary problems of government and law.[5] If citizens are to understand themselves as co-authors of the law they are subject to, they must be able to recalibrate the basic law that structures their own practices of self-rule.

9.2.6   Structured Deliberation

I have stressed so far the central importance of well-structured democratic procedures, but have not said much about the actual procedures. One dominant conception of democratic procedures—captured in both Schumpeter's minimalist model of democracy and Dahl's different pluralist model (Dahl 1989; Schumpeter 1943)—has centered on the use of majoritarian voting as an efficient way of aggregating across individual subject's private interests, thereby finding, and serving through government policy, the largest bloc of identical or overlapping individual, pre-political desires. As is well-known, however, majority rule just as majority rule is not particularly attractive.[6] To see this, consider the problem of the loser in such a democracy: why should the fact that my private interests are shared by less than half

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[5] I have argued elsewhere that in constitutional systems where there are institutions specifically dedicated to constitutional review—e.g., normal appellate courts or constitutional courts—it is inevitable that constitutional modification will occur through the exercise of constitutional review (Zurn 2007). See further Sect. 9.3.5 below. The scope for constitutional modification through normal political processes is even greater, perhaps, through the interactions of the other centers of power in and outside of government. Consider, for example, the many dynamics through which civilian control of militaries waxes and wanes under different political conditions in different constitutional democracies.

[6] In addition to this normative deficit, majority procedures have real problems of arbitrary cycling and of agenda manipulation. See (Arrow 1963) and (Riker 1982) respectively. Deliberative democracy promises to address these problems as well, but that is beyond the scope of this paper.

of the electorate put me under an obligation to serve the interests of the majority? Pure majoritarian decisions that are intended to merely aggregate private interests provide insufficiently compelling reasons for citizens to trust the outcomes of those procedures.

In contrast to the aggregative conception, a deliberative conception insists that democracy is not exhausted by either voting or majority rule. It conceives of voting, in fact, as a temporary caesura to ongoing deliberation and collective decision-making, a caesura required by the need for binding collective decisions under realistic constraints of time, knowledge and reasonable pluralism. And majority rule is just one threshold for decision making on a continuum between only one person in favor and full consensus. Deliberative conceptions of democracy insist then, to begin with, that good political procedures must encourage deliberation in wide and open public spheres. Of course, this alone doesn't distinguish deliberative from aggregative models, since even the latter insist that majoritarian aggregation is more accurate with the better information provided by open public spheres—consider the traditional epistemic defenses of a free 'marketplace of ideas' and a free and independent press.

The distinctive core of the deliberative conception is, it seems to me, the notion of the reasons-responsiveness of government, rather than its responsiveness to various particular constellations of social, legal or political power. The key is that state action must be responsive to good reasons. Specifically, public reasoning practices among citizens and officials should have some direct or indirect influence over the formation of, decision upon, and execution of governmental policy and action. So deliberative democracy does not just stress reasoned public discussion—it stresses *politically relevant and effective* reasoned discussion. There must be a constitutive link between public reasoning and the use of government power. Why insist on reasons-responsiveness? It should be understood as a demand of politically equal co-authorship. Political equality on this model is not the equal impact of each subject's private desires on government policy, but rather the equal part each has to play in collecting, sifting, sorting and evaluating public reasons for public action. In turn (ideally) reason-responsive government action is equally justifiable to each citizen precisely because it is responsive to reasons rather than arbitrary inequalities of power. Hence the procedures of constitutional democracy will need to institutionally structure both high quality collective deliberations and ensure that those deliberations have a constitutive impact on the outcomes of government decisions.

One more point from deliberative democracy should be stressed here. Quality reasons must draw from a wide and diverse pool. Although this is in part an epistemic consideration about the increasing rationality of opinions and decisions with increasing diversity of contents and reasoners, it is also in part a normative consideration. In particular, to the extent to which individuals are subject to collective decisions those decisions must take into account the actual and potential effects of those decisions, and those affected must therefore be involved in collecting, sifting and evaluating that evidence. In short, deliberation must not only have real political influence, but it also must be widely inclusive and participatory.[7]

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[7]This inclusive, participatory position is in some real contrast with more 'expertocratic' strains of some deliberative democratic theory and some republican political theory, strains which assume

9.3 Institutional Possibilities for Democratic Constitutional Change

This section begins to build a framework of evaluative criteria for assessing mechanisms of constitutional change out of the consideration of a few case studies of various institutional experiments. The idea again is that we should reconstruct the key normative ideas by seeing which ideals actually underlie and animate various institutional arrangements and innovations. With the caveats about the need for much more empirical work in mind, I provisionally suggest that there are six crucial normative criteria for assessing constitutional change mechanisms: operationalizability, structural independence, democratic co-authorship, political equality, inclusive sensitivity, and reasons-responsiveness. The order of presentation of the different mechanisms is intended to clarify these criteria, in particular how each case responds to the deficits of the previous case. This overly neat presentation should not, however, be understood as any actual historical sequence, nor even less as some kind of claim about the necessary direction of progress. And again, the normative criteria extracted from these case studies should be seen as reconstructive hypotheses—subject to further research for full support or disconfirmation—rather than reconstructive conclusions.

9.3.1 Direct Democratic Constitutional Change

Let me start by considering an imaginary institutional arrangement: namely, some form of anti-constitutional direct democracy. The idea here involves direct democracy—such as regular periodic assemblies of the entire enfranchised populace—where that assembly has plenary power over all of the law governing the populace. Hence in this scenario, the legislative power is entirely in the hands of the assembled demos. And that legislative power is indistinguishable from a constituent power, since exactly the same procedures apply to passing all forms of law, statutory and regulatory as well as constitutional. Thus the arrangement is anti-constitutional: all laws are equally easy to change; the assembled demos cannot bind future assemblies; every assembly has the ability to overturn any past legal enactments, including any fundamental or constitutive law.[8]

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that high quality deliberation is best carried out by specialists and experts. Here I side with the upshot of Aristotle's argument for wide deliberation in the *Politics:* "the many, of whom each individual is but an ordinary person, when they meet together may very likely be better than the few good, if regarded not individually but collectively, just as a feast to which many contribute is better than a dinner provided out of a single purse. For each individual among the many has a share of virtue and prudence, and when they meet together, they become in a manner one man, who has many feet, and hands, and senses; that is a figure of their mind and disposition. Hence the many are better judges than a single man of music and poetry; for some understand one part, and some another, and among them they understand the whole" (Aristotle 1943, 1281b1–16).

[8] We could call this a 'Rousseauian' arrangement, but for one feature: Rousseau allows for enactment thresholds to be modified—somewhere between a bare majority and full consensual unanim-

Prima facie such an arrangement satisfies many of the conditions I indicated earlier as central to deliberative democratic constitutionalism. Fundamentally, it is a quite straightforward way of structuring the idea of co-authorship of laws. Citizens are here directly involved in giving themselves the laws, enabling them to understand themselves as simultaneous subjects and authors of the law. Furthermore, suitably designed decision procedures for the assembly should be able to track closely other key conditions. Political equality can be easily secured when all citizens have roughly equal opportunities to influence the lawmaking process. Such political equality is extended to fundamental matters since no law is off limits. And the plenary authority over the entire legal corpus at every assembly means that revisability is likewise ensured. As described so far, these arrangements do not necessarily involve structured deliberation; the assembly could use simple majority rules on secret ballots for both initiating and enacting proposals. More naturally however, we would expect practices of debate and deliberation to arise and it should not be difficult to structure them by procedures sensitive to the other conditions indicated. In particular, with deliberative mechanisms for the exchange of information, opinions and reasons, political equality is enriched beyond a simple equal vote, encompassing real opportunities for equal voice and qualitative input into the lawmaking process. And because the entire enfranchised citizenry is involved, we should expect the process of opinion formation and decision making to cast as wide an epistemic net as possible: the assembly of all makes it possible for all kinds of different information and opinions from the broadest swath of citizens to be canvassed and included. Decision processes should then be not only responsive to reasons, but quite inclusively sensitive to the broadest diversity of reasons.

Nevertheless, there is one crucial missing condition: namely, some form of constitutionalism, some form of formal or institutional separation of the exercise of ordinary legislative and constitutional legislative powers. This could of course be relatively easily remedied by the adoption of a formal distinction between ordinary legislative and constitutional legislative activity, a distinction reinforced by making the process of constitutional change more difficult and subject to higher standards of opinion formation. Such moves would then constitutionalize the procedures of direct democracy, thereby enabling citizens to understand the outcomes of those procedures as legitimate and binding even when citizens disagree with the substance of those decisions—as many inevitably will under conditions of persistent pluralistic disagreement on matters of substance.

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ity—according to the trade-offs needed between alacrity and the seriousness of the issue at stake (Rousseau 1997: Book IV, chapter 2). Even so, however, his arrangement is still anti-constitutional in this sense: no law is put out of reach of a current assembly. In fact, every assembly opens first with this question: "whether it please the Sovereign to retain the present form of Government?" (Rousseau 1997: 120, Book III, chapter 18).

9.3.2   Legislative Constitutional Change and Operationalizability

Its no accident that so far I have been referring only to a merely imaginary arrangement. Despite whatever normative attractions some form of direct democracy might have, the fact is that all existing national systems for democratic lawmaking employ elected representative bodies to carry out legislative functions. And the reasons for this are not at all obscure. The costs of operationalizing direct democracy are simply so high as to make it unfeasible for populous, complex and extended nation-states. In particular, the monetary and coordination costs of assembling the entire enfranchised populace regularly, and the time and decision costs of having them deliberate and decide together, are jointly exorbitant.

From a reconstructive perspective it might seem perverse to consider an unrealized arrangement: what does a fantasy have to do with the normative content imminent in historically actualized institutions? I would argue however, that unanimous rejection of the most direct institutional realization of democratic self-rule tells us about a key normative criterion: *operationalizability*. Whatever other values they promise to realize, institutions that cannot be actualized are deficient. It is thus reconstructively clear why all national democratic legislative systems employ indirect modes of democracy.

9.3.3   Agency Problems and Structural Independence

With the move from direct to representative systems, however, new normative concerns arise. Most pressingly, there is the general problem of tying officials' actions to the interests, opinions and reasonings of the demos—the central problem of agent-principle relations. It is well beyond the reach of this paper to say anything in general about the problems of agency encountered by representative democracies. But it does seem to me that with agents for law-making, it becomes ever more important to insist on mechanisms for separating the function of ordinary and constitutional legislation. This can be seen most simply by recalling that constitutional procedures are those which structure not only ordinary lawmaking procedures, but also regulate the elections of representatives and structure the workings of government. As Ely among others have made abundantly clear, then, representative democracy is subject to a particular form of procedural distrust: distrust that legislators will manipulate constitutional procedures to freeze the ordinary mechanisms of democratic change and to insulate themselves or status quo arrangements from challenge (Ely 1980). If one thinks that the legitimacy of a system of law making is fully dependent on the integrity of the processes by which those laws are made—as is insisted upon by the proceduralist paradigm urged here—then the processes of constitutional change are of even greater concern than the usual functions of lawmaking and governance.

Agency problems then recommend a real form of *structural independence* between ordinary legislative and constitutional legislative processes. There ought to be a clear institutional demarcation of the difference between the ordinary exercise of government business through established procedures, and, the people's constituent power of changing the procedures—the fundamental institutions and basic rights protections—that are the procedural warrant for the legitimacy of the outcomes of ordinary political processes. Hence whatever mechanisms are available for constitutional change, they ought not to be easily manipulated by current representative majorities in order to lock in future constitutional procedures that systematically favor them or systematically foreclose ongoing possibilities for democratic change.

The need for structural independence is perhaps most easily seen in the recent constitutional history of Venezuela, where the elected officials of one political party (the PSUV forcefully led by the charismatic Hugo Chávez) were able in subsequent rounds of constitutional change to effectively close off avenues of political change and defang opposition candidates and parties. The sequence of changes was inaugurated by the new 1999 Venezuelan constitution, which laid the grounds for collapsing any independence of ordinary and constitutional legislative functions. The 1999 constitution significantly weakened the legislature in relation to the executive, it significantly centralized and strengthened the executive in the direction of strong presidentialism, and importantly, it specified a quite easy threshold for constitutional amendment. Initiatives for constitutional amendments are very easy to propose—either by the president, by 30 % of the legislature, or by 15 % of enfranchised citizens—and ratification of proposed amendments is quite easy—a simple majority in the unicameral national legislature followed quickly (within 30 days) by a simple majority in a national referendum. In effect, this amendment procedure adds only one additional obstacle beyond the requirements for ordinary legislative enactment: namely a bare majoritarian national referendum following legislative action so quickly that there is little time for extended public discussion or debate.

But even that bare recitation of the formal amendment procedures makes it look harder than it is, given the particularly robust and overlapping forms of the centralization of power in the presidency. Consider for instance a major constitutional amendment achieved 10 years after the new constitution: Amendment 1. In that case not only was the majority in the National Assembly effectively voting in lock step with the wishes of president Chávez, but the entire apparatus of the state was brought to bear in a one-sided propaganda campaign to convince voters to ratify the amendment. And the content of 2009's Amendment no. 1? The abolition of term limits for the president, for national and regional legislators, and regional and municipal governors—effectively closing paths of political change and ensuring the long-term single-party dominance of the PSUV.[9]

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[9]There is of course much more detail that ought to be added to this story in order to understand it fully. In particular, one would need to account for specific social, economic and cultural conditions, as well as pre-Chávez political history, in Venezuela during this period. Legislation passed in 2004 is also important, which allowed for the destruction of judicial independence through a

It is perhaps not overly dramatic to say that because of a lack of structural independence between ordinary and constitutional mechanisms, Venezuelan constitutionalism has enabled apparently democratic mechanisms to be used strategically in order to foreclose the ongoing possibility of open and competitive democracy for the future.

9.3.4   Entrenchments and Democratic Co-authorship

In the light of such dangers, one might think that constitutional obduracy is a preferred way to ensure the structural independence of constitutional change mechanisms from current regime office holders. Making constitutional provisions very hard to change—even making some impossible to change in the form of hard entrenchments—would seem to protect against future agency problems where office holders attempt to change political procedures in order to capture the political system and remain in power. Constitutional amendment procedures might then be set to require a very high bar to enactment—for instance, as in the United States or Australian constitutions—or even set aside certain portions of the constitution as formally not subject to amendment—as in the hard entrenchments of senatorial representation in the U.S. or of certain fundamental individual rights in the German basic law. Comparative scholarship has established, however, that there are significant perils associated with overly obdurate constitutions. For instance, there is a significant correlation between constitutional flexibility and constitutional longevity (Elkins et al. 2009).[10] Overly rigid constitutions are, to be blunt, more likely to suffer an early death.

More recent constitutions have apparently avoided hard entrenchments.[11] For instance, the exemplary South African constitution of 1996 does make one part more difficult to change than all the other parts: Sect. 2.1 of Chap. 2 concerning the foundational principles of the republic (democracy, human dignity, constitutional supremacy) is harder to change than all other parts of the constitution, subject to 75 % rather than 66 % of the legislature (as well as the normal 6 of 9 regional provinces for amendments affecting regional powers). But even then, these foundational

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court packing scheme. And the story would need to mention the failure of a similar attempt at constitutional amendment in 2007 in the face of popular protests. Nevertheless, I believe the rudiments of the story for my purposes—overly easy amendment procedures leading to the collapse of any structural independence between ordinary and constitutional legislation mechanisms—would be unchanged in the main by these and other necessary details.

[10] It should be noted that they also find that constitutions that are too easy to amend suffer diminished longevity. There is then, as they put it, a kind of Goldilocks character to constitutional obduracy, a "just right" balance between two extremes, at least insofar as the long life of constitutions is concerned.

[11] This is a hypothesis that needs further empirical work to support, especially to see whether cases like Brazil's 1988 constitutional entrenchment of certain elements like federalism, the franchise and individual rights are outliers, as I suppose, or more common than that.

principles are not impossible to change, only harder than other constitutional principles. From a normative perspective, it seems clear why hard entrenchments are to be avoided: they violate the criterion of *democratic co-authorship*. In effect, hard entrenchments establish that the people are to be subject to some laws that they themselves cannot alter, or at least cannot alter without a revolutionary replacement of the constitution in its entirety. Thus even the foundational principles of the South African constitutional settlement are in-principle open to democratic renegotiation into the future, even as they are set aside as especially fundamental to the republic—as one would predict from the need for constitutional structuration itself. Democratic co-authorship ought not stop at ordinary legislation, or even at some subset of constitutional law, but must extend to all fundamental matters of law, otherwise subjects can only understand themselves as passive subjects of the lawmaking of others. Apart from hard entrenchments, very difficult procedures for constitutional amendment can also effectively foreclose possibilities for democratic co-authorship of constitutional law, even if they remain in-principle possibilities.

9.3.5   *Judicial Interpretation and Political Equality*

In light of both pressures for constitutional adaptation to changing conditions and the negative correlation between constitutional obduracy and longevity, it should be no surprise that constitutions with formally rigid change procedures have in fact adopted a number of mechanisms for constitutional change apart from formal amendment procedures. Most prominent here is, of course, constitutional change carried out by judiciaries, usually through the exercise of powers for the judicial review of legislation, regulation, and administrative action. For instance, in his comparative study of 36 democratic nation-states between the end of World War II and the mid 1990s, Lijphart found a statistically significant positive correlation between increasing constitutional rigidity and the likelihood of strong judicial review, that is, assertive forms of judicial policy making with respect to constitutional issues (Lijphart 1999). More recent literature on the judicialization of politics—including constitutional politics—shows that there is a real shift in constitutional legislation away from more democratically accountable actors and towards more politically insulated judiciaries (Ginsburg 2003; Hirschl 2006; Shapiro and Sweet 2002; Stone Sweet 2000; Tate and Vallinder 1995).

   It is well beyond the scope of this paper to fully evaluate issues of judicial review; instead I will make just three points concerning the employment of the judiciary as constitutional legislators. The first point is that the criteria of both operationalizability and structural independence speak in favor of constitutional change through judicial interpretation of constitutional law. On the one hand, judiciaries must already specify legal provisions of whatever form in the routine application of those provisions to concrete cases—constitutional provisions no less than any other. It is then an easy mechanism to operationalize. On the other hand, judiciaries are regularly insulated in a number of ways from the vicissitudes of politics and from

pressures facing electorally accountable political actors in order to ensure fairness to individual litigants. Judiciaries involved in constitutional change through interpretation are therefore already structurally independent of the ordinary process of legislation carried out by electorally accountable politicians. This structural independence is, of course, the basis for proceduralist justifications for placing the power of constitutional review in the hands of the judiciary: they are to be, in effect, the unelected guardians of the very procedures of democracy, that is, of the constitutional rules which proceduralists take to warrant the legitimacy of democratic outcomes in the first place (Dahl 1989; Ely 1980; Habermas 1996; Zurn 2007).

The second point is that, nevertheless, it will be very difficult, if not impossible, to cabin courts with powers of constitutional review to the pure function of constitutional protection. Because of several different reasons—the abstract and undertheorized character of constitutional norms, judicial responses to informal political changes in a constitutional system and to general social changes, doctrinal development and legal path dependence—court-based constitutional protection will inevitably transmute into positive constitutional elaboration.[12] The clear line between judicial protection of a legal provision and judicial elaboration of the content of law will be constantly undermined: protection will inevitably bleed into elaboration for both ordinary and constitutional law. In the course of enforcing the (constitutional) rules of the political game, then, judiciaries with powers of constitutional review will inevitably become much more than referees: they will become constitutional legislators.

The holders of constituent power however, thirdly, are emphatically supposed to be the entirety of the citizenry in democratic theory (of whatever form). If only a small subset of citizens are the decisive constitutional legislators, and if those legislators are institutionally positioned exactly so that they are not subject to attempts to influence them by the demos, then constitutional change through the judiciary emphatically violates a baseline criterion of *political equality*. Even if that constitutional elaboration is carried out conscientiously and benevolently, it is still a paternalist institutionalization of the power for constitutional change. This worry about judicial paternalism with respect to fundamental constitutional procedures is, I think, the real basis of the democratic complaint against judicial review, and not the extremely misleading idea that judicial review is suspect because it is counter-majoritarian. For there are any number of counter-majoritarian political procedures which are fully consistent with political equality. For instance, counter-majoritarian voting rules requiring either full consensual unanimity or various levels of super-majorities nevertheless afford each voter an opportunity equal with all other voters to influence the outcome of a decision. The democratic problem with constitutional change through judicial interpretation is that every citizen is distinctly not afforded an equal opportunity to influence the law-making occurring—the problem is then one of political equality, not majoritarianism.[13] When judges are empowered as

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[12] For more detail, see (Zurn 2007, 256–264).

[13] In terms of debates in the United States, the proper democratic complaint against judicial review is Learned Hand's, not Alexander Bickel's.

constitutional legislators—perhaps out of the necessity for some agents of change in overly obdurate and rigid constitutional systems—enfranchised citizens are effectively shut out of that constitutional law-making process and citizens thereby become mere subjects of laws authored and paternalistically imposed by others.[14]

9.3.6   Veto Players and Inclusive Sensitivity

To my knowledge, no democratic constitution formally places the power of constitutional amendment in the hands of courts. Rather, the overwhelming majority provide for amendment through either elected legislatures and executives, or various forms of popular initiative from citizens themselves, or various forms of special constituent assembly of democratically accountable representatives—or frequently

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[14]There are also serious normative consequences of employing courts to carry out constitutional change for two of the other six criteria beyond political equality: reasons-responsiveness and inclusive sensitivity. Courts are usually very responsive to reasons in comparison with other political institutions—after all, they often engage in structured reason-giving for their decisions—but they are not particularly responsive to the right kinds of reasons. Especially when constitutional interpretation is carried out concretely—elaborating law through determinate cases and controversies of individual litigants—and where strong traditions of doctrinal development and *stare decisis* have arisen, the reason-giving of courts is excessively *juristic*: focused upon legalistic minutiae incident to the particularities of the case presentation and the finer points of judicially-crafted doctrinal rules, principles and presumptions—rather than on the broad constitutional policy and principle issues at stake in changing fundamental law. Secondly, court-based constitutional change is quite likely to ignore the interests and opinions of wide swaths of the population, and so will perform poorly in the light of the criterion of inclusive sensitivity. The issue here is the available pool of reasons and sensitivity to a diversity of problems felt throughout a society and especially by individuals and groups whose issues and concerns are not felt, noticed nor well represented by political and social elites, nor by those who have the money and political interests to bring strategic lawsuits to change constitutional law. Consider, for example, the ways in which case presentations often systematically ignore the interests of those affected by policy change simply because those interests are not represented by the incident litigants. A recent striking example in U.S. constitutional jurisprudence: a case about health insurance provisions to cover the costs of contraception where the litigants were employers and the government. Hence, before the court, nobody represented those who would actually have to pay or not pay for the contraception, and endure the consequences (Burwell v. Hobby Lobby, 573 U.S. __ (2014))! This insensitivity is standard fare for courts: in part because courts simply do not have the information collection and processing capabilities to gauge the likely effects of various policy regimes, and in part because of basic structural and procedural requirements for the fair application of law to individual cases. (It may be that the recent Latin American development of Amparo proceedings is significantly decreasing the informational deficit of constitutional courts). The general unsuitability of judicial reason-giving and narrow informational basis for purposes of constitutional law making are treated in a lengthy case study of United States jurisprudence at (Zurn 2007: 163–220). My position is developed in reaction against attempts by deliberative democratic theorists of various stripes—Eisgruber, Michelman, and Rawls—to paint judicial review as democratic precisely because it is 'deliberative'.

from some combination of the three.[15] This is not a mere coincidence: the constituent power is always formally recognized as resting directly or indirectly in the hands of the citizenry, at least in democratic systems. These institutional arrangements lend support to the reconstructive hypothesis that they embody the ideals of democratic co-authorship and political equality.

Furthermore almost all democratic constitutions make constitutional legislation more difficult to pass than ordinary law—lending supporting to the hypothesis concerning structural independence. And even the notable exceptions where there is no formal difference between making constitutional and ordinary law—e.g., the United Kingdom and New Zealand—evince robust informal traditions, norms, and customary practices that distinguish between the two, rendering constitutional changes more difficult.[16] There are however several different characteristic mechanisms for increasing the difficulty of enacting constitutional change. For instance, there can simply be higher supermajority thresholds in the legislature for amendment, typically three-fifths or two-thirds, and less frequently three-quarters. Bicameral systems usually require such supermajorities in both houses. Second or third readings of amendment proposals might be required; intervening elections between those readings can further increase difficulty. All of these amendment mechanisms alone, however, in essence employ the same legislative system—and usually the same legislative players—as used for ordinary lawmaking.

By contrast, empirical research has highlighted a different set of mechanisms as important, giving roles to various actors who are differently situated than normal legislators. For instance, amendment proposals might need to be ratified by regional sub-units of the nation, usually the legislatures of federal states, and usually requiring a slight supermajority of such states. Quite characteristic of newer constitutions, especially in Latin America, amendment proposals must be ratified in popular referenda, usually by majorities or slight supermajorities of ballots cast by ordinary citizens. Finally, many newer constitutions—for example, those of Bolivia (1999), Bulgaria (1991), Colombia (1991), Ecuador (2008), and Venezuela (1999)—require

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[15] Some constitutions give constitutional courts *ex ante* review powers over amendment bills: either the power to pass on the constitutionality of amendments after they have been proposed but before they have been ratified by democratic bodies—as for instance in Colombia's 1991 constitution and Sri Lanka's 1978 constitution—or to pass on the constitutionality of amendment bills before promulgation—as in Cambodia's 1993 constitution. Interesting questions arise here of the location of the constituent power, especially when, as in the Colombian case, a court uses a limited procedural jurisdiction over amendments to have more expansive review of the substantive content of amendment proposals (Bernal-Pulido 2013; Colón-Ríos 2011).

[16] Witness recent proposals—themselves the latest in a long line of such proposals—in the United Kingdom to fundamentally reform the House of Lords, the second legislative chamber of Parliament, by reducing its size, making it fully elected, and making its basic principle of representation geographic. These clearly count as fundamental constitutional changes. Formally, at least, they could be pushed through Parliament given sufficient party strength, and using the same procedures as those for ordinary lawmaking. But all involved acknowledge that using those simple procedures alone would be an 'unconstitutional' violation of conventional understandings of the gravity of constitutional change. Thus the most recent reform promoters (notably Labour leader Miliband) propose to hold a constitutional convention to process the proposals.

or permit a form of special constituent assembly for constitutional change proposals. While the former arrangements simply make it harder for normal legislative officials to pass amendments, the latter arrangements introduce 'veto players' into the mix. Empirical research suggests that only the introduction of veto players into amendment schemes actually significantly increases the difficulty of amendment. Rasch and Congleton have shown for OECD countries (and others have confirmed in EU countries (Closa 2012)) that just making it harder for legislatures to ratify amendments (e.g., from three-fifths to two-thirds to three quarters) doesn't much change the amendment rate (Rasch and Congleton 2006). What really affects the amendability of constitutions seems to be the presence or absence of veto players in the process.[17] Because currently empowered political parties can frequently muster supermajorities in the legislature in subsequent elections, blocks to constitutional amendment ratification such as moderate legislative supermajorities over a period of time and after subsequent readings are not very different than blocks to enacting ordinary legislation. Hence, "in the absence of powerful external veto players, it seems that political parties' agreements may sail through even the most stringent constitutional reform procedure" (Closa 2012, 309).

Normatively speaking, the difference in amendment mechanisms with veto players is, I want to suggest, significant. In particular, such a difference speaks to the *inclusive sensitivity* of the mechanism: the presence of veto players ensures that amendments are acceptable to a broad diversity of constituencies with distinct interests, ideological positions, opinions, values and perspectives.[18] The arrangements for changing the fundamental procedures of politics and lawmaking ought to structurally incorporate sureties that the full diversity of affected persons and interests will be accounted for. Hence the difficulty-increasing procedures for amendments are not just about increasing difficulty—even as this is important for maintaining structural independence. Many of those procedures are better understood as broadening the usual pool of information available for—and the sphere of influencers of—constitutional legislation beyond the current party regime and beyond the usual way in which representation is structured across the national legislature and the executive branch. Ratification in the federal sub-units, for instance, should enable a different set of political representatives to have their specific concerns taken into account. And ratification by popular referendum—beyond the way it serves the criteria of democratic co-authorship and political equality—promises some greater

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[17]The empirical claims in the text are not yet, it seems, fully established. The controversy goes back to a disagreement between (Lutz 1995) and (Ferejohn 1997) about the amendment rate of state constitutions in the United States—on this, see (Dixon 2011).

[18]Empirical research also indicates the importance of broad inclusion. For instance, inclusion—"the involvement of important groups in society in the design and maintenance of the constitution"—is one of only three design features of constitutions that groundbreaking scholarship identifies as strongly correlated with constitutional longevity (Elkins et al. 2009, 208). The other two are the right balance of flexibility and obduracy (noted above in Sect. 9.3.4) and the right balance between constitutional generality and specificity (a factor orthogonal to the concerns of this paper).

sensitivity to the opinions of all those affected by the proposal beyond the normal channels available for citizen influence on elite politicians and political parties.

To be sure, this greater inclusive sensitivity should not be oversold: after all, if the normal legislature is largely responsible for proposing and writing the amendment in the first place, then the role of veto players is largely confined to a simple *ex post* thumbs-up or thumbs-down, rather than direct *ab initio* substantive input into the qualitative content of the initiative. But if the political public sphere is working well and the legislature is at least partly attuned to the likely opinions of veto players, then we can hope at least for some degree of increasing inclusive sensitivity through the use of ratification veto players, even where the original amendment drafting process is driven exclusively by the legislature.

9.3.7   Constituent Assemblies and Reasons-Responsiveness

This last concern about the degree to which a broad spectrum of the citizenry have real effective input into the substantive content of constitutional amendments—as opposed to a simple power of after-the-fact veto or endorsement of that which has already been authored by others—speaks to a central difference between the way political equality is conceived between aggregative and deliberative conceptions of democracy. In particular, while aggregative conceptions emphasize the equal voting power of each in a process of aggregating over the population's simple endorsements or rejections, deliberative conceptions put more emphasis on the equal access all have to the processes of reason collection and evaluation that lead up to and ensue in the design of a particular proposal. Political equality is not then merely a matter of equal impact registered in an equally weighted vote—even as that is quite important to political equality—but must also involve the equal effective part each can play in the processes of deliberation that ensue in policy creation. Voting is then seen as an egalitarian mechanism for temporarily bringing to a halt ongoing processes of collective reasoning when a decision is needed under constraints of time, knowledge, and reasonable pluralism.

Returning to constitutional amendment procedures, the question then is whether we can envision procedures that not only are broadly sensitive to the voting impact of a wide diversity of citizens—as are constitutional ratification mechanisms subject to veto players—but also sensitive to a wide diversity of politically relevant reasons from a broad spectrum of citizens. Is there a way of making amendment procedures specifically reasons-responsive? Clearly one central way in which democracies can be reasons-responsive is by connecting the actual workings and outputs of representative legislatures to robust processes of public opinion formation in free, open and diverse political public spheres (Habermas 1996: especially chapters 7 and 8). However, if we are concerned about two agency problems regularly faced by legislatures—as I think we should be from everyday experience—then we might worry about whether legislatures alone are sufficiently responsive to a wide diversity of relevant reasons, especially when they are taking the lead role in

authoring the substantive content of constitutional proposals. First, given that electoral politics as we know it is largely shaped through political parties and party competition, it turns out that legislatures are frequently captured by currently dominant political parties. In these cases, a dominant party will be able to effectively ignore relevant reasons from other parties that are contrary to their preferred policy outcomes. Second, even if representatives do account for the reasons of other like political elites, they may still be wholly insensitive to the reasons of broad swaths of ordinary citizens who are not able to make effective use of the communications media of the public sphere. Most obviously this comparative communicative disability falls along socioeconomic lines, but it also quite frequently falls along indigenous, national, ethnic, religious and/or racial lines. Hence legislative deliberative processes may suffer from both dominant party capture and elite opinion selectivity. Both problems become normatively more serious the more fundamental the matters are for legislative decision, in particular, when they concern matters of basic constitutional law that is to structure ordinary politics.

It seems to me that constituent assemblies—independently elected bodies with a specific mandate to write proposals for constitutional reform either in the form of amendments or a new constitution—promise to improve reasons-responsiveness over constitutional drafting processes that are legislatively driven. Three features in particular would seem to promote reasons-responsiveness. Because constituent assemblies are specifically designed to consider only issues of constitutional change, their deliberative processes are likely to be better focused on constitutionally relevant reasons. Second, because the elected members are not the same as elected legislators and because they do not stand for re-election to the assembly, their deliberations are likely to be less systematically distorted by the incentives of ordinary electoral and party politics. Third, because the assembly is almost always elected through procedures that ensure a wide representation of different segments of the populace, they are likely to be more sensitive to a broader diversity of reasons, interests and opinions than is a legislature controlled by political party elites. For instance Colombia's 1991 constitution has provisions enabling the convocation of a constituent assembly if both one third of the electorate and both houses of the legislature vote in favor of convening one.[19] Members of the assembly are to be directly elected by citizens through a ballot separate from ordinary legislative elections. While the assembly meets, the legislature's powers are suspended. Reform proposals from the assembly are then ratified when agreed to by both a legislative majority and a popular referendum. Such arrangements promise the three deliberative advantages indicated above of an exclusive constitutional focus, of insulation from ordinary electoral politics, and of broader representation of the diversity of available reasons.

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[19] Colombia's 1991 constitution was itself written by a constituent assembly, albeit a procedurally irregular one in the sense that the possibility for such an assembly was not cognized in the 1886 constitution previously in force. Nevertheless, after a popular ballot initiative passed in 1990 calling for a constituent assembly to draft a new constitution, such an assembly was held, and a new constitution was drafted and enacted.

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That at least is the theory, even if it is not always born out in practice—actual cases are decidedly mixed from the normative point of view of democratic constitutionalism.[20] Brazil's successful transition from military dictatorship to stable constitutional democracy was formally achieved through the adoption in 1988 of a constitution written over 2 years through a national constituent assembly. While the members of the constituent assembly were in fact simply the current members of the legislature meeting in special sessions as an assembly, the procedures adopted in the drafting phase not only required input from a diverse representation of social movements, political interests and ideological positions, they also ensured a great deal of public input through comments, hearings and largely open proceedings.

The successfully democratic Brazilian experience contrasts, however, with Venezuela's 1999 constituent assembly process. While coming into power in 1998, Venezuelan president Chávez promised a referendum to call for a constituent assembly to replace the then-in-force 1961 constitution, even though the latter had no provisions for such an assembly. With very strong support in the referendum (92 % and 86 % on the two questions), an assembly was convened under electoral laws that strongly favored members of the president's party—the party gained 120 of the assembly's 131 seats. The assembly itself wrote the new constitution very quickly, in 2 months. The assembly's debates were well publicized in the drafting phase and, once drafted, the constitutional proposals were subject to inclusive debate with many different opinions sectors of society represented (Landau 2012, 941). The proposal was ratified by a significant majority of voters (over 70 %) in a national referendum. Nevertheless, the new constitution created a government with political power strongly centralized under the authority of a charismatic president, a centralization that has increased as that constitutional settlement has developed—with dramatic results for the loss of structural independence, as discussed above in Sect. 9.3.3. While the Venezuelan case presents a fairly good picture of the way constituent assemblies can heighten broad and inclusive democratic sensitivity, it certainly did not avoid the problem of dominant party capture: indeed, the process made it worse by constitutionalizing capture.

Another even more cautionary tale is provided by Bolivia where an irregular and complicated process between 2006 and 2009 led to the formation of a constituent assembly and the eventual ratification of a new constitution. Simplified, the story begins in 2006 after newly elected president Morales took office in 2005. Employing provisions for constitutional replacement in the 1967 constitution, the legislature approved, by the required two thirds majority, the convocation of a constituent assembly for the total reform of the constitution. After convening in 2007, the assembly was subject to a great deal of disagreement, power struggles and controversy, ensuing in sometimes violent protest. Ominously, after the diverse parties in the assembly failed to come to a agreement, the assembly moved locations twice. After the first move, opposition members refused to participate and, after the second

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[20]Again, these recitations of the cases are overly simplified and purged of potentially relevant detail; it is surely an open question whether I have simplified away from factors of crucial importance.

move, opposition members were forcibly prevented from entering the assembly. Nevertheless, by the end of 2007 the remainder of the assembly delivered a draft to the legislature. More political troubles engulfed the process during 2008 until finally a compromise was reached by elites, and in 2009 a popular referendum was finally held that ratified the new constitution with a 61 % majority of the voters. Even without all the necessary detail, it is hard to consider the recent, troublesomely violent and irregular Bolivian process of constitutional change particularly reasons-responsive (not to mention concerns about political equality and inclusive sensitivity).

Perhaps these cautionary tales should not surprise, since constituent assemblies are usually not called in times of political calm and citizen satisfaction with government; they tend rather to be products of crises of governance of one form or another (Negretto 2012). But Iceland's recent experience with a constituent assembly—one born out of the deeply impactful 2008 financial crisis—shows that, when suitably designed and taking advantage of the latest forms of communications technology, such assemblies can evince real improvements in both inclusive sensitivity and reasons-responsiveness. Told briefly, the story is that a collective of grassroots movements organized a kind of proto-constituent assembly called the National Assembly in 2009, three fourths of whose membership was drawn from randomly generated citizens and one fourth from political institutions and associations. The purpose was to brainstorm the key ideals for the future of Iceland through well-designed deliberative small-group discussions combined with larger plenary sessions. In 2010, the legislature established a formal constituent assembly comprised of 25 individuals elected in national elections—the 'Constitutional Council'—in order to revise the 1944 constitution.[21] The legislature also organized a one-day 'Constitutional Gathering' as a participatory event for ordinary citizens before the elections to the assembly. The constituent assembly itself drew heavily on citizen input into its deliberations, particularly through the use of internet communications media. A draft constitution ensued from a full consensus of the assembly and was presented to the legislature in 2011.[22] The draft was endorsed in a non-binding advisory referendum in 2012 (with a 67 % popular majority), but to this date, the proposed constitution is in limbo, as it has not been ratified by the legislature.

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[21] I have simplified the story by leaving out the unfortunate intervention of Iceland's supreme court in 2011, attempting to overturn the election of the Constitutional Council's members on questionable grounds. This court ruling was effectively rejected by the legislature by simply appointing the officials actually elected to the Council. There is some legitimate concern about how inclusive the membership of the Council turned out to be. Most of the membership was drawn from established political elites; Reykjavík was over-represented whereas other regions under-represented; and, working and lower classes were under-represented (Landemore 2014).

[22] It seems that many of the institutional innovations were directly modeled on the deliberative democratic opinion polling and decisional forums designed by James Fishkin and allied democratic theorists (Fishkin 2009), including proposals for a national deliberation day (Ackerman and Fishkin 2004), and prominently employing sortition as an alternative mechanism for ensuring broad representation and political equality (at least in the earlier consultative National Assembly)—even if not all procedures met all of Fishkin's preferred criteria (Landemore 2014, 18–20).

This was very much a process of proposed constitutional change that began 'from below' and it maintained throughout a remarkable openness to and constitutive connections with broad and diverse populations, interests and opinions throughout the populace. "The originality and unprecedented nature of the whole process lies clearly in the explicit emphasis on citizen-driven constitutional reform, a form of 'crowd-sourcing' in the form of a civic brain-storming session, and the explicit exclusion of members of political parties to participate in either the National Gathering or to stand for elections for the Constitutional Council. The citizen-driven constitutional revision process is unique in any established democratic society" (Bergsson and Blokker 2014, 161). In short, it seems to me, that the Icelandic constitutional revision process institutionally approximated quite closely the ideal of reasons-responsiveness in manifold ways.[23] It also achieves this responsiveness precisely by institutionally approximating the other ideals I have highlighted of inclusive sensitivity, democratic co-authorship, political equality and structural independence—and its operationalizability is shown by the fact that it has worked.

In considering a few constituent assembly processes, we have then evidence of both successes (Brazil and Iceland) as well as failures (Venezuela and Bolivia). However, when viewed with a bit more discernment and in the light of striking new empirical evidence, the divergence of the cases might be explainable in a way that precisely supports the stress I have been placing on *ab initio* democratic input into the substantive content of constitutional change proposals, as opposed to mere *ex post* democratic ratification. An important recently published paper establishes the crucial causal importance to a polity's future prospects for democratization of the presence or absence of substantive and widely inclusive democratic input *during the drafting stage* of constitution-making processes (Eisenstadt et al. 2015). Comparing the outcomes of 138 constitutions in 118 different countries over the last 40 years, the study focused on two questions. First, does a high level of democratic participation in general in the constitution-making process make any difference to the prospects for democracy in that country after promulgation? Second, does citizen involvement in the earliest drafting stages of constitution-making lead to differences in prospects for democracy, in contrast to citizen involvement during later stages of debate on and ratification of elite drafted proposals? Their evidence is quite striking: the answer to both question is yes, *and* democratic involvement at "the earliest stage, drafting, has a greater impact on democratization than the debate stage or the modalities of ratification" (Eisenstadt et al. 2015, 599). These results seem to confirm a basic hypothesis of deliberative conceptions of democracy, namely that when it comes to constitutional change "direct [*ab initio*] participation through public debate is more important than [*ex post*] voting for deepening democracy" (Eisenstadt et al. 2015, 593). While I certainly do not want to claim that this single causal factor helps explain all of the relevant differences

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[23] Apparently influenced by the openness of web-based tools to citizen input, the Irish Constitutional Convention (2013–2014), charged with recommending constitutional changes to government, is another remarkable recent example of combining inclusive sensitivity with reasons-responsiveness.

between constituent assembly successes in Brazil and Iceland and failures in Bolivia and Venezuela, the evidence from my four case studies is largely congruent with the broader trends found through comparative constitutional analysis. The failed processes incorporated inclusive democratic participation only while debating and ratifying proposals that had already been drafted by small groups of elites dominated by a single party; the successful processes, by contrast, incorporated wide, inclusive and diverse participation at the drafting stages as well. It seems a quite plausible hypothesis, then, that institutions of constitutional change that incorporate democratic input into substantive constitutional content as it is being drafted in fact embody the crucial deliberative ideal of reasons-responsiveness, and embody it in a way that effectively contributes to a polity's on-going democratization.

9.4   Objections and Open Questions

In this paper I have sketched a framework of six evaluative criteria—operationalizability, structural independence, democratic co-authorship, political equality, inclusive sensitivity, and reasons-responsiveness—that we can use to assess various ways of institutionalizing processes of constitutional change in contemporary constitutional democracies. My conjecture is that these normative criteria are constitutively built into—and can be reconstructed out of—the actual institutional practices historically witnessed in constitutional democracies. I have not yet provided, however, the full evidential support that would be required to turn these conjectures into robust theoretical hypotheses. In lieu of a simple concluding recapitulation, I would like to indicate how different kinds of objections might be met, before tuning to some areas of future research this framework opens up.

The arguments presented here are then open, first and foremost, to empirical objections: for instance, that the evidence employed here is factually incorrect, that the evidence is not representative of the nature of most democratic systems and their development, or, that the paper has ignored significant counter-examples. But the arguments are also open to reconstructive objections: for instance, that the paper has distilled the wrong conception of relevant ideals out of particular institutions and practices, or that it has ignored other significant ideals or values that those institutions and practices embody. Only attention to a significantly greater number of examples would be able to address such objections and thereby substantiate the empirical and reconstructive conjectures made here.

Of course, the paper's general approach is also open to normative objections: for instance, that democracy should not have the priority assigned to it here, or, that the correct conception of democracy ought to include a thick catalog of substantive legitimacy conditions that must be guaranteed no matter what any contingent demos happens to say. I hope to have provided at least some considerations in response to such concerns in Sect. 9.2 where I reviewed the general kinds of reasons in favor of democracy and proceduralism, even if the full support of deliberative democratic constitutionalism is beyond what can be accomplished here.

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Let me further flag three areas where this project opens up intriguing areas for future research. First, there are critical questions about the relationship between the six evaluative criteria I've identified and the contextual specificity of institutional design proposals for amendment mechanisms. Clearly such a framework of normative criteria cannot be translated directly into universally applicable institutional proposals. To begin, there are simply too many other relevant variables differing across contexts that normative content alone cannot address. But even within that normative framework, I think we should fully expect different criteria to have differing weights and relative priorities depending on specific socio-historical and political contexts, including differing constitutional regime types and histories. For instance, ensuring and heightening structural independence is crucial where the constitutional change process can be easily harnessed by the current regime to entrench itself in power, as in strongly presidentialist systems like Venezuela. But structural independence is much less important where—for example, as in Great Britain—there are robust traditions highlighting constitutional change, a diverse, vigorous and independent press and deliberative public spheres including diverse and active civil society organizations specially attuned to proposed constitutional changes. In short, it seems absurd to expect one definitive or universally preferred set of amendment institutions or procedures—the suitability of particular procedures is a matter of complex and sensitive contextual judgment.

Such contextual judgments refer, secondly, to issues concerning the interrelations between the evaluative criteria. Clearly, for instance, operationalizability seems a necessary criterion for any amendment procedure, but beyond that it is not immediately clear whether, say, democratic co-authorship is more or less important than political equality or reasons responsiveness, and so on. And such questions of normative priority and balance across the diverse criteria will become most salient where there are tensions between the criteria. So for instance, we might think that there are typically institutional tradeoffs between reasons responsiveness and democratic co-authorship, on the theory that constitution-writing experts—lawyers, judges, politicians, academics—might have a better grasp on the relevant reasons, while reasonability may suffer in the name of including more of the populous into the process. Even on the optimistic conjecture that experiments like Iceland's demonstrate that the various desiderata might be plausibly met jointly in one overall process of constitutional change, the framework developed here must still conceptually and practically address the priorities, balances and trade-offs involved in attempting to institutionally realize all six normative criteria.

A third area of questions opens up around the disruptiveness of constitutional transitions in general. Processes of constitutional change not only frequently arise from out of societal and political ferment and conflict, but the processes themselves can add significantly to instability and turmoil, with real possibilities of political violence and repression hovering nearby as a specter. Might we perhaps then need to add some criterion of stability to the set of six normative criteria adumbrated here, maybe say, some measure of the degree to which an amendment institution promotes legal continuity, or continuity of governmental authority, or peaceful transitions? While non-violent constitutional change is surely normatively preferable,

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its unclear how that might be assessed as a differential measure of various institutions. And the other ideas of legal continuity or continuity of authority both seem to overly constrain democratic co-authorship in the kind of constitutional changes citizens might envision and believe warranted. And this in turn raises a fascinating set of questions about the distinction between constitutional amendment and constitutional replacement. While intuitively plausible, and frequently referred to in formal amendment procedures, the distinction is much harder to make in practice than it might seem. This is not only a conceptual problem, but also a problem for empirical research—when is a constitution changed enough to count as a new constitutional regime?—and for law and jurisprudence—when does an official amendment outstrip its authorizing text and constitute a new constitution? This brings us full circle back to the relationship between actual constitutional practices and theory, between fact and ideal. While the framework here has stressed the importance of institutional procedures for embodying various democratic ideals, the fact is that an enormous number of actual constitutional change dynamics are distinctly irregular, not in accord with pre-established procedures. If democratic legitimacy in the face of substantive disagreement hangs on procedural regularity—as the general conception of deliberative democratic constitutionalism insists—what is that conception to make of the fact that many if not most constitutional transitions have significant elements of procedural irregularity? Should we say that facts vitiate ideals here, or might we treat procedural regularity as a regulative ideal of constitutional change processes, a normative lodestar of such processes even if unreachable and only asymptotically approachable in the world? The evaluative framework proposed here thus opens up onto fundamental theoretical questions, from the relationship between theory and practice, to the definition of a constitution, to the nature and justification of constitutional democracy itself. But this is precisely what theory should expect in light of the exciting ferment and experimentation, witnessed today around the globe, attempting to secure increasingly democratic institutions of constitutional change.

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Democratizing Constitutional Law

Perspectives on Legal Theory and the
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