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RESEARCH ARTICLE

Deliberative Judicial Review

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Abstract

Strong constitutionalism usually conceives rights as instruments for protecting people. The problem with this conception is that it generates legal alienation, since it views people as passive recipients of protection, which is an exclusive matter for the state and, ultimately, for judicial review. In contrast, deliberative constitutionalism gives people an active role in deliberating about rights, among themselves as well as between them and the state. However, despite the development of deliberative constitutionalism, it is not yet clear what this view of rights requires of judicial review. Accordingly, this contribution to the *Federal Law Review*'s symposium issue on deliberative rights theory argues for deliberative judicial review, which is a form of judicial review that, by respecting and promoting democratic deliberation, offers better protection of rights, as well as greater impartiality and legitimacy. In support of this argument, the article first makes explicit that the guide that should orient judicial review is not deference or activism but rather democratic deliberation. Next it states that, from this guide, a form of judicial review should be inferred that is not merely substantial or merely procedural, but rather semiprocedural. It then argues that, notwithstanding contextual turns, weak constitutionalism combined with channels of social dialogue offers a better institutional basis for deliberative judicial review than strong constitutionalism. Lastly, it concludes that deliberative judicial review respects and contributes to articulating rights without legal alienation, i.e. through dialogue among all potentially affected persons.

Keywords: deliberative constitutionalism; deliberative democracy; human rights; judicial review; legitimacy

I Introduction

Rights are often conceived as instruments for protecting individuals. Despite its genuine concerns, the problem with this conception of rights is that it views people as largely passive objects, or as mere recipients of protection. This is a state-centric and juricentric view of rights, since their protection is seen as a matter for the state and, ultimately, for judicial review. Thus the problem becomes more serious, as the branch of the state with the least democratic legitimacy, and which is the furthest removed

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from society, has a privileged say in defining the scope, limits and priority relations of rights.

These problems are evident in strong constitutionalism, which is the globally dominant theoretical and institutional model.[1] The core of strong constitutionalism is synthesised by Dworkin: 'We may better protect equal concern by embedding certain individual rights in a constitution that is to be interpreted by judges rather than by elected representatives, and then providing that the constitution can be amended only by supermajorities'.[2] From this perspective, rights are conceived as 'trump cards' over the 'majority' or 'sovereignty'.[3] Thus rights should be 'removed' from society and its political representatives, while the 'final decisions' on such rights should be 'assigned to courts'.[4] Since courts are 'insulated' from society,[5] they are 'institutionally better placed' and 'more likely to reach sound conclusions about rights'.[6]

The problem with strong constitutionalism is that it remains stuck, in Forst's words, in a 'predemocratic era' because it omits the fact that '*the first question of justice is the question of power*' and confers 'priority to teleological values which are supposed to ground a just or good social order'.[7] This perpetuates 'alienation', as these values and rights are not subjected to the justificatory authority of the persons involved. Therefore the 'victim of injustice' should not be seen as the person who 'lacks' certain rights, but rather as someone who 'does not count' in the definition of rights. Rights, then, should not refer to what it is fair to 'receive' or 'give' to each person, but rather to the 'role' that they should have in the process of justification. Thus the 'content of human rights is to be justified discursively', that is, through democratic or inclusive deliberation or dialogue. However, this becomes impracticable when decisions about rights are shifted

[1]Strong constitutionalism is the predominant model not only in the academic arena, but also in the institutional arena. On the one hand, prominent scholars endorse a deliberative conception of democracy in the democratic realm, but endorse a strong conception of constitutionalism in the constitutional realm. Beyond the academic arena, some form of strong constitutionalism is adopted by most of the world's countries. On this, see Ignacio Giuffré, 'El constitucionalismo fuerte en la encrucijada. El constitucionalismo deliberativo como salida' (2023) 118 *Revista de Derecho Político* 289.

[2]Ronald Dworkin, *Is Democracy Possible Here? Principles for a New Political Debate* (Princeton University Press, 2008) 144.

[3]Ronald Dworkin, 'Rights as Trumps' in Jeremy Waldron (ed), *Theories of Rights* (Oxford University Press, 1984) 153, 158; Ronald Dworkin, *A Matter of Principle* (Harvard University Press, 1985) 59 ('A Matter of Principle'); Ronald Dworkin, *Freedom's Law: The Moral Reading of the American Constitution* (Oxford University Press, 1996) 198 ('Freedom's Law').

[4]Ronald Dworkin, *Freedom's Law* (n 3) 30–1.

[5]Ronald Dworkin, *Taking Rights Seriously* (Bloomsbury, 1997) 110.

[6]Ronald Dworkin, *A Matter of Principle* (n 3) 25.

[7]Rainer Forst, *Justification and Critique: Towards a Critical Theory of Politics* (Polity Press, 2014) 3–6, 18–22, 34–35, 64; italics in the original. On 'the point and ground of human rights' from a deliberative and democratic perspective, see also Rainer Forst, 'The Point and Ground of Human Rights: A Kantian Constructivist View' in Davis Held and Pietro Maffettone (eds), *Global Political Theory* (Polity Press, 2016) 22. Gargarella also refers to 'legal alienation' as the situation in which society does not recognise the constitutional organisation as an expression of its will, but rather as something alien that hinders self-government instead of promoting it (Roberto Gargarella, 'Una maquinaria exhausta: Constitucionalismo y alienación legal en América' (2010) 33 *Isonomía* 7, 31–2; my translation). Similarly, see Cristina Lafont, *Democracy Without Shortcuts: A Participatory Conception of Deliberative Democracy* (Oxford University Press, 2020) 3, 4, 7, 18–24 ('*Democracy Without Shortcuts*').

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from the people and their representative institutions to judges—in Waldron's terms, 'a handful of men and women, supposedly of wisdom, learning, virtue, and high principle who, it is thought, can alone be trusted to take seriously the great issues that they raise'.[8]

In line with these concerns, deliberative constitutionalism has emerged and developed, ie a constitutional model that draws on the principles of the deliberative theory of democracy. For deliberative constitutionalism, rights are also important instruments for justice in the political community. However, deliberative constitutionalism is concerned with the substantive question of *what* is decided in a political community, without downplaying the legitimacy and impartiality of the institutional organisation of power, or the procedural question of *by whom* and *how* this is decided. Faced with this second question—in Waldron's terms, the 'constitutional structure',[9] or in Gargarella's terms, the 'engine room'[10]—deliberative constitutionalism suggests that decisions about rights, to be legitimate and impartial, must be taken by considering and discussing the reasons and perspectives of all the potentially affected persons.

However, despite the development of deliberative constitutionalism in recent decades, it is not yet entirely clear what such a view of rights requires of judicial review.[11] Hence the purpose of this contribution to the *Federal Law Review*'s symposium issue on deliberative rights theory which, to fill this gap, proposes a deliberative form of judicial review. According to my argument, by respecting and promoting democratic deliberation, this type of judicial review better protects rights, with greater impartiality and legitimacy.

To support this claim, the paper is structured as follows. First, it makes explicit that the normative standard that should guide the exercise of judicial review is not deference or activism, but the respect and promotion of democratic deliberation (section II). Second, it shows that, from this standard, a judicial review must be derived that is neither merely substantive—limited to the analysis of the content of the legislation— nor merely procedural—limited to the analysis of the law-making process—, but semiprocedural—attending to both aspects in an interrelated manner—(section III). Third, it argues that, notwithstanding the contextual requirements of each political community, weak constitutionalism, accompanied by channels of inclusive dialogue, provides a better institutional basis than strong constitutionalism (section IV). Lastly, it concludes that deliberative judicial review respects and contributes to the articulation of rights without political alienation, i.e. through dialogue between all potentially affected persons (section V).

[8]Jeremy Waldron, *Law and Disagreement* (Oxford University Press, 1999) 213.

[9]Jeremy Waldron, *Political Political Theory: Essays on Institutions* (Harvard University Press, 2016) 6.

[10]Roberto Gargarella, *Latin American Constitutionalism: The Engine Room of the Constitution* (Oxford University Press, 2013) 177–8.

[11]This gap can be seen, among other examples, in two books that, although fundamental to this trend, lack chapters offering a deliberative theory of judicial review: André Bächtiger et al, *The Oxford Handbook of Deliberative Democracy* (Oxford, 2018) and Ron Levy et al, *The Cambridge Handbook of Deliberative Constitutionalism* (Cambridge, 2018). Hence the relevance of this symposium in general, as well as Ron Levy and Kate Ogg's paper in particular.

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Before I begin, two clarifications are necessary. First, this article does not address the implications of deliberative constitutionalism for judicial review based on the understanding that this institution is or should be the central guarantee of rights. On the contrary, my study of judicial review seeks to reverse the centrality given to it by the constitutional culture and, rather, assumes that this institution is not the main forum but only another one within the deliberative constitutional system. Secondly, this article does not attempt to offer a complete and applicable theory of judicial review without contextual nuances. Indeed, the features and objectives of judicial review depend not only on the normative issues that I address here, but ultimately on the requirements of each particular context.

II From judicial deference and activism to democratic deliberation

This section will make the case for orienting judicial review towards a particular normative ideal: democratic deliberation. The focus on this dimension is justified because institutional reform is not enough, although it is needed (section IV), to guide judicial review towards this ideal. Otherwise, this paper would be limited to such reform and the reconstruction of a guide would be futile. However, the way in which the constitutional system functions is only partly determined by institutional design choices, as the constitutional culture or conception of the appropriate way to exercise judicial review also matters.[12] To appreciate these dimensions, it is useful to note Tushnet's caution regarding the possibility of implementing weak judicial review in the United States. In this respect, he has expressed doubts because, beyond the current institutional structure, 'the legal culture seems to support strong-form review with little qualification'.[13] Similarly, regardless of the institutional framework, strong judicial review has sometimes operated in terms of dialogue—eg the Grootboom case of the South African Constitutional Court[14]—, while weak judicial review has sometimes retained the last word—eg although the Canadian 'notwithstanding clause' hasn't lapsed into desuetude, its lack of use has been lamented.[15]

Democratic deliberation, as will be argued, requires going beyond what is required by two traditional standards, judicial deference or non-interventionism and judicial activism or interventionism. On the one hand, then, it is worth noting the differences between what democratic deliberation and deference require of judicial review. These theories include, for example, a 'clear error' of parliament,[16] 'judicial minimalism',[17] the

[12]Scott Stephenson, 'Is the Commonwealth's Approach to Rights Constitutionalism Exportable?' (2019) 17(3) *International Journal of Constitutional Law* 884, 885.

[13]Mark Tushnet, 'New Forms of Judicial Review and the Persistence of Rights – And Democracy-Based Worries' (2003) 38 *Wake Forest Law Review* 813, 824, footnote 42 ('New Forms').

[14]*Government of the Republic of South Africa. & Ors v Grootboom & Ors* [2001] 1 SA 46 (Constitutional Court).

[15]On this, see Mark Tushnet, *Weak Courts, Strong Rights: Judicial Review and Social Welfare Rights in Comparative Constitutional Law* (Princeton University Press, 2008) ('*Weak Courts*').

[16]James B Thayer, 'The Origin and Scope of the American Doctrine of Constitutional Law' (1893) 7(3) *Harvard Law Review* 129.

[17]Cass Sunstein, *One Case at a Time. Judicial Minimalism on the Supreme Court* (Harvard University Press, 1999).

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'passive virtues' of judges,[18] the court as the 'referee' of 'channels of political change' and 'discrete and insular minorities',[19] and a 'margin of discretion'.[20] These theories have to some extent taken note of the counter-majoritarian objection to judicial review, and have proposed some form of judicial self-restraint towards parliament. However, judicial deference does not necessarily imply deliberative inter-institutional interaction or deliberation between the state and society. Thus, despite their notable concern with the democratic principle, these theories have avoided assuming a deliberative conception of the democratic principle.

While the standard of democratic deliberation admits that the final decision in some cases lies with parliament, its objective is broader. According to this standard, legitimacy and impartiality do not depend exclusively on the parliamentary majority, but also depend on a dialogue between the political branches and society. This therefore demands more from courts than a passive role *vis-à-vis* the decisions taken by parliamentary majorities. It requires courts to take an active role in respecting and promoting democratic deliberation. Hence judicial deference to parliament cannot be assimilated to the dialogue among potentially affected persons.

In this sense, Habermas has pointed out that the role of judicial review should be that of a guardian of deliberative democracy, rather than that of 'an advocate for judicial self-restraint'.[21] Similarly, Webber has made clear that dialogue provides a 'richer' alternative to judicial deference, since, while deference is guided by a 'spatial' criterion of competence delimitation between the actors of the constitutional system, dialogue is guided by an 'exchange of reasons' between these actors.[22] Indeed, deference is a unilateral, unconditioned, static and previously defined decision-making criterion, independent of the deliberative and decision-making process. This criterion, in short, is limited to justifying the legitimacy and impartiality of the constitutional system in a single place or institution, ie parliament.[23]

On the other hand, it is worth noting the differences between what democratic deliberation and activism demand of judicial review. To this end, it is useful to consider some definitions. Atienza, for example, has defined the 'activist' court as one that

[18] Alexander Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (Bobbs-Merrill, 1962).

[19] John Ely, *Democracy and Distrust: A Theory of Judicial Review* (Harvard University Press, 1980) ('*Democracy and Distrust*').

[20] This approach, mostly prevalent in the European human rights system, basically requires the international court to have, *prima facie*, some level of deference to the decisions of the states of the system, to ensure a certain degree of discretion as to how to implement their international legal obligations. However, this approach may also be taken by national courts concerning the other branches of government within the same state.

[21] Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (Massachusetts Institute of Technology Press, 1996) 276–7 ('*Between Facts*').

[22] Grégoire Webber, 'The Unfulfilled Potential of the Court and Legislature Dialogue' (2009) 42(2) *Canadian Journal of Political Science/Revue Canadienne de Science Politique* 443, 458 ('The Unfulfilled Potential').

[23] In similar terms, see Ron Levy and Kate Ogg's paper in this symposium.

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'decides a legal question following its views of what is just, even if this means transgressing the limits set by the law'.[24] Similarly, Bayón has defined this type of judge as 'one who not only never sees in the law a guideline called upon to conclusively control his decisions, which for him must result directly from the balancing—his balancing—of the reasons at stake, but also does not take seriously that these reasons must be those of the legislator, those which the legislator has taken into account and with the weight he has intended to give them. Rather, looking above the law, he seeks to derive them from his reading of the constitution (which is often indistinguishable from his idea of justice), thereby ultimately substituting what the legislator has decided with what he thinks the legislator ought to have decided'.[25]

These definitions show that judicial activism gives priority to the substantive dimension—*what* decides—but does not concern itself as much with the procedural dimension—*who* decides and *how*. However, since the law is mired in disagreement, the institutional dimension is unavoidable. Hence judicial activism falls into a juricentric and juristocratic position, since legitimacy and impartiality cannot be achieved with isolated robed judges, but only with social agreements about justice. In this sense, Atria has described the activist judge as a 'free-rider', inasmuch he 'retains the idea of the judge in terms of his function of giving to each his own, but believes that it is possible to do so in the manner of pre-modern law'.[26]

In reaction to this controversy, Roach has given one of his books a suggestive subtitle: 'Judicial activism or democratic dialogue',[27] and suggests that it is necessary to 'move beyond' the debate for or against judicial activism.[28] For him, this debate often becomes a 'dead end', so as an alternative he proposes to deal with rights through democratic deliberation.[29] In his view, this alternative differs from judicial activism as it does not provide a guideline for courts to issue the 'right answers', but rather a way to reconcile judicial review with democracy.[30] While this point will be further developed below (section IV), Roach has argued that a weak constitutional model, as opposed to a strong constitutional model, offers an institutional structure with the potential to promote such democratic dialogue. Under such an institutional framework, any

[24] Manuel Atienza, 'Siete tesis sobre el activismo judicial' (2018) 10(39) *Grand Place* 39, 41; my translation.

[25] Juan Carlos Bayón, 'El Imperio de la Ley y la interpretación y aplicación del Derecho: dos visiones' (2017) 40 *Doxa, Cuadernos de Filosofía del Derecho* (special edition) 67, 70; my translation.

[26] Fernando Atria, *La forma del derecho* (Marcial Pons, 2016) 241; my translation.

[27] Kent Roach, *The Supreme Court on Trial: Judicial Activism or Democratic Dialogue* (Irwin Law, rev ed, 2016).

[28] Ibid 8.

[29] Ibid 13, 327.

[30] Ibid 6. Similarly, Roach has emphasised that 'dialogic judicial review' does not 'tell judges how to decide hard cases', but rather focuses on 'how society should struggle together for the best answers to controversies about justice'. Hence, using the Learned Hand's well-known expression, Roach has concluded that 'dialogic judicial control does not set the judges up as infallible Platonic gatekeepers': Kent Roach, 'Dialogic Judicial Review and its Critics' (2004) 23 *Supreme Court Law Review* 49, 104 ('Dialogic Judicial Review'). However, as highlighted in Ron Levy and Kate Ogg's paper at this symposium, some aspects of Roach's theory are also in tension with deliberative constitutionalism.

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activist judicial decisions, while not final in nature, will constitute a legitimate contribution to democratic deliberation concerning how to define the boundaries, contents and priority relations of rights.

In conclusion, deference and activism are rigid and static standards of judicial action that, depending on the circumstances, may lack legitimacy and impartiality, while the dichotomy between these two standards is unhelpful for the treatment of rights. Similarly, Habermas has stressed that '[w]e cannot carry on the discussion of the Supreme Court's activism or self-restraint in abstracto'.[31] Therefore judicial review, instead of limiting itself to the categorical choice of a single authority or a single standard, should combine them according to the circumstances of each specific case and with deliberative democratic sensitivity. Consequently, the standard of democratic deliberation suggests following one standard or another according to the performance or dialogic and inclusive approach given to the specific case: the more inclusive and dialogic the process, the greater the judicial deference; and the less inclusive and dialogic the process, the greater the judicial activism.[32] Hence, if it is appropriate to speak of activism and deference, then it is more appropriate to speak in terms of *deliberative activism*—understood as the duty to promote and guarantee democratic deliberation—and *deliberative deference*—understood as the duty to respect and yield to the arguments that emerge from democratic deliberation. In other words, the standard of democratic deliberation suggests that judicial review should be either very strong—activist, if so willed—or very weak—deferential, if so willed—depending on the degree to which two conditions are met in the particular decision-making process at stake: dialogue and inclusiveness.

This guiding principle of judicial action ultimately entails a particular *criterion of decision-making*. That is, a reciprocal, dynamic and procedural criterion of deliberative activism in the absence of inclusive dialogue—or deliberative deference—in the presence of the force of the arguments that arise from inclusive dialogue. This criterion is *reciprocal* because the relationship between the various institutions and society must be guided by a mutual and complementary deliberative activism or deliberative deference that is attentive to the quality of the procedure, and responsive to the strength of the best argument. It is *dynamic* because the authority in charge of the decision is to be fluidly defined in the course of deliberative and inclusive interactions, so that the decision is left to society or to a particular authority, depending on the force of its arguments. It is *procedural* because the deliberative activism or deliberative deference that society and institutions must display towards each other depends on the deliberative performance that each actor, from a systemic perspective, has given in the search for the best arguments. In short, this criterion aims, rather than safeguarding an *a priori* determined authority, to safeguard its *a posteriori* arguments. This criterion, in short, implies that the decision on rights should not reside exclusively and unconditionally in a single authority defined in advance of the deliberative and decision-making

[31] Habermas, *Between Facts* (n 21) 279.

[32] Similarly, Gargarella has suggested that the role of constitutional courts depends on the nature of the issues at stake. It should be self-restricted on questions concerning 'substantive issues', and activists on questions concerning the 'procedural conditions of democratic dialogue': Roberto Gargarella, *The Law as a Conversation Among Equals* (Cambridge University Press, 2022) 227 ('*The Law as a Conversation*').

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process—parliament according to judicial deference, or the courts according to judicial activism—but rather in the procedures of justification through collective debate. This criterion is equally valuable for international human rights courts, so that decisions should not reside exclusively and unconditionally with a local court or the international court, but with the institution that gives the best deliberative performance.

Before closing this section, I should clarify that this guideline for judicial review applies not only to promoting the principles of democratic deliberation—eg freedom, equality, openness, inclusiveness, justification, *inter alia*—in decision-making processes, but also to ensuring that the content of those decisions enables such democratic deliberation—eg by guaranteeing social rights. Hence 'deliberative activism' is 'revolutionary' in nature, in the sense that it calls for profound changes not only in decision-making processes, but also in 'the distribution of resources'.[33] Furthermore, Fung has argued that in circumstances of 'material and political inequality and failures of reciprocity', while it is imperative to 'promote deliberation', political action cannot be limited to 'persuasion' alone when this is not possible. In such cases, 'non-persuasive, even coercive, methods' should be used to materialise not only democratic deliberation, but also the preconditions and resources necessary for it.[34]

Democratic deliberation provides a more justifiable and promising normative guide in the face of, in Gargarella's terms, one of the most 'unproductive debates around judicial control', ie the 'unattractive' dichotomy between activism and self-restraint.[35] In the following sections, it will be argued that semiprocedural judicial review is what derives from this criterion (section III), and that a weak institutional framework is most conducive to deliberative judicial review (section IV). For now, it suffices for me to affirm with Tushnet that one of the attractions of weak constitutional models is that they 'provide an opportunity to think about judicial review outside the tired categories of activism and restraint'.[36]

III Semiprocedural judicial review

Beyond the counter-majoritarian difficulty, another important objection to judicial review is that it tends to focus on assessing the content of political decisions, while minimising their process of genesis. This criticism is made more acute by the fact that courts often have a privileged authority over such content or even the last word. This section, then, will revisit this objection to substantive review with a privileged judicial voice, in order to argue for a semiprocedural judicial review. This alternative, far from aiming to limit democracy or keep it at bay, is an institutional derivation of judicial review's orientation towards democratic deliberation (section II).

[33] Archon Fung, 'Deliberation Before the Revolution: Toward an Ethics of Deliberative Democracy in an Unjust World' (2005) 33(2) *Political Theory* 397 ('Deliberation Before the Revolution'). Similarly, Lafont conceives democratic deliberation as a 'weapon of the weak' because '[p]owerful political actors may have safer alternatives at their disposal apart from having to risk finding out whether or not their agenda can withstand deliberative scrutiny': Lafont, *Democracy Without Shortcuts* (n 7) 150.

[34] Fung, 'Deliberation Before the Revolution' (n 33) 399.

[35] Gargarella, *The Law as a Conversation* (n 32) 257.

[36] Tushnet, 'New Forms' (n 13) 824, 838.

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As a starting point, it is worth emphasising that substantive judicial review with the primacy of judicial authority is predominant at both the theoretical and institutional levels. At the theoretical level, the prevailing theories have tended to pay more attention to the question of *what* is decided than to the questions of *how* and *by whom*. They have thus conceived of rules as an end product, rather than as a process, such that they have not paid enough attention to the process of lawmaking; and, when they have done so, it has not been through a deliberative conception, so they have not conceived the genesis of rules as open processes of exchanging reasons, but rather as processes of negotiating interests and majority voting. These theories, in turn, have defended the primacy of judicial authority over such substantive issues. Consequently, they have not explored the advantages of judicial review in assessing the inclusive and dialogic quality of lawmaking processes in particular and political processes in general.

At the institutional level, judicial review throughout the world has also tended to be self-limiting in terms of assessing the content of norms. Instead, the assessment of the genesis of norms has been considered a 'forbidden territory'.[37] Substantive judicial review has not only been informed by the aforementioned theories, but has traditionally been based on very narrow readings of some basic principles. In some cases, it has been argued that the lawmaking process involves *non-justiciable political questions*, i.e. private spheres over which the legislative and executive branches have autonomy, such that the courts have no jurisdiction to intervene in the control of such matters. In other cases, it has been held that the *separation of powers* establishes that the courts should not control the lawmaking process, as this falls under the internal affairs of the other branches of government. Finally, in still other cases, it has been held that the *democratic validity* of norms depends on the vote of political representatives, so the courts are not empowered to assess whether the norms are the result of an argumentative and open process before the vote.

This theoretical and institutional trend has also been largely nurtured by the expectations—legitimate and genuine—of the litigants involved in each particular court case, as well as of society at large in cases involving structural issues. Indeed, citizens and those involved in judicial proceedings tend to expect courts to resolve the merits of disputes with reference to the rights they claim have been undermined or threatened, and in accordance with principles such as reasonableness, progressive realisation of rights, non-retrogression, proportionality, among others.

The idea of judicial non-intervention in procedural questions concerning how norms are created has been supported by many remote clauses with global influence. In this sense, the *Bill of Rights 1689* (UK) provided that 'the freedom of speech and debates or the proceedings of Parliament ought not to be impeached or questioned in any court or place out of Parliament'.[38] Similarly—albeit almost a century later, and no longer in the framework of the Westminster constitutional model, but rather of a strong constitutional model—the *United States Constitution* §6.1 established that 'for any speech or debate in either house, they [Senators and Representatives] shall not be

[37] Aileen Kavanagh, 'Proportionality and Parliamentary Debates: Exploring Some Forbidden Territory' (2014) 34(3) *Oxford Journal of Legal Studies* 443.

[38] *Bill of Rights 1689* (UK) art 9.

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questioned in any other place'.[39] These ideas have subsequently been replicated, in one form or another, in the constitutions of countless countries—South Africa (articles 58 and 71), Argentina (article 68), Germany (article 46) and Spain (article 71), *inter alia*.

In contrast to this historical trend, in recent decades judicial review has undergone a procedural—but, as will be seen, not necessarily deliberative—turn at the institutional and theoretical levels as well. One of its main pillars emerged just over four decades ago with the publication of John Ely's book *Democracy and Distrust: A Theory of Judicial Review*,[40] which, on the basis of another pillar, a relevant US Supreme Court ruling,[41] raised the earliest and most impactful objection to purely substantive judicial review. Ely's starting point is a pluralist theory of 'representative democracy', according to which substantive issues must be adopted by 'our elected representatives'; and if we disagree with them, 'we can vote them out of office'. In this framework, judicial review should not aim at imposing 'fundamental values' or 'substantive outcomes', but rather at 'representation-reinforcing' or guaranteeing the political process through two main objectives.

These objectives are justified by the court's 'special institutional position'. On the one hand, the courts must ensure the ongoing openness of 'the channels of political change', for example, in the face of rules that prevent political alternation by excluding other groups or by undermining basic freedoms such as speech, assembly and voting. On the other hand, the courts must ensure the protection of 'discrete and insular minorities', for example, in the face of majorities who, while not denying voice and vote to such minority groups, systematically disadvantage them or treat them in a hostile manner. As Ely concludes, this theory of judicial review has an 'antitrust' rather than a 'regulatory' orientation, as the court intervenes as a 'referee' only if 'the political market' does not function properly.[42] According to this theory, a court is impartial if, unlike the theories Dworkin suggests, it 'resists the temptation to fill out its interpretive latitude with moral value judgments', so that it can 'relieve adjudication' of its 'authoritarian' and 'paternalistic' role.[43]

Several works have recognised the value of Ely's theory, while making explicit the limits of his procedural conceptions of democracy and constitutionalism. The theories of Michelman and Sunstein, for example, have been two of the first and most important to revisit Ely's theory from the perspectives of deliberative and republican conceptions of democracy and constitutionalism. Michelman has taken up Ely's procedural judicial review theory, but instead of its 'pluralist' character, he has given it a 'republican' and 'dialogical' character.[44] Sunstein has also given a 'republican' and 'deliberative' turn to

[39] *United States Constitution* §6.1.

[40] On the commemoration of the 40th anniversary of Ely's critique, see the recent 'I·CON: Debate!' in the *International Journal of Constitutional Law* (2020) 18(4) 1065, 1429–57.

[41] Ely's theory is based on the famous footnote 4 elaborated by US Supreme Court Justice Harlan F Stone in *United States v Carolene Products Co.*, 304 US 144 (1938), 75–7.

[42] Ely, *Democracy and Distrust* (n 19) 101–4.

[43] Habermas, *Between Facts* (n 21) 264–5. Nino, in similar terms, appeals to the idea of 'decompressing moral responsibility' from judicial review (Carlos Santiago Nino, *Fundamentos de derecho constitucional: análisis filosófico, jurídico y politológico de la práctica constitucional* (Astrea, 4th ed, 2013) 697.

[44] Frank Michelman, 'Law's Republic' (1988) 97(8) *Yale Law Journal* 1493, 1525.

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Ely's procedural approach to judicial review, on the grounds that the deliberative aspirations of the constitutional system require judicial review to not simply guarantee free and pluralistic competition, but also inspect whether the content of legislation is the result of deliberation uncaptured by private power.[45]

Habermas has also taken up Ely's procedural theories of democracy and judicial review to give them a deliberative turn. Regarding the former, Habermas has not understood the democratic procedure of lawmaking in pluralist terms, i.e. as based on rules such as those of the market on free competition—in the case of democracy, based on the election of political representatives—but rather in terms of satisfying the conditions of inclusion and dialogue in both the institutional and the social public spheres. Regarding the latter, Habermas has understood judicial review not as a referee that must protect free competition, but rather as oriented towards protecting and even promoting democratic deliberation.[46] Thus 'the constitutional court must examine the contents of disputed norms primarily in connection with the communicative presuppositions and procedural conditions of the legislative process'.[47] Habermas has justified this turn by saying that, in his view, Ely's theory is ultimately oriented towards 'justify[ing] "judicial self-restraint"'[48] and, as we have seen (section II), Habermas has considered such an orientation of judicial review to be limited. Zurn has agreed with Habermas, stating that, according to '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'.[49]

In line with these theories that have proposed a reorientation of Ely's conceptions of democracy and constitutionalism, Nino has expanded the cases to which judicial review should be directed. Thus Nino has said that while 'in general terms' his argument is directed against justifying the democratic legitimacy of judicial review, he admits three exceptions. One of these exceptions, in line with Ely, requires courts to monitor the conditions of the democratic process. Unlike Ely, however, Nino has conceived of such democratic conditions not only in 'deliberative' terms, but also in 'epistemic' terms. To this exception, Nino has added two further cases in which judicial review should be justified: protecting personal autonomy and guaranteeing the continuity of the social and historical practice of the constitution.[50]

Likewise, Gargarella has not only taken up Ely's procedural theory of democracy and constitutionalism in deliberative terms, but has also expanded beyond Ely's two cases and Nino's three cases in which judicial review must be activated. In Gargarella's view, there is a need for 'a contextual turn' of this theory towards the current framework of 'defective democracies', ie political communities with problems such as systematic inequality, violation of social rights, concentration of power, democratic dissonance,

[45]Cass Sunstein, *The Partial Constitution* (Harvard University Press, 1993) 104, 144.

[46]Habermas, *Between Facts* (n 21) 253–65.

[47]Ibid 264.

[48]Ibid 265.

[49]Christopher Zurn, 'Judicial Review, Constitutional Juries and Civic Constitutional Fora: Rights, Democracy and Law' (2011) 58(127) *Theoria: A Journal of Social and Political Theory* 63 ('Judicial Review').

[50]Carlos Santiago Nino, *Fundamentos de derecho constitucional: análisis filosófico, jurídico y politológico de la práctica constitucional* (Astrea, 4th ed, 2013) 657–706.

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political and social violence, and the politics of moral perfectionism, among other issues. These difficulties require judicial review to be oriented towards promoting constitutional dialogue and to focus not only on the Ely and Nino cases—albeit conceived in other terms—but also on additional cases beyond those mentioned above. In this regard, Gargarella has alluded, albeit not exhaustively, to the following aspirations: (1) democratic reconstruction of the constitutional system, rather than representation reinforcement; (2) promoting democratic deliberation—above all, while including marginalised groups—rather than simply clearing the channels of political change; (3) guaranteeing the material conditions of democracy or social rights for the impoverished majority, rather than worrying only about discrete and insular minorities; (4) safeguarding the procedures of deliberative democracy; (5) a presumption against a concentration of powers, and restoring the system of checks and balances; and (6) protecting personal autonomy from policies of moral perfectionism.[51]

More recently, Kavanagh has defended the 'political process review' as a 'useful technique of collaborative constitutionalism'. According to her, this review should evaluate if an impugned law has been the result of research, consultation, and reasoned consideration of the rights issues involved, as well as if all opposing views were represented in the legislative debate. This analysis plays an 'informative role'—by providing material concerning the rationale underlying the legislation—and a 'confirmatory role'—by showing if the legislature has confronted the rights issue involved and resolved it in a deliberate and deliberative manner. The evaluation of the presence and scope of 'parliamentary engagement with rights', 'without usurping or debilitating the democratic process', could operate as a 'calibrating factor' of judicial review. Under these conditions, judicial review could function as a 'catalyst for enhanced democratic deliberation' and a 'signalling device' to incentivise increased engagement with rights.[52]

Beyond the basis provided by Ely's theory and its reformulations in deliberative terms provided by the aforementioned scholars, another clarification is necessary. It does not seem entirely appropriate to refer to this type of judicial review in 'procedural' terms. In this respect, Habermas has stated that Ely presupposes the validity of certain 'procedural principles' and, from this, infers that judicial review should be oriented towards the service of these principles. However, such principles 'definitely have a normative content', since democratic procedure is based on a normative principle of justice according to which all people should have an equal say in political matters. Therefore Ely is 'inconsistent' in arguing that structural principles, insofar as they are procedural in nature and need to be supplemented by a theory of justice or rights, are not sufficiently informative.[53]

Gardbaum also points out that despite Ely's 'process theory label', his account does not actually involve judicial review of the process itself, but is limited to a subtype of substantive judicial review, because like the substantive theories he rejects, 'it is still

[51] Roberto Gargarella, 'From "Democracy and Distrust" to a Contextually Situated Dialogic Theory' (2021) 18(4) *International Journal of Constitutional Law* 1466.

[52] Aileen Kavanagh, *The Collaborative Constitution* (Cambridge University Press, 2023) 302–8.

[53] Habermas, *Between Facts* (n 21) 265–6.

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about review of legislative outputs (albeit of a specific sort) and not inputs'.[54] Thus, although Ely's theory limits strong judicial review to a particular set of cases distinct from those targeted by substantive theories—those involving laws that obstruct 'channels of political change' or harm 'discrete and insular minorities'—it is still tied to 'outcomes' or 'outputs', that is, to 'what' the parliament did rather than 'how' it did it.[55] Moreover, according to Gardbaum, Ely's judicial review omits the assessment of procedural issues not only of legislative processes *per se*, but also of political processes in general.[56] Nor does it focus on forms of democratic participation for the people that go beyond voice and vote in free and fair elections, such as the participation of society and its representatives in congress or other formal and informal public spaces.[57] On the other hand, for reasons such as the above and others, Gardbaum concludes that, since Ely's theory has been formulated with a 'parochial' scope, in the sense that it has been conceived for the United States, it needs to be expanded, refined and updated to address the constitutional practices that are now compelling in comparative law.[58] In this regard, he argues that judicial review may be appropriate for preventing and correcting a (by no means exhaustive) series of failures of the political process: (1) legislatures' failures to hold the executive accountable; (2) government capture of independent institutions; (3) capture of the political process by special interests; (4) outright dysfunction of the political process; and (5) non-deliberativeness of the legislature.[59]

Thus Ely's theory and its reformulations provide a basis for rethinking judicial review and rights. This basis allows us to infer that it is necessary to add a procedural turn, as proposed by Ely, to the substantive and paternalistic conceptions of judicial review. In turn, as Gardbaum has warned, such judicial review needs to be genuinely procedural, ie it needs to be concerned with who and how rules are produced—not only those enacted by parliament. Such procedures must also be conceived in light of the deliberative turn in the theory of democracy, that is, in terms of dialogue and inclusion. Seen from this perspective, the fact that a norm is approved by a democratic authority or on the basis of a majority vote provides a necessary, but not a sufficient, reason for its impartiality and legitimacy. Although this question may be insignificant for a substantial judicial review, for a review such as the one proposed here it becomes a fundamental question—eg an omnibus law, which implies the approval of multiple

[54]Stephen Gardbaum, 'Comparative Political Process Theory' (2020) 18(4) *International Journal of Constitutional Law* 1429, 1431, 1448 ('Comparative Political Process Theory'); Stephen Gardbaum, 'Pushing the Boundaries: Judicial Review of Legislative Procedures in South Africa' (2019) 9(1) *Constitutional Court Review* 1, 5, 18 ('Pushing the Boundaries').

[55]Ibid 18; Stephen Gardbaum, 'Comparative Political Process Theory' (n 54) 1431.

[56]Stephen Gardbaum, 'Pushing the Boundaries' (n 54) 5; Stephen Gardbaum, 'Comparative Political Process Theory' (n 54) 1448–9.

[57]Stephen Gardbaum, 'Pushing the Boundaries' (n 54) 18.

[58]Stephen Gardbaum, 'Comparative Political Process Theory' (n 54) 1432–48. In the same vein, Dixon proposes to 'develop a truly comparative, sociologically informed account of judicial representation-reinforcement that both draws on comparative understandings of courts' role in democracy protection and promotion *and* acknowledges the potential limits and contestability of this role': Rosalind Dixon, *Responsive Judicial Review: Democracy and Dysfunction in the Modern Age* (Oxford University Press, 2022) 2 (emphasis in original).

[59]Ibid 1430–2.

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norms by a single vote without due and specific reasoned justification for each of them. On the other hand, this type of judicial review, as Sunstein or Michelman have emphasised, must have a republican character, according to which freedom is understood as the absence of public and private domination. As a result, judicial review, rather than being restricted to ensuring the absence of external interference, must guarantee—as Habermas or Gargarella have both suggested—both the structural principles of democratic deliberation, as well as its material preconditions or social rights.

It is therefore more appropriate to refer to this type of judicial review in *semiprocedural* terms. In this respect, Bar-Siman-Tov has proposed to combine the analysis of the process of the genesis and enactment of norms with the analysis of their substance.[60] In this way, semiprocedural judicial review focuses not only on the substantive aspects of what the content of norms is, but also on the procedural aspects concerning by whom and how norms are created, and how they are enacted. In this way, judicial review has a double dimension. On the one hand, it must assess the compatibility of the substance of the norm in question with constitutional and conventional norms. On the other hand, it must assess the observance of the structural principles of democratic deliberation. In short, these two assessments should not be understood as incompatible alternatives, but as complementary and mutually reinforcing.

On the other hand, it is important to connect this form of judicial review with what has been said about the deliberative democratic standard that should guide it (section II). This connection allows us to infer that semiprocedural judicial review should not be guided rigidly or exclusively by interference or deference, but rather by one or the other orientation, depending on the specific case under adjudication (section III). The choice of one or the other orientation ultimately depends on the fulfilment of conditions of inclusion and dialogue —hence its deliberative quality and its potential to assuage objections to judicial review.[61] Undoubtedly, in some cases, determining compliance with these conditions can be a complex and contentious task. In such cases, the appropriate alternative seems to be judicial deference to the branch of government with the best deliberative and inclusive performance in the decision-making process.[62]

However, enabling the judicial assessment of procedural matters and requiring an active role for courts in such matters does not imply that they should have a final veto power, least of all over substantive rights issues. It is precisely this type of judicial review that requires courts to respect or, where appropriate, promote more deliberative and inclusive practices when faced with claims of rights violations. Indeed, in the face of a deficient democratic procedure, courts should not 'restrict' but 'expand' this procedure,

[60] Ittai Bar-Siman-Tov, 'Semiprocedural Judicial Review' (2012) 6(3) *Legisprudence* 272.

[61] Ibid 284–5.

[62] In turn, the difficulties of defining when a norm is the result of a legitimate procedure highlight the importance of deepening the research on *legisprudence*, ie a rational theory of legislation. Legisprudence—from the Latin *prudentia legis*—is to Congress what jurisprudence is to constitutional courts. Its objective is an approach of elaborating norms from a rational perspective, as a condition of validity, which attends to the fulfilment of the duties of argumentation and justification—eg attention to relevant facts, weighing and balancing the available alternatives, prospection, correction, retrospection and formulation of problems.

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since such a flaw cannot be corrected with greater deficiencies of legitimacy and impartiality, but only with more and better democratic deliberation. Therefore, in the face of a procedure for creating or reforming norms that is not the result of inclusion and dialogue, a semiprocedural judicial review can help the majority, without necessarily abandoning its position, to reconsider or attend to other reasons, different perspectives, and eventual contradictions and problems of substantiation. Moreover, semiprocedural judicial review can encourage the branches of government to take seriously their duty to justify their decisions on rights, while recognising that society has a central place in this lawmaking process. To this end, courts should not assume a monologic or invasive role, but should leave some margin with a range of constitutional possibilities for democratic authorities to decide questions on which there is legal openness, as well as indeterminacy, uncertainty, epistemic limitations, limited expertise, complexity, incommensurability, or moral disagreement.

Recently, some constitutional and supranational courts have exercised a judicial review like the one proposed here. In their rulings, they have analysed the degree and quality of inclusive dialogue in the lawmaking process. Depending on whether or not the procedural conditions have been met, they have either upheld the decisions—as in the 'Animal Defenders' case of the European Court of Human Rights[63]—or exhorted the competent authorities to re-examine them under these conditions—as in the 'Doctors for Life' case of the Constitutional Court of South Africa.[64] In this second group of cases, judicial review has not aimed to impose substantive criteria, but has instead pointed to procedural criteria—eg transparency, inclusiveness, social engagement, reasoned justification, etc.—for society and democratic institutions to decide on that basis the substantive issue over which there is disagreement.

These rulings have provided exhortations for the obliged authorities to reconsider and reformulate the contested issues in order to provide more satisfactory answers. Such answers, again, despite having some margin to choose between the available alternatives set by the court under existing law, have had to be elaborated under discursive conditions. By no means has this control implied that courts should not rule on substantive issues, but only that on such issues they should not necessarily have predetermined final authority—for, as we have seen, such authority is defined at the end of the process on the basis of deliberative performance (section II).

Indeed, when new judicial cases have been opened in order to contend that the obligated authorities have failed to comply with such warnings or exhortations, in these second procedural rounds the courts have been able to issue stronger decisions on the merits of the case. An interesting example of this is the 'Badaro' case of the Argentinean Supreme Court,[65] in which the legislative and executive branches were ordered to reformulate and update pensions in order to guarantee the fundamental rights at stake; but given the prolonged non-compliance of these authorities, the court issued a second resolution fixing the index for updating pensions itself and ordering their payment.

[63] European Court of Human Rights, *Animal Defenders International vs United Kingdom*, 22-04-2013.

[64] Constitutional Court of South Africa, *Doctors for Life International vs The Speaker of the National Assembly and Others*, 17-08-2006.

[65] Supreme Court of Justice of Argentina, *Badaro, Adolfo Valentín c/ ANSES s/ Reajustes Varios*, 08-08-2006 and 26/11/2007.

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So, semiprocedural judicial review suggests intervention in the face of decisions that undermine the structural principles of inclusive dialogue and the rights that are needed to enable them. As can be contrasted with what was seen at the beginning of this section, such judicial review entails a significantly different reading of several basic ideas. First, it conceives of the structural principles of democratic deliberation and its material preconditions as *justiciable political questions*, requiring courts to play a very active role in guaranteeing them both. Second, it conceives of the *separation of powers* in deliberative terms, which does not imply that the privative powers of other branches should be exempt from debate and control, but rather that where the exercise of such powers has led to flawed procedures or decisions with arbitrary content, courts can call upon them to take up such issues under conditions of dialogue and social inclusion. Third, it conceives of *democracy* in terms of deliberative empowerment, the transformation of preferences through inclusive dialogue and reasoned justification; not only within courts, but also in the seats of other public authorities and in society.

In short, against the prevailing trend, here I have argued for a type of judicial review that is sensitive to democratic deliberations in the formal and informal public spheres, as well as to the rights that are needed to enable such deliberation as conditions for the validity of norms. This form of judicial review not only helps to avoid objections to judicial review, but also respects and promotes social and inter-institutional dialogue, while providing a tool for guaranteeing fundamental rights, with more legitimacy and a greater probability of making good decisions. Indeed, this type of judicial review decentralises courts, as they no longer exercise hierarchical powers aimed at imposing a final authority, but instead trigger dialogue with public authorities and affected social groups. In this way, the adjudication of rights promotes democratic deliberation, rather than undermining it with alienation. This type of judicial review, in short, while not a panacea for all current problems, is particularly useful in contexts characterised, in material terms, by poverty and inequality and, in procedural terms, by the capture of opinion-forming procedures and political will by certain economic groups and political elites.

These new conceptions of the orientation (section II) and objective (section III) of judicial review make room to explore and reconsider what is the most fruitful institutional framework for this orientation and objective (section IV).

IV General keys to an institutional framework

Deliberative judicial review is not tied to a single institutional design. Moreover, institutional design proposals are not 'unconditional' or valid for all times and places, but rather depend on the singularities of each context.[66] Notwithstanding these caveats,

[66]Many normative proposals tend to proceed in this way. For example, Rawls defends strong judicial control in the framework of a 'well-ordered constitutional society': John Rawls, 'The Idea of Public Reason Revisited' (1997) 64(3) *University of Chicago Law Review* 765, 767–8, 771–2. The same happens with Waldron who, in contrast to Rawls, formulates a critique of strong judicial review that is not 'absolute' or 'unconditional', but depends on certain conditions in 'free and democratic societies': Jeremy Waldron, 'The Core of the Case Against Judicial Review' (2006) 115 *Yale Law Journal* 1348, 1366, footnote 37. Lafont also proceeds in similar terms, stating that 'once it is determined that an institution […] serves a democratic function, this opens up the empirical question regarding how we can ensure that the institution works as intended':

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in normative terms there are institutional designs with greater or lesser deliberative potential than others. This section, then, offers two arguments. According to the first argument, neither Westminster constitutionalism —that is, as far as this article is concerned, a system without judicial review— nor strong constitutionalism offers an adequate institutional framework for deliberative judicial review. According to the second argument, weak constitutionalism, accompanied by mechanisms for facilitating social dialogue, provides institutional frameworks more conducive to deliberative judicial review.

It is worth emphasising at the outset that the aim here is not to infer a single answer to the question of institutional design from deliberative theories of democracy and constitutionalism. Indeed, while deliberative democracy has now become one of the most dominant theories, this has taken place at the democratic level of normative principles; for at the constitutional level, disagreements over institutional arrangements and practices are evident. As Martí puts it, while 'we all share the same ideal: one in which the people self-govern, respecting the rights of all others', 'we disagree about the concrete institutional way to approach, if not achieve, such an ideal'.[67] Similarly, Lafont has stressed that 'when one turns to normative democratic theory for guidance as to how to strengthen democratic institutions or reduce democratic deficits, one encounters sharp disagreement over what the ideal of democracy even requires in the first place, as well as attendant disagreements over the institutional reforms that would be most helpful for bringing current societies closer to that ideal'.[68]

These ideas make clear that those who eventually read this paper might subscribe to the guideline for (section II) and the type of (section III) judicial review proposed above, while remaining convinced about the supposed virtues of strong constitutionalism. However, beyond these disagreements, which may reasonably arise over 'small-scale' institutional details, an obstinate preference for strong constitutionalism entails a misguided analysis of the 'large-scale' institutional question.[69] Indeed, in normative terms, there is a mismatch between defending deliberative democracy and defending strong constitutionalism as the appropriate institutional framework; for strong constitutionalism hinders democratic deliberation. Under strong constitutionalism it is possible to minimise or replace democratic deliberation by imposing the will of the courts. This mismatch is seen in various theories that have conceived judicial review as an 'exemplar of public reason' (Rawls), a 'forum of principles' (Dworkin), an 'argumentative representative institution' (Alexy), or the 'highest authority' (Lafont).[70]

Lafont, *Democracy Without Shortcuts* (n 7) 224, footnote 18. So does Mendes, who formulates 'a pragmatic yet principled case for a deliberative constitutional court': Conrado H Mendes, *Constitutional Courts and Deliberative Democracy* (Oxford University Press, 2013) 5–9.

[67]José Luis Martí, 'Is Constitutional Rigidity the Problem: Democratic Legitimacy and the Last Word' (2014) 27(4) *Ratio Juris* 552 ('Is Constitutional Rigidity the Problem').

[68]Lafont, *Democracy Without Shortcuts* (n 7) 3.

[69]The distinction between 'large-scale' and 'small-scale' institutional designs is due to Adrian Vermeule, *Mechanisms of Democracy: Institutional Design Writ Small* (Oxford University Press, 2007) 1–3.

[70]On this mismatch in Rawls, Dworkin and Alexy, see Ignacio Giuffré, 'Constitucionalismo fuerte y democracia deliberativa: Inconsistencias en Rawls, Dworkin, y Alexy' (2023) 21(5) *International Journal of Constitutional Law* 1273. And on this mismatch in Lafont, see Ignacio Giuffré, 'Deliberative Constitutionalism 'Without Shortcuts': On the Deliberative Potential of Cristina Lafont's Judicial Review

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While such theories have endorsed a deliberative conception of democracy, at the level of constitutionalism they have preferred a strong conception, which implies granting courts a privileged voice over rights. This mismatch is problematic because the normative premises of deliberative democracy are inconsistent with the institutional goals of strong constitutionalism. While deliberative democracy demands inclusive dialogue, strong constitutionalism—based on a mistrust or fear of society and its political representatives—aims to inhibit it. In this sense, Dryzek has said that democratic deliberation cannot be fulfilled in the framework of strong constitutionalism.[71]

Of course, a deliberative conception of democracy is not necessarily incompatible with some element of strong constitutionalism taken 'alone' —for example, the existence of a constitution, constitutional supremacy, constitutional rigidity, judicial primacy, *inter alia*. However, the incompatibility is manifest when, from a holistic perspective, many or all elements of the constitutional system, combined as a whole 'formula', are of a strong type.[72] In that case, as has been argued, the possibilities for inclusive dialogue and reform of the contents of the constitution, as well as of the meaning and scope that a court attributes to them, become improbable and reduced. Indeed, the only alternatives left are a new judicialisation of the issue after the retirement or impeachment of one of its members, a constitutional amendment or a ruling by an international court.[73] In addition, if the constitutionalisation of these contents is carried out by means of a very exhaustive regulation, then moral issues cannot be discussed broadly and inclusively in the ordinary agenda.

The principles of deliberative democracy require much more than these instances offered by strong constitutionalism. Under these conditions, on the one hand, there are no incentives or institutional channels for ongoing dialogue on constitutional issues between the branches of government and society, but only a system of division of powers with channels of agonal exchange and elitist decision-making mechanisms. On the other hand, there are few, if any, institutional avenues for society and public authorities to discuss, monitor and challenge courts' decisions, leading to 'blind deference'[74] to their decisions. As a result, this institutional model cannot fulfil the conditions set by deliberative democracy for decisions to be legitimate and impartial.

However, the premise that strong constitutionalism is not a suitable institutional framework for the purposes of deliberative judicial review does not shift the balance in favour of revitalising the defunct Westminster constitutionalism. Although this model is more respectful of the democratic will of parliament, the authority operates in terms

Theory' (2023) 12(2) *Global Constitutionalism* 215; Ignacio Giuffré 'De la democracia deliberativa al constitucionalismo dialógico' (2023) 55 *Revista Derecho del Estado* 141.

[71] John Dryzek, *Deliberative Democracy and Beyond: Liberals, Critics, Contestations* (Oxford University Press, 2000) 175, also 6, 19, 28.

[72] José Luis Martí, 'Is Constitutional Rigidity the Problem' (n 67) *Ratio Juris* 552, 556.

[73] In addition to the aforementioned ways, it is possible to add the limitation of competence or the subtraction of matters subject to the adjudication of the constitutional court. However, in such cases, by taking away an institution's voice, dialogue becomes more difficult.

[74] In Lafont's view, some level of 'deference' from society to public authorities is inevitable, but the problem arises when such delegation is 'blind', i.e. when it is not accompanied by alternatives of control and contestation in the hands of society against decisions that coerce it and demand obedience: Lafont, *Democracy Without Shortcuts* (n 7) 8.

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of exclusivity, and there are no institutional alternatives conducive to democratic deliberation. In fact, this system has no judicial review of constitutionality, which implies the absence of an additional channel for contributing to the deliberation of rights with the other branches of government and society. Legislative rule of law therefore has certain deliberative deficits that make it unattractive under a deliberative conception of democracy and constitutionalism. In Habermas's words, the 'legitimating force' of a constitutional system cannot be found in a single place or institution, but only in the multiple processes of justification between the different actors of the constitutional system.[75]

Having made explicit the limitations of both constitutional models, it is now time to offer an institutional alternative that is free of such limitations, while enhancing the legitimacy and impartiality of decisions. Weak constitutionalism, inaugurated in some Commonwealth entities –Canada, New Zealand, United Kingdom, Australian Capital Territory, Victoria, Queensland, *inter alia*–, takes the best and avoids the worst of each of the two pre-existing models. This constitutional model allows for inter-institutional dialogue, but accompanied by devices to link such institutions with society and to promote the discussion between citizens, can lead to an inclusive dialogue on rights—without any subjects being 'removed' from the hands of society and its political representatives—while being more conducive to a reciprocal, dynamic and procedural criterion of deliberative activism or deliberative deference (section II).

Weak constitutionalism has the potential to avoid the objections to strong constitutionalism, as well as offering a more conducive institutional framework for the collaborative and deliberative modulation of constitutional issues. In this model, the court is not conceived as the institution in charge of the primary protection of rights, nor as the best guarantee of correctness on constitutional issues. By taking seriously the fact of disagreement on such matters, this constitutional model keeps open the channels of dialogue and collaboration between institutions. According to Hogg and Bushell, '[w]here a judicial decision is open to legislative reversal, modification, or avoidance, then it is meaningful to regard the relationship between the Court and the competent legislative body as a dialogue'.[76] Hence, according to Sathanapally, democratic deliberation fits better with weak constitutionalism, as it tends to have 'the potential to advance the processes of reason-giving that are central to a deliberative democracy, and support the entry of alternative points of view into political decision-making'.[77] As such, 'weak-form review is a promising method of human rights protection—one which supports human rights protection against majorities yet invites representative institutions to engage in principled deliberation on what rights require'.[78]

So if strong constitutionalism provides few institutional channels conducive to democratic deliberation, weak constitutionalism helps to make up for these deficits.

[75]Habermas, *Between Facts* (n 21) 242.

[76]Peter Hogg and Allison Bushell, 'The Charter Dialogue Between Courts and Legislatures' (1997) 35(1) *Osgoode Hall Law Journal* 79.

[77]Aruna Sathanapally, *Beyond Disagreement: Open Remedies in Human Rights Adjudication* (Oxford University Press, 2012) 57, 60.

[78]Ibid 63.

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In this respect, Tushnet has argued that strong judicial review 'does not satisfy the conditions of dialogue', as it 'make[s] dialogue depend on personal decisions by individual judges regarding their understanding of their role'.[79] Moreover, he has insisted that strong constitutionalism undermines the ideal of democratic self-government, as it leaves society with only 'long-term' alternatives to change judicial decisions.[80] In contrast, Tushnet has conceived of weak judicial review as 'better' because it makes 'the possibility of dialogue a structural feature of [its] design',[81] such that it 'has the advantage of creating an institutional framework that allows reasoned deliberation over alternative interpretations of constitutional provisions'.[82] Weak constitutionalism is more consistent with the ideal of democratic self-government, insofar it provides society with simpler, 'short-time' mechanisms for political change.[83] Under these conditions, Tushnet's argument is that if weak-form systems of judicial review 'can be stably sustained', then they may be 'the best institutional mechanism for enforcing all fundamental rights, first-, second-, and third-generation'.[84]

However, weak constitutionalism offers an institutional framework that is more conducive to dialogue but does not necessarily guarantee its development. In this sense, Webber has agreed with Tushnet that weak constitutionalism 'creates' the 'framework' that 'allows' for dialogue, but Webber has added that the 'formal structures of the constitution' do not constitute the dialogue itself. As anticipated (section II), dialogue also depends on a 'culture', 'disposition' or 'commitment' that comes from 'outside' the institutional design.[85] For this reason, Kavanagh has noted that the distinction between weak and strong judicial review is not always consistent with the distinction between dialogic and non-dialogic judicial review.[86] In sum, decision-making based on a reciprocal, dynamic and procedural criterion of deliberative activism or deliberative deference depends not only on institutional issues, but also on the motive and conception that judges have regarding their own activity.

Under these conditions, the relevance of weak constitutionalism is twofold. If judicial review is committed to the deliberative standard of performance (section II) and to a semiprocedural analysis (section III), then a weak constitutional model offers a more suitable institutional platform for its implementation, as such a model is more conducive to deliberation. However, there is no certainty that judges will commit to such a standard, as they may not have an innate orientation towards deliberation, while they may prefer other—even opposing—courses of action. In such cases, a weak

[79]Mark Tushnet, 'Forms of Judicial Review as Expressions of Constitutional Patriotism' (2003) 22(3/4) *Law and Philosophy* 355 ('Forms').

[80]Tushnet, *Weak Courts* (n 15) 22–3, 33–4.

[81]Tushnet, 'Forms' (n 79).

[82]Mark Tushnet, 'Judicial Review of Legislation' in Peter Cane and Mark Tushnet (eds), *The Oxford Handbook of Legal Studies* (Oxford University Press, 2003) 177.

[83]Tushnet, *Weak Courts* (n 15) 22–23, 33–34.

[84]Ibid 228.

[85]Webber, 'The Unfulfilled Potential' (n 22) 446, 455, 457, 459.

[86]Aileen Kavanagh, 'What's so Weak about 'Weak-Form Review'? The case of the UK Human Rights Act 1998' (2015) 13(4) *International Journal of Constitutional Law* 1012.

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constitutional model becomes indispensable.[87] For such a model provides deliberative mechanisms—such as legislative responses to judicial decisions—that do not depend on the courts, but which can be activated by other actors in the constitutional system, even against the judges' own will or theory of their own activity. In short, if deliberation in the strong constitutional model depends exclusively on the will or theory that guides the judges, then deliberation in weak constitutionalism can be promoted through institutional channels, even despite the judges' contrary will or theory.

Thus this institutional framework takes over the motivational problem of judges, that is, the issue raised by Madison concerning how to combine 'personal motives' with 'constitutional means'.[88] Similarly, Rawls has also noted that every political regime raises not only the questions of whether its institutions are just and whether their designs promote their proposed goals, but also the motivational question of 'whether citizens, in view of their likely interests and ends […] can be relied on to comply with just institutions and the rules that apply to them in their various offices and positions'.[89] More specifically, according to Gargarella, the point is the following: since the courts have no natural inclination towards democratic deliberation, it becomes indispensable to *institutionally* push, induce or motivate judges towards such a purpose.[90] My italics are justified here because, in a context where judicial review is unlikely to promote deliberation, an impulse or motivation from the institutional framework becomes necessary, even regardless of the theory offered (section II and section III) and the will or motive of the judges.

Of course, a reciprocal, dynamic and procedural criterion of deliberative activism or deliberative deference does not depend exclusively on the courts—on their motives, conception and institutional design—but also on the other actors of the constitutional system. Indeed, in practice, a strong judicial review can operate either strongly or weakly, while a weak judicial review system can operate weakly, and can either 'escalate' to a strong model or 'degenerate' into a Westminster model.[91] In this regard, Tushnet has noted a certain 'instability' and lamented that weak constitutionalism's promise to qualify objections to judicial review may not be fulfilled in practice,[92] if legislatures 'routinely accede to' or 'routinely ignore' judicial decisions. In such cases, weak judicial review is simply a system of judicial supremacy 'in disguise' in the first case, and of parliamentary supremacy in the second case.[93] This scenario, in short, makes clear that, beyond the courts, it is indispensable that the system's other actors also have not only the appropriate designs, but also motives or theories about their own activity that are in line with deliberative constitutionalism.

[87] In the same line, see also Ron Levy and Kate Ogg's paper in this symposium.

[88] Alexander Hamilton, James Madison and John Jay, *The Federalist* (Harvard University Press, 1974) 256.

[89] John Rawls, *Justice as Fairness: A Restatement* (Harvard University Press, 2001) 136–7. Rawls has also drawn attention to a fourth issue, that of competence, but this is not relevant to the argument of this paper.

[90] Gargarella, *The Law as a Conversation* (n 32) 230-2.

[91] Tushnet, 'New Forms' (n 13) 814; and Tushnet, *Weak Courts* (n 15) 43; Roach, 'Dialogic Judicial Review' (n 30) 75–76.

[92] Tushnet, 'New Forms' (n 13) 815.

[93] Tushnet, *Weak Courts* (n 15) 43, 47.

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This constitutional model, by not being equipped only with attack and defence devices, and by not establishing a final authority, is a promising institutional design approach for what Mendes calls a 'deliberative division of powers'. This interactive system can 'relativise' the idea of the institutional last word through a 'provisional', 'fluid' and 'flexible' decision-making criterion, rather than a 'rigid and static' one.[94] To this end, the specific domain of each public authority should not be definitively settled, but instead 'readjusted' through 'deliberative interaction'. Beyond the unavoidable disputes of forces, failures and uncertainty, this proposal is 'more sensitive' to the force of public reasons[95] and is open to both the ebbs and flows as well as the trial-and-error exercises of the arguments that are offered.[96] In effect, the branches of government do not function as 'counterpowers' in a competition or war, but rather as 'counterarguments' or as reactive institutions with responsibilities for justification.[97] In this framework, the assessment of the legitimacy of decisions must be made in a 'contextual', 'anticipatory', 'volatile' and 'comparative' manner, rather than in an 'abstract' and 'preestablished' way.[98] Under these conditions, the authority that should prevail is the one that 'shows better deliberative performance'. By fostering more and better deliberation, this system offers greater possibilities for better answers, so that it not only confers more legitimacy on decisions, but also has higher epistemic potential.[99]

However, weak constitutionalism is insufficient if it is not complemented by the necessary channels for deliberation between public institutions and society, and among citizens. These additional channels are what provide an extra and necessary step from merely inter-institutional dialogue to inclusive dialogue.[100] In Habermas's words, democratic deliberation requires a 'two-track' institutional platform, connecting the 'institutional public sphere' with the 'social public sphere' in political opinion and will formation.[101] This has been achieved, to a greater or lesser extent, by many recent institutional experiences around the world.[102] Among them, it is worth recalling the aforementioned experiences of the judicial review of lawmaking processes, as well as the judicial exhortations or dialogic and inclusive resolution of structural reform litigation (section III).

[94]Conrado H Mendes, 'Una división de poderes deliberativa: entre el diálogo y la última palabra' in Roberto Gargarella (comp), *Por una justicia dialógica. El Poder Judicial como promotor de la deliberación democrática* (Siglo XXI Editores, 2014) 159, 165, 175–8, 183 ('Una división').

[95]Conrado H Mendes, 'Neither Dialogue nor Last Word: Deliberative Separation of Powers III' (2011) 5(1) *Legisprudence* 37.

[96]Mendes, 'Una división' (n 94) 165.

[97]Ibid 169.

[98]Ibid 176, 177.

[99]Ibid 168, 179–83.

[100]On the different scopes of constitutional deliberation, see Ignacio Giuffré, 'Pushing the Boundaries of Deliberative Constitutionalism. From Judicial Dialogue to Inclusive Dialogue' (2023) 50 *Revus. Journal for Constitutional Theory and Philosophy of Law* 1.

[101]Habermas, *Between Facts* (n 21) 304–8.

[102]On this, see Ignacio Giuffré, 'The Coming of Age of Deliberative Constitutionalism' (2024) 37(2) *Canadian Journal of Law & Jurisprudence* 397.

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In addition to these experiences, it is worth mentioning: public hearings, eg Law 9.868/99 (article 9) and Law 9.882/99 (article 6) in Brazil; amicus curiae, eg the 2007 Rules of Procedure of the Inter-American Court of Human Rights; citizen unconstitutionality actions, eg the Constitution of Colombia (article 24); and prior judicial consultations of indigenous communities, eg the United Nations Declaration on the Rights of Indigenous Peoples (articles 17, 19, 30, 32, 36 and 38), among others. In addition to these institutional experiences, works such as those of Ackerman and Fishkin,[103] Leib,[104] Spector,[105] Ghosh,[106] Zurn,[107] and Colón-Ríos,[108] albeit with some nuances, have proposed multiple democratic and deliberative mechanisms that give juries and deliberative assemblies formed by drawing lots among citizens a central role in forming and transforming political opinion, as well as in the elaboration of ordinary norms, constitutional adjudication and constitutional reform.

V Conclusion

To recapitulate, this paper has argued for a deliberative form of judicial review. That is, according to the first argument, a judicial review that should be guided by democratic deliberation, rather than by the limited standards of judicial deference or activism (section II). Such normative guidance, according to the second argument, calls for a semiprocedural judicial review, rather than one that is limited to analysing substantive or procedural aspects of the legislation in isolation (section III). According to the third argument, the proposed form of judicial review, notwithstanding contextual turns, may operate better in a weak constitutional framework, accompanied by channels for social dialogue, as there will be more institutional incentives aligned with its purposes than in a strong constitutional framework (section IV).

This argumentative itinerary leads us to the conclusion that the proposed form of judicial review respects and contributes to the articulation of rights through deliberation between the branches of government and all potentially affected persons; that is, without legal alienation. Thus deliberative judicial review not only enjoys greater legitimacy and impartiality, but also better guarantees the rights involved in cases submitted to judicial adjudication. This view of judicial review ultimately reaffirms Habermas's idea that between rights and democracy there is no 'paradoxical union of contradictory principles', but rather a relationship of 'co-originality' between the two principles.[109]

[103] Bruce Ackerman and James Fishkin, *Deliberation Day* (Yale University Press, 2004).

[104] Ethan J Leib, *Deliberative Democracy in America: A Proposal for a Popular Branch of Government* (Pennsylvania State University Press, 2004).

[105] Horacio Spector, 'The Right to a Constitutional Jury' (2009) 3(1) *Legisprudence* 111.

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

[107] Zurn, 'Judicial Review' (n 49) *Theoria* 63.

[108] Joel Colón-Ríos, *Weak Constitutionalism. Democratic Legitimacy and the Question of Constituent Power* (Routledge, 2012).

[109] Jürgen Habermas and William Rehg, 'Constitutional Democracy: A Paradoxical Union of Contradictory Principles?' (2001) 29(6) *Political Theory* 766, 780.

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