Deliberative Democracy and the Institutions of Judicial Review

Christopher F. Zurn

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In this book, Christopher F. Zurn shows why a normative theory of deliberative democratic constitutionalism yields the best understanding of the legitimacy of constitutional review. He further argues that this function should be institutionalized in a complex, multilocation structure including not only independent constitutional courts, but also legislative and executive self-review that would enable interbranch constitutional dialogue and constitutional amendment through deliberative civic constitutional forums. Drawing on sustained critical analyses of diverse pluralist and deliberative democratic arguments concerning the legitimacy of judicial review, Zurn concludes that constitutional review is necessary to ensure the procedural requirements for legitimate democratic self-rule through deliberative cooperation. Claiming that pure normative theory is not sufficient to settle issues of institutional design, Zurn draws on empirical and comparative research to propose reformed institutions of constitutional review that encourage the development of fundamental law as an ongoing project of democratic deliberation and decision.

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Acknowledgments

I have been thinking about the ideas in this book for several years. My original interest in the topic of judicial review was sparked by a conversation with Martino Traxler in 1998 about Habermas's approach to constitutional interpretation. As often happens, Martino made what seemed at first to be a rather straightforward objection, one that should be answerable in due course through, perhaps, a few minor adjustments of leading concepts: wouldn't judges using a proceduralist theory of constitutional interpretation need to rely on contextually specific and contested ethical values in order to adjudicate constitutionally specified social and ecological rights, thereby violating their proceduralist mandate? My first approaches to answering this objection were all unsatisfactory and, as time went on, I found myself needing to delve ever more deeply into basic questions about the proper normative conception of constitutional democracy itself, and about how to institutionalize a legitimate practice of constitutional democracy, before I could adequately address issues of how judges should interpret constitutional provisions. Some of the fruits of that thinking were first published in 2002, and this book represents my sustained efforts over the years since to come to terms with those basic normative and institutional questions.[1] Unfortunately, an adequate response to Martino's concerns about adjudicative methods, if there is one, still awaits further work.

I would like to thank many people for helpful comments, conversations, and criticisms of various claims and arguments presented in this book: Amy Allen, Ken Baynes, Jim Bohman, Jean Cohen, Brian Cubbage, Will Dudley,

[1] Christopher F. Zurn, "Deliberative Democracy and Constitutional Review," *Law and Philosophy* 21 (2002). Though this book largely reproduces the normative arguments made there, it introduces a more complex characterization of the distinctions involved in debates about deliberative democracy and constitutionalism (see especially Chapter 3), significantly expands the scope of those normative arguments, and substantially changes the speculations concerning various institutional reform proposals considered there.

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1

Introduction

Is judicial review democratic or antidemocratic, constitutional or anti-constitutional? Should electorally unaccountable judges in a constitutional democracy be able to declare unconstitutional, and so overturn, the laws and decisions made through ordinary democratic political processes? At its most basic, this problem of where to place the powers of constitutional review appears to revolve around fundamental tensions between two of our most important political ideals – constitutionalism and democracy – and between various ways of realizing these ideals in political institutions and practices. If courts perform constitutional review, how can this be squared with democratic ideals? How can the people be sovereign if their direct representatives can't make the laws that the people demand? Alternatively, how can the democratic process be kept fair and regular without constitutional controls on elected politicians? Wouldn't constitutionally unhindered officials attend only to the demands of majority preferences at the expense of the rights of individuals and minorities? Can the distinction between ordinary law and the higher law of the constitution be maintained over time if elected politicians are responsible for both? Can the distinction between making law and applying law be maintained over time if judges do both in their role as expositors of the constitution? Should the constitution be a part of the political process, or an external check on that process? And, finally, who decides: who decides what the scope of constitutional law is, who decides what a constitution means, who decides whether ordinary laws violate the constitution?

One central premise of this book is that such questions are best answered in the light of a philosophically adequate and attractive theory of constitutional democracy, one that can convincingly show how constitutionalism and democracy are not antithetical principles, but rather mutually presuppose each other. Political philosophy, then, plays a crucial role in understanding and justifying the function of constitutional

review in terms of its fundamental role in a well-functioning democracy. But pure normative theory alone is insufficient to settle questions about how best to design institutions to carry out that function. Whether constitutional review is best performed as part of the normal appellate court system (as in the United States), or in independent constitutional courts (as in many European nations), or in more politically accountable branches such as parliaments (as in many British commonwealth nations) – these are questions that require judgments sensitive to the empirical conditions of institutions, politics, and law as we know them, and to the different legal, political, and historical contexts evinced in various constitutional democracies. Thus a second central premise of the book is that an adequate theory of judicial or nonjudicial review – a theory that proposes specific ways to institutionalize the function of constitutional review – needs also to be attentive to the results of legal scholarship and comparative studies of democratic institutions. The types of questions posed here – concerning the legitimacy, institutional location, scope, and adjudicative aims of constitutional review in constitutional democracies – must be addressed, then, through a combination of normative and empirical research: political philosophy, comparative political science, and jurisprudence.

More specifically, this book argues for a theory of constitutional review justified in terms of the function of ensuring the procedural requirements for legitimate democratic self-rule through deliberative cooperation. Proceeding from the premises of deliberative democratic constitutionalism, it claims further that constitutional review is best institutionalized in a complex, multilocation structure including independent constitutional courts, legislative and executive agency self-review panels, and civic constitutional fora. It proposes that such institutions would work best in a constitutional context encouraging the development of fundamental law as an ongoing societal project of democratic deliberation and decision. Recognizing that specific institutions of constitutional review should be tailored to different political and legal systems, it claims that such institutions should, in general, be oriented toward broadening democratic participation, increasing the quality of political deliberation, and ensuring that decision making is reasons-responsive and thereby democratically accountable.

A. AN OLD CHESTNUT IS ACTUALLY TWO

The central issue this book addresses then is the tension commonly felt between democracy and the institution of judicial review. Although there are many ways of formulating exactly what this tension consists in – and, of course, of formulating responses to it – two formulations in the American context stand out as canonical: Alexander Bickel's and

Judge Learned Hand's. I want now to briefly indicate what these two formulations are in order to show that they are not equivalent: they depend on different conceptions of the ideals of democracy, of democratic decision making processes, and of the relationship of judicial review to those ideals, and processes.

1. The "Countermajoritarian Difficulty" with Judicial Review: Bickel

> The root difficulty is that judicial review is a counter-majoritarian force in our system. . . . When the Supreme Court declares unconstitutional a legislative act or the action of an elected executive, it thwarts the will of representatives of the actual people of the here and now; it exercises control, not in behalf of the prevailing majority, but against it. That, without mystical overtones, is what actually happens. . . . The essential reality [is] that judicial review is a deviant institution in the American democracy.[1]

According to Bickel's formulation, democracy is essentially rule by current majorities, and the American political system is fundamentally a democratic one. Furthermore, the current majority whose will is supposed to rule are the current citizens of the United States, and that will is most manifest and forceful as reflected in the will of the directly elected representatives of the people: elected representatives, the elected president, and all those who are directly authorized by these elected representatives. Because national judges in the United States are not elected but appointed, and once appointed serve for life terms, there is no direct electoral control over them, and precious little indirect control. When a court strikes down a legislative act or executive action as unconstitutional then, it acts in a countermajoritarian, and therefore antidemocratic, way. Thus, "judicial review runs so fundamentally counter to democratic theory . . . in a society which in all other respects rests on that theory."[2] Of course, Bickel does have a series of arguments to show that even if countermajoritarian, judicial review is nevertheless an overall good in the American political system (I discuss these arguments in the next chapter), but what I am concerned with here is the basic normative conception of democracy that underlies the countermajoritarian formulation of the objection. In short, democracy is taken to be a preeminent value of politics; the ideal of democracy is rule by present majority will; that will is effected through the democratic process of electing representatives who in turn pass laws and administer

[1] Alexander M. Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics*, second ed. (New Haven, CT: Yale University Press, 1986), 16–18.
[2] Ibid., 23.

policies; judicial review of those laws and policies is countermajoritarian and so undemocratic.

2. The Paternalist Objection to Judicial Review: Hand

Although Bickel quotes approvingly Judge Learned Hand's objection to judicial review in his discussion of the countermajoritarian difficulty, I believe that the latter's concerns are of quite a different kind than Bickel's:

> For myself it would be most irksome to be ruled by a bevy of Platonic Guardians, even if I knew how to choose them, which I assuredly do not. If they were in charge, I should miss the stimulus of living in a society where I have, at least theoretically, some part in the direction of public affairs. Of course I know how illusory would be the belief that my vote determined anything; but nevertheless when I go to the polls I have a satisfaction in the sense that we are all engaged in a common venture.[3]

To begin with, the rhetorical reference to Platonic Guardians conveys a quite specific set of antithetical attitudes towards practices of paternalism. An individual is treated paternalistically when she is forced to do something against her own will and where that something is asserted or justified as being in her own best, real, or true interests by another who claims to know better what those interests are than she herself knows. Paternalism is opposed to self-rule, to self-government, to autonomy. It is important to note here that the problem is not so much the coercion involved, or even the coercion against one's present will – although coercion is a necessary part of paternalism – but, rather, the fact that the person controlled has no significant part in the decision-making processes of the guardian even though the matter centrally concerns her own interests.

When the idea is extended into the political realm of the government of a collectivity, paternalism is opposed to democratic self-government. The individual treated paternalistically becomes the collective group of democratic citizens, who are forced to do something against their own manifest will and where that something is asserted or justified as being in their own best, real, or true interests by others who know better what those interests are than they themselves do. Clearly with the change in scale from individual to collectivity, the decision-making processes involved are more complex socially and institutionally, and it may be harder to say what exactly counts as manifesting the will of the citizenry. Yet Hand's formulation gives us crucial criteria here: democratic processes

[3] Learned Hand, *The Bill of Rights* (Cambridge, MA: Harvard University Press, 1958), 73–74.

must be those in which each citizen has an inexpungeable role in the mutual determination of collective decisions and each must be able to understand her or himself as part of a common venture of self-rule. The issue is not the impact of one's vote on the outcome – in large collectivities like modern nation-states individuals' electoral impact may well be miniscule – but, rather, the degree to which the decision-making processes accord individuals the capacity to understand themselves as collective authors of the law that each is subject to. And that self-understanding is accorded precisely where each has a role in mutual and collective processes of practical reasoning together in order to decide the terms of their common political life.[4] Finally, insofar as the decision-making processes of courts exercising constitutional review do not allow citizens to understand themselves as involved in a common venture of self-government with their fellow citizens – appointed, life-tenured judges using legal methods for decision do not generally consider the people's own opinions about where their best, real, or true interests lie – those processes are objectionable because paternalistic. On this formulation, then, the ideal of democracy concerns the self-government of a collectivity; democratic processes must somehow allow each citizen the equal satisfaction of being engaged in a common venture of self-government with others; judicial review, as it doesn't allow this, is paternalistic and so undemocratic.

We have then two quite different formulations of the old chestnut concerning the tension between democracy and judicial review, each drawing on different conceptions of the ideals of democracy, their proper realization in democratic processes, and the relation of those ideals and processes to the institution of judicial review. Democracy as majority rule versus democracy as self-government; representative reflection of the desires of the majority versus facilitation of consociation among citizens on terms arising from the mutual exercise of practical reason; countermajoritarianism versus paternalism. In short, Bickel's objection to judicial review rests on a vision of democracy as majoritarian aggregation; Hand's on a vision of democracy as deliberative consociation. As this book moves in Chapter 2 through the traditional defenses of judicial review and into Chapters 3 to 7 through more recent defenses of and attacks on judicial review, it will be moving

[4] For those who think that this reads too much into Hand's phrases about "some part in the direction of public affairs" and "a collective venture" I would refer them to the parable of democracy he puts forward at Learned Hand, "Democracy: Its Presumptions and Realities," in *The Spirit of Liberty: Papers and Addresses of Learned Hand*, ed. Irving Dilliard (New York: Alfred A. Knopf, 1960 [1932]), 99–100, in which explicit references are made to mutual reckoning, listening to the concerns of others, and collectively consociating through the pooling of wishes. Note also that Hand's parable connects paternalistic guardianship to infantilization.

from the terrain of aggregative to deliberative conceptions of the meaning, import, and institutional bases of democracy.

3. Reopening the Chestnuts

The set of problems revolving around the relationship between judicial review and democracy make up a well-worn *topos* – in jurisprudence especially, but also in allied fields of political philosophy, political science, and comparative law. One might wonder what is to be gained from returning to that ground. There are three broad types of reasons for the thought that it is worthwhile to take up anew the questions about how to institutionalize constitutional review. First, many treatments of judicial review tacitly presuppose particular normative ideals of democracy and constitutionalism, without fully noting how much argumentative weight these particular ideals carry. When, for example, some jurisprudential treatments argue for a specific method for interpreting constitutional provisions, crucial claims and arguments often turn on foundational normative premises about how to understand constitutional democracy, rather than strictly jurisprudential concerns. Often these implicit assumptions are in fact embedded within the nationalist limitations of the theory. So, for example, although American legal academics have taken a lead role in the revival of thought about the legitimacy, scope, and methods of judicial review, they have often simply assumed that the arrangements that give the Supreme Court of the United States supreme authority to carry out the function of constitutional review are increasingly universally shared arrangements, or are at least universally justifiable. They then proceed to develop theories with universal intent that in fact are only appropriate to the contingent historical legal and political context of the United States. The sketches of the ideals of democracy and constitutionalism employed in some recent jurisprudential positions in the next section of this chapter are intended to indicate the argumentative pathologies that arise when specific normative conceptions of democracy and constitutionalism are instrumentalized to the need to justify United States arrangements for constitutional review as the best of all possible arrangements.

Second, a central claim of the book is that the complex of issues surrounding the questions concerning how to institutionalize constitutional review look quite different once one sees them from the perspective of new developments in political philosophy over the last generation. On the one hand, deliberative theories of democracy have arisen that intend to supplant older models of competitive elitism or corporative pluralism. Deliberative theories stress the normative significance, and the empirical relevance, of discussion and debate for generating convincing public reasons for collective decisions and state action. Rather than viewing

democracy as the simple aggregation of a majority's private preferences, deliberative democrats tend to see it as a way of structuring wide cooperative participation by citizens in processes of opinion formation and decision. They thereby provide, to my mind, a more compelling picture of the ideals and actual practices of democracy.

On the other hand, constitutional theory has moved away from natural law inspired accounts – those stressing the constitutional protection of a substantive list of metaphysically grounded prepolitical individual rights – and turned instead to accounts of constitutionalism as the procedural structuring of political processes, where constitutional rights are seen as one part of the procedural requirements that warrant the legitimacy of democratic decisions. I argue that a deliberative conception of democracy and a proceduralist conception of constitutionalism belong together, and that this combination – deliberative democratic constitutionalism – is, in comparison with more traditional models, both more attractive normatively and more compelling empirically in modern societies marked by deep and apparently intractable moral disagreements.

Chapter 2 schematically presents variations on the traditional model of constitutional democracy employed in the United States – what I call majoritarian democracy constrained by minoritarian constitutionalism – and indicates some of the normative and empirical deficiencies of the model, deficiencies that motivate a move beyond it. Chapters 3 through 7 then present a series of competing conceptions of deliberative democracy and constitutionalism, using the specific arguments presented by each conception for and against judicial review as a way of focusing attention on the interactions between normative ideals and considerations about appropriate political institutions. This examination supports the conception of deliberative democratic constitutionalism I put forward by drawing on the insights, and avoiding the deficiencies, of the various competing conceptions.

Third, I argue that the resulting conception can helpfully guide and inspire the design of responsive and competent institutions for realizing the function of constitutional review. Political philosophy alone, however, is insufficient to carrying out such design tasks: we need rather to combine the insights of normative theory with productive directions in recent empirical, comparative, and legal scholarship. In a sense, the result of the arguments in Chapters 3 through 7 is a robust conception of deliberative democratic constitutionalism that can provide a strong justification for the *function* of constitutional review, but not for any particular way of *institutionalizing* that function. It is the task of Chapters 8 and 9, then, to try to mediate between the ideal and the real, between norm and fact, by proposing a series of reforms in current institutions that carry out constitutional review. Only by attending to the burgeoning fields of scholarship focused on courts, political institutions, constitutional design, and

democratic deliberation can one properly support particular institutional designs. The relationship between normative and institutional issues is not a one way street however. Not only do normative ideals help shape appropriate institutional designs, but the differences in performance manifested by various arrangements in the world of politics, law, and institutions as we know it in turn help to specify the determinate content of, and thereby support the cogency of, the normative ideals – that is, the ideals of deliberative democratic constitutionalism. In the worlds of politics and law, good ideals and institutions are not drawn from some conceptual heaven, but are the determinate results of historical learning processes and reflections on such.[5]

B. PATHOLOGIES OF *AD HOC* TRIANGULATION

Part of the motivation for reopening the old chestnuts is a certain dissatisfaction with the normative conceptions of democracy and constitutionalism that underlie much of the most interesting recent work in American constitutional jurisprudence. Many of the impressive insights in this scholarship – concerning, for instance, the historical transformations in American judicial doctrines of constitutional construction, what current doctrinal innovations could plausibly carry forward worthy political ideals while fitting together with existing doctrinal touchstones, what kinds of structural and institutional innovations could improve democracy in the United States, what interpretive methodologies judges should adopt, the proper role of the Supreme Court in relation to other branches and subnational regional governments, and so on – are simultaneously accompanied by political philosophical conceptions that distort democracy or contort constitutionalism. The speculative thesis I explore here briefly is that these distortions and contortions are, in an important sense, determined by the argumentative context faced by American legal academics. The idea is that such scholarship must triangulate between three types of argumentative constraints: the normative ideals of constitutional democracy, the facts of how constitutional review is institutionalized in the United States, and the relations between firmament and favorite Supreme Court precedents. Because some of these constraints are more constraining than others – in particular, as the ideals of democratic

[5] Said differently, the best one could hope for methodologically is a merely analytic separation between the justification of a normative political scheme and the institutional designs intended to put that scheme into practice, as the two are dialectically interconnected. For, in actual fact, our considerations of what general normative schema is most justifiable is formed against a background sense of what kinds of institutional realizations have and have not been successful over time and in various contexts. Reciprocally, institutional innovations can change our sense of what the real meaning and import of the various general principles and values are that are normatively schematized.

constitutionalism are most open to contestation – the variable elements end up getting instrumentalized to the more fixed constraints. To make this speculation clear, I first explain briefly what the three types of constraints are, before turning to some selective examples of the argumentative pathologies that arise from them.

1. Three Argumentative Constraints

The first constraint involves the need to refer favorably to the ideals of democracy, constitutionalism, and constitutional democracy, and to refer to them as preeminent or superordinate political ideals. In modern Western societies these are powerful ideals, and in the United States they play a particularly salient role in citizens' sense of their collective identity, as the collective members of a particular nation-state. In United States legal contexts – not only in the legal academy but also in political and judicial arenas – they have an especially pronounced salience. To put it another way, it would be seriously beyond the pale for a legal elite – whether a judge, a politician, or a law professor – to put forward a substantive claim or theory that outright rejects democracy, constitutionalism, or constitutional democracy as ideals government ought to live up to. Changes in the intellectual milieu also have intensified attention to the ideals of democracy, in part because of the demise of a felt consensus on substantive principles of justice tied to the tradition of natural law, and in part because of the rise of attacks on the American judiciary – as an antidemocratic imperium – in the wake of tumultuous social changes and legal adaptations to them after the end of World War II. However, because these abstract political ideals can be considered essentially contested concepts, they provide a great deal of maneuvering room in jurisprudential argumentation.

The next constraint – what might be called institutional panglossianism – is, by contrast, much more fixed. The idea here is that the established institutions and practices of the United States political system are to be accepted as, in the main, unchangeable social facts, and that any comprehensive constitutional jurisprudence should be able to justify their main structures and features as being close to "the best, in this the best of all possible worlds." In the context of constitutional law, this tendency is particularly pronounced with respect to the peculiar American system for the institutionalization of constitutional review. A theory of constitutional jurisprudence that seriously doubted the basic legitimacy, for instance, of the role of the Supreme Court of the United States in interpreting the constitution or in producing a body of controlling constitutional doctrine through the development of case law, would be a theory destined to have little impact where it matters for the legal academy: both among other academics and among judges engaged in that precedential development.

Surely theories are allowed to raises questions around the edges – perhaps concerning different ways of amending the constitution or ways of changing ordinary political structures or jurisprudential strategies in order to alter the balance of power between courts and other political organs – but the basic legitimacy of the Court and a great deal of its actual work product must be accepted as facts of American political life, and as unavoidable facts for constitutional jurisprudence.[6] To be relevant and influential, a theory must accept these facts; to be comprehensive it must further offer some way of justifying it from the point of view of the theory's preferred normative conceptions. Michael Perry nicely encapsulates the fact-value amalgam of institutional panglossianism, putting the point explicitly as a question of patriotism:

> Judicial review has been a bedrock feature of our constitutional order almost since the beginning of our country's history. Nor is it a live question, for us [the people of the United States now living], whether judicial review is, all things considered, a good idea. It would be startling, to say the least, were we Americans to turn skeptical about the idea of judicial review – an American-born and -bred idea that, in the twentieth century, has been increasingly influential throughout the world. For us, the live questions about judicial review are about how the power of judicial review should be exercised.[7]

[6] One might object here by pointing to a number of recent works in jurisprudence that facially challenge the legitimacy of judicial review as currently practiced in the United States – two of the most prominent are Larry D. Kramer, *The People Themselves: Popular Constitutionalism and Judicial Review* (New York: Oxford University Press, 2004), and Mark Tushnet, *Taking the Constitution away from the Courts* (Princeton, NJ: Princeton University Press, 1999). I am not claiming that such positions are literally an intellectual impossibility, or that they have not actually been defended. The claim is rather that, to the extent that a constitutional jurisprudence seriously questions current American institutions and practices of judicial review, it risks becoming irrelevant and uninfluential. Clearly this is a predominately sociological claim that I cannot empirically support here. Indirect evidence is found in the rhetoric of the opening lines of a review of Kramer's book in a preeminent legal journal: "Larry Kramer has written an awesome book, and we mean 'awesome' in its original and now archaic sense. *The People Themselves* is a book with the capacity to inspire dread and make the blood run cold. Kramer takes the theory *du jour*, popular constitutionalism (or popular sovereignty), and pushes its central normative commitments to their limits. *The People Themselves* is a book that says 'boo' to the ultimate constitutional authority of the courts and 'hooray' to a populist tradition that empowers Presidents to act as 'Tribunes of the People' and has even included constitutional interpretation by mob," Larry Alexander and Lawrence B. Solum, "Popular? Constitutionalism? A Book Review of *the People Themselves* by Larry D. Kramer," *Harvard Law Review* 118, no. 5 (2005): 1594.

[7] Michael J. Perry, "What Is 'the Constitution'? (and Other Fundamental Questions)," in *Constitutionalism: Philosophical Foundations*, ed. Larry Alexander (New York: Cambridge University Press, 1998), 120.

The basic institutional arrangement of constitutional review is, then, not something up for grabs here, no matter what one's preferred conceptions of political ideals are. After all, everyone is copying our arrangements, so they must be the best possible.[8] The main issue is, rather, to develop a theory of constitutional interpretation that will serve those ideals within the given institutional order.

This brings me finally to the third constraint: the sorting of Supreme Court cases into firmaments and favorites. Given that theories of constitutional jurisprudence are oriented mainly toward explicating and justifying a particular mode of constitutional interpretation, each theory will have to work from and incorporate two lists of cases. On the one hand, there is the widely accepted list of firmament cases: those decisions that are acknowledged in the legal community as unimpeachably correct or erroneous. *Marbury, McCulloch*, and *Brown* are all firmament cases correctly decided; *Dred Scott, Plessy*, and *Lochner* are all firmament examples of cases wrongly decided.[9] Firmament cases are ones that a jurisprudential theory must be able to explain and justify as rightly or wrongly decided. A theory goes beyond the pale when it entails the endorsement of an erroneous firmament or the rejection of correct firmament. The list of favorite cases, on the other hand – comprising positive and negative judgments on the outcomes of select nonfirmament cases – is specific to the particular theory and constitutes the central core around which the originality of the account of constitutional interpretation is built. The idea here is to illuminate in a new way areas of settled constitutional precedent in a manner that can normatively guide judicial

[8] The claim that everyone is copying United States judicial review is empirically false at relevant levels of specificity: most constitutional democracies that have some form of judicial review have not arranged it on the model of the United States, many constitutional democracies have systems of constitutional review that include nonjudicial branches in the process, and many constitutional democracies have no formally structured procedures for judicial review. Investigating some of this diversity becomes essential in Chapters 8 and 9 when I turn to the questions of institutional design. Before then, it is worth keeping in mind Railton's observation: "There is an intolerable degree of parochialism in explanations of the survival and growth of liberal democracy in the United States that place great credit in the Constitution, the Supreme Court, the two-party system, or 'the genius of American politics,' while ignoring that other nations have made similar progress though lacking these features," Peter Railton, "Judicial Review, Elites, and Liberal Democracy," in *Liberal Democracy*, ed. J. Roland Pennock and John W. Chapman, *Nomos XXV* (New York: New York University Press, 1983), 167.

[9] *Brown v. Board of Education*, 347 U.S. 483 (1954), *Dred Scott v. Sandford*, 60 U.S. 393 (1857), *Lochner v. New York*, 198 U.S. 45 (1905), *Marbury v. Madison*, 5 U.S. 137 (1803), *McCulloch v. Maryland*, 17 U.S. 316 (1819), *Plessy v. Ferguson*, 163 U.S. 537 (1895). Obviously the list of firmament cases changes over longer stretches of time: *Plessy* was a firmament correct case before being overruled by *Brown*; moving *Lochner* onto the correct list has very recently become a possibility, at least among some legal academics if not the courts.

decisions in the future.[10] These two lists of cases then are the building blocks around which different judicial methodologies are built and justified: originalism, textualism, structuralism, minimalism, neutralism, pragmatism, proceduralism, interpretivism, rationalism, and so on.

Although the articulation and justification of an interpretive methodology against rival versions is possibly the central task of American constitutional jurisprudence, I will not be frontally addressing those debates here, either in this chapter or throughout the book. My interest is squarely focused on the questions of the relationship between normative conceptions of constitutional democracy and the institutional design of constitutional review. From this latter point of view, it is important to note that much of the debate about interpretive methods has centered on how best to relieve the tensions felt between democracy and the United States institutions and practices of judicial review. The strategy then is to square actual judicial practices with the ideals of democracy and constitutionalism. The main reason I do not treat these interpretive debates is that, inferentially, they put the cart before the horse, as it were. If the concern is about the legitimacy of a judicial institutionalization of the function of constitutional review, then a preferred conception of how judges should interpret a constitution cannot supply reasons for or against the legitimacy of judicial review. If we do not assume that judicial review is a fact of life – if in fact the very question is whether we should accept or reject this particular institutional structure – then a claim that one judicial methodology is more democratic than another cannot answer to concerns about the democratic legitimacy of the institution in the first place. Perry's "live questions ... about how the power of judicial review should be exercised" may be the central ones given the constraints of institutional panglossianism, but answers to those 'live questions' cannot be used to justify that panglossianism. Answering the democratic criticism of the institution of judicial review with a method for judicial interpretation simply begs the question at issue.

[10] Ely adds an important argumentative constraint on jurisprudence that I have not stressed here: the general academic requirement for an "original contribution to scholarship." "Law teachers are caught in something of a whipsaw here, in that academia generally rewards originality, whereas the law generally rewards lack of originality – that is, the existence of precedent. The tension thus created probably helps account for the common scholarly slalom in which the author's theory is said to be immanent in a series of decisions, though no prior academic commentator has even come close to apprehending it," John Hart Ely, "Another Such Victory: Constitutional Theory and Practice in a World Where Courts Are No Different from Legislatures," *Virginia Law Review* 77 (1991): footnote 55, 583.

2. Distorting Democracy

One *ad hoc* strategy for justifying American-style judicial review then – recommending a democratic mode of interpretation to the courts – begs the question at issue. Another *ad hoc* strategy is more promising, however: that of employing a persuasive redefinition of democracy. The idea here is to accept U.S. judicial review as it is, and exploit the more malleable argumentative constraints of the normative ideals of democracy and constitutionalism in order to show that, despite appearances, judicial review is not a "deviant institution in the American democracy" as Bickel claims. Here the inferential direction is more cogent: explicate and defend the most compelling account of the ideals of constitutional democracy, show how those ideals can be best realized in a particular set of political institutions and structures, and conclude that U.S. judicial review sufficiently approximates those justified institutions and structures.

There is then nothing inferentially wrong with this strategy – in fact it is the same basic strategy employed in this book. The proof, however, is in the pudding: namely, in the degrees to which the conception of constitutional democracy proffered is cogent and compelling, to which that conception convincingly supports proposed institutional designs, and to which United States institutions do or don't accord with the preferred institutions for constitutional review. If argumentative pathologies arise here, they are caused by the particular character of American institutions. For if we accept the argumentative constraint of institutional panglossianism, then the conclusion of the argument is predetermined, and the premises must be instrumentalized to that conclusion. If in fact one is skeptical, like Bickel and Hand, about the extent to which judicial review can actually be considered a democratic institution, then one should expect distortions in the ideals of democracy and constitutionalism that the theory uses to justify its particular institutionalization in a specific national political system. In this and the next section I want to sketch the underlying ideals of democracy and constitutionalism found in some American constitutional jurisprudence as a way of supporting my speculative thesis that argumentative pathologies arise from the particular argumentative constraints. It is important to stress that I will be largely ignoring much of what is most valuable and interesting in this work – the advice given to United States judges – in order to focus on the question of the legitimacy of judicial review. I should stress further that these are somewhat polemical sketches, intended mostly to motivate the move beyond the argumentative constraints of nation-state specific jurisprudence.

The most straightforward instrumentalization of democratic ideals to the justification of American judicial review is to be found where democracy is simply redefined as equivalent to the extant American

judicial system. Consider, for example, one articulation of what it would mean to have a "democratic" form of constitutionalism:

> Modern constitutionalism in the western democracies has generally involved the idea of a civil society organized and governed on the basis of a written body of "constitutional" law. A "democratic" constitution embodies a conception of the fundamental rights and obligations of citizens and establishes a judicial process by which rights claims may be litigated. The function of a judiciary is to interpret the constitution and to authorize the enforcement of its decisions. Pragmatically, it seeks to strike a "delicate balance" between the rights and freedoms of "the governed" and the exigencies of effective government.[11]

According to this formulation, the difference between constitutionalism as such and *democratic* constitutionalism is that only in the latter are individuals' fundamental rights guaranteed, and guaranteed by an independent judiciary. It is hard to see exactly what is specifically democratic about such a practice of constitutionalism, at least on a minimal understanding of democracy. For democracy seems to have something to do with the direction of governmental decisions by citizens, and perhaps could be capaciously defined as a form of government in which all citizens have some significantly equal opportunities to influence, in some way or another, the actions of government. Perhaps the formulation above would be better rewritten in lines with the classical understanding of liberal political arrangements: "a 'liberal' constitution embodies ... " Then of course judicial review would be justified as liberty protecting, but this does little to still democratic skepticism of the institution.

Chemerinsky provides a much more frank acknowledgment of the bald strategy of redefining democracy to accord with American judicial review:

> To clarify analysis and arguments [in a "defense of judicial activism"], "democracy" should be redefined. Analytically, altering the definition is unnecessary.... However, democracy is an incredibly powerful term in this society.... In essence, there are two choices: abandon the term democracy as the major premise in analysis or redefine it to portray accurately the nature of government embodied in the Constitution [of the United States]. Because the former is improbable, the latter is essential. Altering the definition of democracy has important implications in determining a role for the Supreme Court and ascertaining the proper approach to judicial review.[12]

[11] Alan S. Rosenbaum, "Introduction," in *Constitutionalism: The Philosophical Dimension*, ed. Alan S. Rosenbaum (New York: Greenwood Press, 1988), 4.

[12] Erwin Chemerinsky, "The Supreme Court, 1988 Term – Foreword: The Vanishing Constitution," *Harvard Law Review* 103 (1989): 76.

Once democracy has been redefined to accord with the realities of one particular nation-state's constitution and its historically particular governmental institutions, then one can get past the pesky problem of institutional legitimacy and on to the real tasks of recommending to the Court preferred modes of constitutional interpretation.[13] Alleviate the democratic worry about judicial review rhetorically by simply calling what we happen to do around here full democracy, and move on to the "live questions."

The bald redefinition strategy then, although admirably frank, will do little to overcome the democratic objections to judicial review. A different approach might be termed the denigration strategy.[14] Here democracy is portrayed in such an unattractive light that, although one may admit that judicial review conflicts with democracy, it doesn't amount to such a worry since no one could really support democracy in the first place. I think we can espy this strategy, ironically, in one of the most virulent attackers of the work product of the Supreme Court of the United States as a form of antidemocratic despotism. Consider Bork's radically anticognitivist account of constitutional democracy. The key phrase throughout is "value choices" and the major issue of constitutional democracy is whose value choices are to be authoritative and in what areas of governmental decision. According to Bork, the American model of constitutional democracy "assumes that in wide areas of life majorities are entitled to rule for no better reason that they are majorities. We need not pause here to examine the philosophical underpinnings of that assumption since it is a 'given' in our society."[15] In other areas of life, however, "value choices are attributed to the Founding Fathers"[16] and these are the particular areas of control placed beyond the value choices of present majorities. Judicial review, then, should be as far as possible exercised to implement the actual value choices made by the founding fathers. Any judge that goes

[13] To be sure, Chemerinsky's overall strategy is somewhat more complex than portrayed here. He proposes, on the one hand, to attend only to the countermajoritarian objection to judicial review and, on the other, to "extract" the major normative ideals of the American system from the Constitution and claim that democracy is not central to that system. The idea is then that the U.S. Constitution is the definition of normative and institutional rightness and, although it is rightly undemocratic, jurisprudes should throw a rhetorical bone to those who want it to be.

[14] Waldron has consistently attacked this denigration strategy, in particular by considering the asymmetries in jurisprudential attitudes towards the comparative competence and work product of legislatures and judiciaries, celebratory in the one case and fully skeptical in the other. Jeremy Waldron, *Law and Disagreement* (New York: Oxford University Press, 1999). I consider in more detail Waldron's arguments against judicial review in Chapters 4 and 5.

[15] Robert H. Bork, "Neutral Principles and Some First Amendment Problems," *Indiana Law Journal* 47 (1971): 2–3.

[16] Ibid.: 4.

beyond those value choices is imposing her own value choices on the majority, and is thereby illegitimately exercising power. To the objection that a judge – or for that matter any other person – might be able to give a convincing reason or justification for her value choices, Bork's repeated response is clear: there are only facts about actual decisions by persons, and none of these decisions have any cognitive content:

> There is no principled way to decide that one man's gratifications are more deserving of respect than another's or that one form of gratification is more worthy than another. . . . Equality of human gratifications, where the document does not impose a hierarchy is an essential part of constitutional doctrine. . . . Courts must accept any value choice the legislature makes unless it clearly runs contrary to a choice made in the framing of the Constitution.[17]

I do not intend here to enter into meta-ethical considerations about emotivism, subjectivism, decisionism or other radically skeptical forms of noncognitivism, some combination of which are clearly playing the leading roles in Bork's arguments. For those so skeptically inclined, this book is not for you. I do however want to point out the denigration strategy involved here. If democracy is nothing more than the satisfaction of the unvarnished subjective desires for gratifications of contingent present majorities, and other past supermajorities have made value choices (according to their own subjective gratification preferences) to put certain gratifications out of the reach of future gratification-seeking majorities, then a system of judicial review is unobjectionable from the point of view of democracy because . . . well, democracy is basically worthless.[18] Why exactly anyone would want to live under either a democratic system of unreasoned majoritarian decisionism or a constitutional system of unreasoned supermajoritarian decisionism goes wholly unexplained, as does any thought about how or why the exercise of governmental coercion in the light of those facts of "value choice" could be seen as legitimate by citizens and subjects. Nevertheless, on this wholly desiccated and hollow "conception" of constitutional democracy, there can be no democratic objection to judicial review (properly performed of

[17] Ibid.: 10–11.

[18] Although I said I would avoid meta-ethical considerations, one should stop to wonder exactly what moral or general normative grounds Bork could invoke to support his central jurisprudential claim in the article: namely, that judges *should* adopt a *principled* manner of decision making with respect to the constitution. As Apel would put it, this simultaneous denial of the justifiability of any normative recommendations and assertion of particular normative recommendations commits the fallacy of a "performative self-contradiction," Karl-Otto Apel, "The a Priori of the Communication Community and the Foundations of Ethics," in *Towards a Transformation of Philosophy* (London: Routledge & Kegan Paul, 1980).

course), since objections involve reasons and in the realm of value choices there simply are no convincing reasons of any sort.

A much more typical denigration strategy does not start with extreme normative skepticism but, rather, attempts to explain the worth and attractiveness of constitutional and democratic ideals by showing how they are carried out in practice and embodied in actual American political institutions. Because the central argumentative move is to demonstrate the gap between political ideals and their actual realization, it is perhaps better to call it a deflationary strategy. In particular here, a robust conception of democracy is counterposed to the actual workings of representative institutions in the United States and, in the light of their failure to live up to the ideals of democracy, judicial review is justified as better fulfilling those ideals. The variations here are numerous, and I will be investigating many of them throughout Chapters 4 through 7.

One good place to start is Ronald Dworkin's conception of democracy as that system of government that gets the right answers according to substantive criteria of equality amongst a nation's members. His conception of democracy:

> *denies* that it is a defining goal of democracy that collective decisions always or normally be those that a majority or plurality of citizens would favor if fully informed and rational. . . . Democracy means government subject to conditions – we might call these the "democratic" conditions – of equal status for all citizens. When majoritarian institutions provide and respect the democratic conditions, then the verdicts of these institutions should be accepted by everyone *for that reason*. But when they do not, or when their provision or respect is defective, there can be no objection, in the name of democracy, to procedures that protect and respect them better.[19]

Because I will deal with Dworkin's arguments at greater length in Chapter 4, I wish only to note here how the deflationary strategy will work given this robust conception of democracy. In short, actual electorally accountable political institutions, such as legislatures and executives, will be shown to be deficient in the extent to which they support the democratic conditions of equal status. So the institutional design question becomes: what institutions would best ensure these equality conditions? By definition, any institution – no matter how its decision-making processes are structured and no matter how or in what ways it is or is not responsive to the demos – that best secures equal status will count as democratic. For Dworkin the special qualities of the judiciary for reasoning according to principle will then provide a way of reconciling

[19] Ronald Dworkin, *Freedom's Law: The Moral Reading of the American Constitution* (Cambridge, MA: Harvard University Press, 1996), 17, emphases added.

judicial review with democracy. For there could be no democratic objection even to rule by actual Platonic guardians, if in fact those guardians better secured the substantive conditions of democracy than could those institutions more traditionally associated with democratic politics. Because democracy requires getting the right answers on fundamental questions, any political institutions that do so are by (re)definition democratic.

A somewhat different deflationary strategy focuses not upon judges' superior capacity for moral reasoning per se, but rather on the special suitability of the language of judicial opinions for exemplifying democratic conversations about the basic structures of society. Chapter 6 looks at three different variations on this theme. One variation put forward by Rawls starts with an account of the ideals of democracy in terms of the need for citizens to find a specifically political language that is not partial to any of the competing ethical worldviews that different citizens find compelling and motivating.[20] Democratic citizens should then adhere only to the limits of this political language when deliberating about and deciding upon the fundamental terms of their political consociation.

> In a democratic society public reason is the reason of equal citizens who, as a collective body, exercise final political and coercive power over one another in enacting laws and in amending their constitution. . . . The limits imposed by public reason do not apply to all political questions but only those involving what we may call ''constitutional essentials'' and questions of basic justice.[21]

[20] One might object here that Rawls is a poor example to use in support of my general thesis about the argumentative constraints faced by United States jurisprudes – after all, he is a political philosopher. Three brief comments are in order. First, as I explain in Chapter 6, Rawls does not take himself to be engaged in institutional design, and his comments about the United States Supreme Court are intended to be illustrative of philosophical points, not a justification for the claim that judicial review is an indispensable institution. Second, however, Rawls's theory of democracy, such as it is, is almost entirely carried by his discussion of public reason, and he consistently thinks of public reason as the reason of judges. This suggests that he takes democracy as an ideal that must be incorporated into his theory, and that he has a way of making that incorporation fully consistent with the actual institutions of the American political system as given, including judicial review. (It is notable here that Rawls's discussion of judicial review quickly moves from abstract considerations concerning ''a constitutional regime with judicial review'' to a more parochial set of ''remarks on the Supreme Court'' John Rawls, *Political Liberalism*, paperback ed. [New York: Columbia University Press, 1996], 231 and 40.) Finally, Rawls's justificatory methodology of reflective equilibrium stresses the need for normative principles to be in line with our settled convictions, and our settled convictions will include settled ideas about the worth of specific political institutions (this latter point is made explicit in the response to Habermas: Rawls, *Political Liberalism*, 381). As citizens of the United States, then, it would appear that the normative principles of the theory of political liberalism are methodologically required to come into line with at least the major features of our parochial political institutions.

[21] Rawls, *Political Liberalism*, 214.

The account of "public reason" as the special language of democratic consociation – a language denuded of references to particular comprehensive doctrines and relying only on the special argot of the overlapping consensus – combined with the claim that the Supreme Court is the only institution that always properly speaks in the democratic argot then obviates objections to judicial review from democracy. "In a constitutional regime with judicial review, public reason is the reason of its supreme court. . . . The supreme court is the branch of government that serves as the exemplar of public reason. . . . It is the only branch of government that is visibly on its face the creature of that reason and that reason alone."[22] This deflationary strategy involves showing how the other branches of national government – the electorally accountable branches – do not properly limit themselves to the democratic argot and so are not really democratic, despite appearances. In a few short pages we are taken then from the idealization of democracy as a special kind of mutual consociation amongst citizens, to the claim that, institutionally realized, democracy is a conversation carried out by linguistic experts – especially judges and lawyers addressing them – and located in that political institution most insulated from the input of citizens.

Are the representative branches of government really representative of the people? Answering this question in the negative has furnished the starting point for innumerable attempts to counter Bickel's countermajoritarian objections to judicial review. After all, if it were to turn out that the Court were more representative of the people themselves than the legislative and executive branches, the countermajoritarian objection fails. One of the most fully developed and fascinating uses of this strategy is Ackerman's in-depth normative and historical account of the development of American constitutional law over two hundred years.[23] Without doing full justice to this account, I think it is not wrong to boil down its answer to the democratic objection. First, real and authentic democratic politics is defined as those moments when the American people constitute themselves as a people – as a group of fellow citizens in a strong sense, "mobilized and capable of sober deliberation"[24] – and take on the fundamental tasks of constitution writing, constitution changing, and constitution elaborating. Understanding such higher forms of lawmaking as the paradigm of democracy, Ackerman's two-track model distinguishes it from ordinary lawmaking: those political

[22] Ibid., 231 and 35.

[23] Bruce Ackerman, *We the People: Foundations* (Cambridge, MA: Harvard University Press, 1991), Bruce Ackerman, *We the People: Transformations* (Cambridge, MA: Harvard University Press, 1998).

[24] Ackerman, *We the People: Foundations*, 194.

process carried out by the legislative and executive branches that are supposed to be constrained by the constitutional structures elaborated by the people.

The deflationary aspect then kicks in by painting ordinary lawmaking by the government as, in general, a gradual erosion over time of the achievements by the people themselves in their higher lawmaking mode. Although Ackerman acknowledges that elected officials can sometimes act out of principled concerns for constitutional values and the public good, most of the time "elected politicians find it expedient to exploit the apathy, ignorance, and selfishness of normal politics in ways that endanger fundamental traditions."[25] Unfortunately, between those rare moments in a nation's history when the people take up the powers of constitutional lawmaking into their own hands, there is actually no people at all, no collective group of citizens deliberating together about their fundamental law, only a diverse collection of self-interested individuals attending to their private business. It seems we need, therefore, an institution specifically designed to maintain the people's intermittent constitutional achievements against self-serving and exploitative governmental officials: "How to preserve the considered judgments of the mobilized People from illegitimate erosion by the statutory decisions of normal government?"[26] Judicial review to the rescue. Since democracy is idealized as popular self-government through constitutional lawmaking, but this only occurs in rare times of crisis – in American history, only once every sixty or one hundred years or so – the Court represents the absent/slumbering people under everyday conditions of ordinary lawmaking. "If the Court is right in finding that these politician/statesmen have moved beyond their mandate, it is furthering Democracy, not frustrating it, in revealing our representatives as mere 'stand-ins' for the People, whose word is not to be confused with the collective judgment of *the People themselves*."[27] So judicial review is not antidemocratic: during the interregnums of mass mobilization and popular constitutional deliberation, democracy is actually carried out by unelected judges and against the merely apparent democratic will of contemporary citizens and elected officials. Unless one happens to have the good fortune of living during those rare and propitious moments of higher lawmaking, democracy means submitting to the rule of judicial guardians. Having satisfied the first two argumentative constraints by giving a democratic justification for institutional panglossianism, the final remarkable move is the claim that even the higher lawmaking of people can be carried mainly through doctrinal changes by the Supreme Court. Taking the demise of *Lochner* era doctrine as paradigmatic, Ackerman's theory of dualist democracy

[25] Ibid., 307. [26] Ibid., 7. [27] Ibid., 262.

also fulfills the third argumentative constraint by explaining and justifying both firmament and favorite Court cases.

This short tour – which could surely be extended – through some jurisprudential justifications for judicial review in the United States was intended to lend support to my speculative hypothesis that the three argumentative constraints do not function symmetrically. Because institutional panglossianism and the differences between firmament and favorite Supreme Court precedents are relatively peremptory for legal scholarship, the normative ideals of constitutional democracy are functionalized to those two argumentative constraints. Having shown some of the distortions induced in the conceptions of democracy by instrumentalizing those to a fixed parochial context, I turn now to contortions in the conceptions of constitutionalism.

3. Contorting Constitutionalism

If there has been a fair amount of reflectivity about the meaning and import of ideals of democracy, even as conceptions of democracy are tailored to saving institutional panglossianism, the same cannot be said about the concept of "constitutionalism." For with respect to the latter, much jurisprudence simply assumes an equivalence between constitutionalism and judicial review as carried out in the United States system. But this unthinking equivalence, I will argue, creates two significantly contorting preemptory foreshortenings of the concept. On the one hand, it entails the denial that many national political systems are what they in fact appear to be: namely, functioning constitutional democracies. On the other, by reducing the practice of constitutionalism to that which is strictly speaking justiciable, it conceptually erases much of the actual text and, more importantly, the actual institutional structures and practices of constitutional government.

Let me first present some evidence that the synecdochical reduction of constitutionalism to the actual structure of judicial review as carried out by the Supreme Court of the United States is widespread. I start with judges' own statements, beginning with Chief Justice Warren's insistence on the Court's supremacy with respect to determining the meaning and import of the Constitution for all other governmental actors from 1958:

> *Marbury v. Madison* ... declared the basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution, and that principle has ever since been respected by this Court and the Country as a permanent and indispensable feature of our constitutional system. It follows that the interpretation of the Fourteenth Amendment enunciated by this Court in the *Brown* case is the supreme law of the land.... Every state legislator and executive and judicial officer is solemnly committed by oath taken pursuant to Article VI,

clause 3, 'to support this Constitution.' ... No state legislator or executive or judicial officer can war against the Constitution without violating his undertaking to support it.[28]

This claim, strong as it is, does yet not equate American constitutionalism *tout court* with the practice and work product of the Supreme Court. Rather, it insists that, where the Court has spoken, its interpretation of the Constitution is supreme and controlling for all governmental officials. But similar sounding dicta from Justices O'Connor, Kennedy, and Souter in 1992 comes quite a bit closer to equating the Court's work product with constitutionalism *simpliciter*:

Like the character of an individual, the legitimacy of the Court must be earned over time. So, indeed, must be the character of a Nation of people who aspire to live according to the rule of law. Their belief in themselves as such a people is not readily separable from their understanding of the Court invested with the authority to decide their constitutional cases and speak before all others for their constitutional ideals. If the Court's legitimacy should be undermined, then, so would the country be in its very ability to see itself through its constitutional ideals. The Court's concern with legitimacy is not for the sake of the Court, but for the sake of the Nation to which it is responsible.[29]

Note the claim with respect to constitutionalism: United States citizens could not understand themselves as citizens under a constitutional system of government unless the Supreme Court is the only institutional representative of constitutional ideals. Finally, in a 2003 radio broadcast of a interview about her semiautobiographical book, Justice O'Connor makes explicit the reduction of constitutionalism in general to the practices of the Supreme Court in exercising judicial review.

[Interviewer]: Some of the Court's decisions in divisive cases remain controversial, ... and yet, public confidence in the Supreme Court remains strong. Why is that?

[O'Connor]: That's hard to say. You know, we've had a lot of years of experience now. Our Constitution has been in effect longer than any other constitution around the world, and I think the American people have grown to accept the role of the Court in deciding Constitutional issues and have tended to accept the notion of constitutionalism, if you will, and that we have a Court that has assumed this role, and a notion that its going to be accepted. Its so remarkable how the other branches of government have accepted the role of the Court as well.[30]

[28] *Cooper v. Aaron*, 358 U.S. 1, 18 (1958).

[29] *Planned Parenthood v. Casey*, 505 U.S. 833, 868 (1992).

[30] Sandra Day O'Connor and Pete Williams, "The Majesty of the Law: An Interview with Justice Sandra Day O'Connor," in *University of Louisville Kentucky Author Forum* (Louisville, KY: WFPL, 2003).

Of course, judges have a particular interest in identifying their own role and work product with constitutionalism: constitutionalism is a powerful idea in the United States, and such a self-identification at least avoids a facial confrontation with antidemocratic objections to judicial review. But the reduction of constitutionalism to parochial judicial practices is not restricted to judges. Theorists of various stripes also make similar moves. Rawls claims, for instance, that "the constitution is not what the Court says it is. Rather, it is what the people acting constitutionally through the other branches eventually allow the Court to say it is."[31]

A small step can be made away from such provincialism by identifying constitutionalism generally with the institutions and practices of judicial review – but it is a small step. We have already seen one attempt that defines constitutionalism (albeit "democratic" constitutionalism) as simply the judicial enforcement of individual liberty rights.[32] Dworkin makes the claim explicit: "By 'constitutionalism' I mean a system that establishes individual legal rights that the dominant legislature does not have the power to override or compromise."[33] He then proceeds to argue that, since we are talking about legal rights, we ought to "assign adjudicative responsibility [for constitutional interpretation of those rights] to judges, whose decision is final, barring a constitutional amendment, until it is changed by a later judicial decision."[34] In short, no judicial review, no constitutionalism. An excellent political science textbook collecting diverse theoretical and empirical writings on democracy similarly reduces issues of constitutionalism in general to specific debates surrounding practices of strong judicial review of legislative actions in the name of individual rights.[35] More examples could surely be given of this tendency aptly summed up (and decried) by Bellamy: "Rights, upheld by judicial review, are said to compromise the prime component of constitutionalism, providing a normative legal framework within which politics operates. . . . Constitutionalism has come to mean nothing more than a system of legally entrenched rights that can override, where necessary, the ordinary political process."[36]

[31] Rawls, *Political Liberalism*, 237–38.

[32] See text supra accompanying footnote 11.

[33] Ronald Dworkin, "Constitutionalism and Democracy," *European Journal of Philosophy* 3, no. 1 (1995): 2.

[34] Ibid.: 10.

[35] Robert A. Dahl, Ian Shapiro, and José Antonio Cheibub, eds., *The Democracy Sourcebook* (Cambridge, MA: The MIT Press, 2003). After a series of selections from *The Federalist Papers* mostly centered on the judiciary and judicial review, five of the six remaining selections in the "Democracy and Constitutionalism" chapter of the textbook are entirely focused on judicial review.

[36] Richard Bellamy, "The Political Form of the Constitution: The Separation of Powers, Rights and Representative Government," *Political Studies* XLIV (1996): 436.

What then is pathological about such reductions of constitutionalism to American-style practices of securing individual rights through an independent judiciary? To begin with, such a view conceptually entails rejecting any number of contemporary political systems as constitutional systems. Clearly the United Kingdom and several commonwealth countries are, on this understanding, simply not constitutional systems because they have no written constitutions to be interpreted by judges. But there would also be no "constitutionalism" in nation-states that do in fact have written constitutions, but no U.S.-style judicial review: for instance, Belgium, Finland, France, Israel, Luxembourg, the Netherlands, and Switzerland. Borderline cases would then be presented by political systems that have forms of judicial review which, unlike the diffuse system in the United States, are concentrated in special constitutional courts: for instance, many of the other European democracies, including most of the new Eastern European democracies. Perhaps judicial review of legislation is enough to warrant the label "constitutional"; perhaps not, if individuals cannot directly access that constitutional court for decisions in their own concrete cases and controversies, and so vindicate their individual legal rights in every situation.[37] Perhaps other borderline cases include countries that have judicial review but where it is nevertheless subject to various forms of authoritative constraint by the political branches, such as in Canada. The point, however, is that we shouldn't need to engage in such contortions to "save" the phenomena of all of these various political systems that look, for all intents and purposes, like *constitutional* democracies. Our conceptual resources shouldn't be so constrained by institutional panglossianism in the first place: countries without United States–style judicial review are not for that very reason un- or non-constitutional.

The second major reason we should reject this contorted notion of constitutionalism is that it equates constitutionalism with only that class of public issues that are *justiciable*. Because this view focuses almost exclusively on the actions of courts, all other aspects of actual constitutional texts, constitutional structures, or constitutional practices become mere residues, relegated to a different domain of concern. Even from a purely provincial perspective, however, this is inadequate. For the basic political structures and powers, which the Constitution of the United States is largely dedicated to establishing, would simply disappear from view. Article I, for instance, looks like constitutional law – "All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consists of a Senate and House of Representatives ... " – but very little of that long Article is justiciable. Does this mean that, in fact, it is not

[37] I take up at length the differences between concentrated and diffuse systems of constitutional review, and between abstract and concrete review modalities in Chapter 8.

part of what we want to consider under the rubric of constitutionalism? One of the great documents of American constitutional theory, *The Federalist Papers*, dedicates only six of its eighty-five papers to the judicial branch – is the rest really about something else than constitutionalism? Koopmans captures the problem nicely:

> In the United States, the concept of 'constitutional law' is used in a narrower sense than in Great Britain: it covers only the areas of law concerning the constitution which have given rise to judicial decisions. The relationship between the President and Congress has not been the subject of any important body of case law, and the result is that it is chiefly examined in American books on "government" or "political science" rather than in those on constitutional law. I see no reason to adopt such a limited view of constitutional problems in this book.[38]

The fact that much of the constitutional provisions that establish, structure, and specify the various organs of government, their duties, and their interrelations are nonjusticiable provisions, furthermore, does not thereby invalidate their force, cogency, or effectiveness as binding *constitutional law*. Perhaps most important, we should not adopt a concept of constitutionalism that *a priori* blinds analysis to the tremendous amount and import of extrajudicial constitutional politics. Constitutional conflicts and resultant constitutional politics erupt not only over provisions ensuring to citizens their judicially enforceable individual liberty rights, but also over the fundamental procedures and structures of government themselves. An adequate theory of constitutional democracy should not take such issues off the table by a conceptual legerdemain. An exclusivistic focus on constitutionalism as judicially enforceable law then threatens to simply erase much of what constitutionalism – as a political ideal and a distinct set of political practices – is about.

C. FUNCTIONS AND INSTITUTIONS

We need then a fresh start, one that can avoid the argumentative pathologies of *ad hoc* provincialism, in particular one that is not subject to the constraint of institutional panglossianism. Let me be clear. I am not recommending that we start from a view from nowhere, from a pure normative perspective wholly disconnected from the realities of politics and its institutional structures as we have historically and currently known them. Although I cannot argue for the methodological claim here, my starting assumption is that normative political ideals and actual political arrangements are separable, at most, only analytically. In the domain of

[38] Tim Koopmans, *Courts and Political Institutions: A Comparative View* (Cambridge: Cambridge University Press, 2003), 3.

political theory, the ideal and the real, norm and fact, are dialectically intertwined, each shaping and delimiting the other. Just as our actual institutional structures have developed over time in response to and (hopefully) in accord with our preferred normative ideals of democracy, constitutionalism, and constitutional democracy, those ideals themselves are shaped by and adapted to the actual practices and structures of political institutions we have experience with or reasonably believe achievable in practice. The conception of deliberative democratic constitutionalism I defend in this book then is a normative theory – it articulates and defends certain specific conceptions of our political ideals that are used to evaluate the worth of particular political arrangements – but it is not an ideal theory – developed and justified independently of historical and empirical considerations and, in a second step, applied to the fallen world of only partially compliant institutional realities. It is, rather, a conception developed to evaluate institutional possibilities and proposals, one simultaneously developed out of and responding to the world of political institutions as we know them.

This methodological point about the reciprocity between normative ideals and institutional possibilities at the general level, however, should not obscure the basic inferential priority of normative ideals over extant institutional considerations. We cannot evaluate the worth of institutional structures and results except in the light of justified normative ideals. By contrast, accepting extant institutions as the measure of normative ideals will only lead to pathologies of ad hocery like those just canvassed, fundamentally distorting those ideals beyond usefulness and recognition, leaving them mere rhetorical honorifics.

1. Judicial Review as One of Many Supreme Judicial Functions

Like other exercises in normative theory, this book will assume certain simplifications of the workings of actual constitutional democracies in order to focus on underlying ideals of constitutional democracy and their competing conceptualizations. One of the most important of these simplifications is to focus the arguments around the question of only one of the functions captured in the phrase "judicial review." In the U.S. judicial system, for example, the Supreme Court has many different roles and carries out many different functions. At least five can be analytically distinguished. Most of these functions, of course, are carried out not only by the Supreme Court but also by other national and subnational regional courts: for each of the functions, the Supreme Court has final but not exclusive jurisdiction.

First, as the supreme appellate court for the nation, the Court has the role of ensuring the internal coherence of individual case decisions and related doctrinal developments across the different normal and appellate

federal courts below it in the hierarchy. To the extent possible and reasonable, the Court should attempt to make decisions in specific cases and controversies throughout the nation consistent, applying the same criteria for decisions where those criteria are based in coherent doctrinal rules and principles. Second, the Court has a significant role in ensuring the internal coherence of a system of ordinary national laws: different national statutes, regulations, common law rules, and so on should not conflict with one another and, when they do, the Court has final responsibility for resolving conflicts with a view to the coherence of national law. Third, the Court has the power to review the actions of officials of the national government to ensure that they are consistent with the corpus of controlling ordinary law. Thus, the Court has final jurisdiction over determinations of, for instance, whether relevant officials have faithfully carried out their duties as spelled out in statutes or administrative regulations or whether they have abused the discretion or misused the specific powers delegated to them by ordinary law. Fourth, the Court has the final responsibility for ensuring that subnational regional laws and the actions of subnational regional officials are in line with the demands of the national Constitution. While individual states, for instance, have their own constitutions, systems of ordinary law, and judicial systems, the laws and actions of states must suitably conform to the demands of national constitutional law. Often in practice this means that the Court is involved in settling jurisdictional disputes between national and state governments. Much the same goes for other subnational political authorities, even as special problems of federalism are raised most acutely with respect to the relations between the federal government and the individual states. Finally, fifth, the Supreme Court has the authority to review national ordinary law and the actions of national officials for their consistency with the Constitution of the United States and the doctrinal interpretations of its provisions as elaborated in controlling precedent. Here the Court has the power to "strike down" both statutes passed through the national legislative process and administrative regulations issued by various national agencies, as well as to review the actions of officials and governmental organs, when it finds that these ordinary laws and actions violate the higher law represented by the Constitution.

It is true that constitutional issues may well arise in the course of carrying out all five of these functions. Nevertheless, when I refer throughout this book to "judicial review," I am referring most centrally only to the fifth category of functions carried out by United States courts. For it is in carrying out this fifth function that the tensions between judicial review and democracy are felt to arise most acutely. Because democracy is strongly allied with the selection and control of governmental officials through periodic elections, and an independent judiciary is, by definition, not directly accountable through periodic elections, the judicial

review of the work product of the electoral branches of government is thought to give rise to both the counter-majoritarian and paternalist objections. Of course, there is a great deal of disagreement about whether we should so strongly ally democracy with electoral accountability – as we will see in working through the various arguments in Chapters 2 through 7. But it will help to focus the discussion if we attend only to the function of national constitutional review when considering the objections to judicial review. In part, this should help ward off rhetorically undifferentiated fusillades about "government by judiciary" or the "despotism of black robes," for many of the targets of particular attacks on the judiciary are, in fact, straightforward legal consequences of the work product of electorally accountable branches of government: ordinary statutes, regulations, and official actions directed by them.[39] More important, however, focusing only on judicial review in this narrow sense will enable sustained attention to controversies over the ideals of constitutionalism and democracy underlying much of the debates about judicial review and, in particular, to the tensions thought to arise from the combination "constitutional democracy."

One other lamentable simplification should be mentioned: I assume throughout that the frame of reference is the delimited context of a single nation-state's political system.[40] Although some of the most fascinating and complex questions concerning judicial review and democracy are

[39] It is important to stress here how relatively rare judicial review, in the narrow sense used here, is in the United States. For the fifty-three-year period from 1803 to 1856, only two congressional statutes were declared unconstitutional by the Supreme Court: in the case that inaugurated judicial review in America (*Marbury*) and in solidifying the slave power by striking down the Missouri compromise (*Dred Scott*). This yields a judicial review rate of .0377 per year. In the thirty years after the Civil War, the nullification rate increased to around .67 per year (counting twenty nullifications over that period: Robert Lowry Clinton, "How the Court Became Supreme," *First Things* 89 [1998]). Over the thirty-five-year period (1953–1989) of the Warren and Berger courts – courts thought to be especially activist – the rate was around 4.63 nullifications of Congressional statutes per year (162 cases of judicial nullification out of 9,976 dispositions: Harold J. Spaeth, *United States Supreme Court Judicial Database, 1953–1997 Terms* [Computer File] (Michigan State University, Dept. of Political Science, 1998 [cited January 10 2005]); available from http://webapp.icpsr.umich.edu/cocoon/ICPSR-STUDY/09422.xml). In the thirteen years from 1990 through 2002, the rate was around 2.62 per year (thirty-four federal statutes were held unconstitutional: Lawrence Baum, *The Supreme Court*, eighth ed. [Washington, DC: CQ Press, 2004], 170). Discussion of other ways of measuring instances of judicial review, with figures including constitutional nullification of state laws and local ordinances, can be found at footnote 55 of Chapter 8. One method yields a measure of the yearly rate of all statutory nullifications as a percentage of the number of cases decided with full, signed opinions. The contemporary percentage here is just above 10 percent of Supreme Court cases per year.

[40] As is evident by my omission, in the previous list of five functions, of the United States Supreme Court's powers concerning international and transnational law and issues.