IX. The Institutions of Constitutional Review II: Horizontal Dispersal and Vertical Empowerment

This chapter continues the institutional design process started in the previous, turning to four different types of modification in the system of constitutional review. I consider, in turn, the establishment of self-review panels in the legislative and executive branches of national governments (A), various mechanisms for inter-branch debate and decisional dispersal concerning constitutional elaboration (B), easing constitutional amendability requirements in overly obdurate systems (C), and finally establishing civic constitutional fora as replacements of traditional amendment procedures (D). In each case the proposals are motivated by the problems of judicial review I identified in the previous chapter, and their design is oriented to the fullest realization of the six assessment values I specified there. I assume throughout that some form of judicial review is extant in the political system, and for the most part I assume the concentrated system with specialized constitutional courts that I argued for there. Where something important hangs on the difference between a concentrated and diffuse system of constitutional courts for the design of these other mechanisms for constitutional elaboration, I take that up in the discussion.

Let me turn now to some simpler proposals that could help to mitigate the various kinds of structural sensitivity deficits and potential jurisdictional and empowerment pathologies of constitutional courts. Recall that the basic idea here is to disperse the inevitable processes of constitutional elaboration both horizontally across the various organs of government and vertically throughout the various levels of the formal and informal public spheres. The next two proposals of self-review panels and encouraging various kinds of inter-branch constitutional dialogue can both be thought of in terms of the former horizontal dispersal; the final two of easing amendability requirements and institutionalizing civic constitutional fora can be thought of in terms of vertical dispersal.
A. Self-Review Panels in the Legislature and Regulatory Agencies

As it first step in horizontal dispersion, I recommend formalized procedures for the official rule-making branches of government to institutionalize their own constitutional review. The idea is to establish panels in both the legislative and the executive branches that would have responsibility for considering the constitutionality of proposed statutes and regulations before they are formally enacted into law, and resubmitting them for revision should they be found deficient.\(^1\) The supporting arguments here are fourfold. First, from an ideal point of view, the proposal is recommended from the simple fact that all government officials have pre-eminence duties to uphold, support, and further the constitution and its inherent rules and principles. As entrenched, higher-order law, the constitution binds all government officials equally.\(^2\) Furthermore, as an on-going project of self-government, the practice of constitutionalism is to be carried by the constituent power of the people and, to the extent that the legislative and executive branches are the official representatives of the people, those branches ought to play a central role in whatever constitutional elaboration happens outside of formal procedures for constitutional opinion- and will-formation. Third, given the greater reason and information collecting capacities of the larger and more

\(^1\) Other institutional variations are possible. In New Zealand, for example, the Attorney-General has the explicit duty of screening legislative bills for possible conflicts with a bill of rights, and bringing these to the attention of the legislature before passage. This way of institutionalizing review processes may, by introducing inter-branch checks, may strengthen the \textit{a priori} review process along the dimension of political independence.

\(^2\) This is essentially the same normative idea that has undergirded proposals in the United States for so-called ‘coordinate construction’ of the constitution. The idea stretches at least as far back as the anti-federalist arguments against judicial powers of review when understood as final and supreme ‘constructions’ of constitutional meaning. See Brutus’s letters XI through XV: Brutus, "Letters of "Brutus"," in \textit{The Federalist with Letters of "Brutus"}, ed. Terence Ball (New York: Cambridge University Press, 2003), 501-29, especially 07-08 and 27-29. Allied arguments for coordinate construction have repeatedly arisen in American political history, advanced by (among others) Thomas Jefferson, Andrew Jackson, Abraham Lincoln, Franklin Roosevelt, and Richard Nixon. They are also now particularly resurgent in United States legal scholarship: Kramer, \textit{The People Themselves}, Michael Stokes Paulsen, "The Irrepressible Myth of \textit{Marbury}," \textit{Michigan Law Review} 101 (2003), Terri Jennings Peretti, \textit{In Defense of a Political Court} (Princeton, NJ: Princeton University Press, 1999), Thomas, "Recovering the Political Constitution: The Madisonian Vision.,” Tushnet, \textit{Taking the Constitution Away from the Courts}, Whittington, \textit{Constitutional Construction: Divided Powers and Constitutional Meaning}. The overly stringent argument for the pre-eminence of constitutional ‘settlement’ that I criticized in Section A.7 above is largely directed against these newly resurgent arguments for coordinate
representative branches of government, some of the sensitivity deficits of a constitutional
court might be addressed by the proposal. Finally, as a practical matter, I believe that such
self-review panels should positively influence the character and quality of constitutionally-
relevant debate, discussion, and decision-making in the various branches. By formally
connecting official decision-making processes with an awareness of constitutional issues, it is
to be hoped that politically-accountable officials can no longer off-load onto the judiciary, as
it were, the difficult work of squaring policy proposals with the demands of constitutionality.
By making such officials responsible for the constitutional dimensions of their duties, such
panels might be able to reduce the prevalence of a phenomenon apparent where an
unaccountable court is taken as not only the final, but as the only arbiter of the meaning and
import of constitutional provisions as well.\footnote{For, when constitutional review is entirely
entrusted to the judiciary, it appears that politically accountable officials routinely take
advantage of what might be called a ‘double demagoguery’ credit: enacting laws (statutory or
regulatory) that are known to be unconstitutional but nevertheless sound appealing in a
sound-bite polemic (credit one), and then attacking a constitutional court as un- and anti-
democratic when the law is predictably struck down (credit two). The point of such panels,
then, is to bring the relevance and specific shape of constitutional rules and principles into
ordinary processes of legislative and regulatory lawmaking.}

Assessment of the proposal according to the six values can proceed by thinking of the
contrasting situation, where there are no such internal constitutional self-review panels. (In the
assessment of this and the following three proposals, I assume the existence of independent
constitutional courts, in either a concentrated or diffuse system). Such self-review panels

\footnote{The reader will forgive me if my example is overly specific to American politics. Even if the phenomenon
highlighted here is not generally observed, hopefully the broader positive effects of increasing the quality of
constitutionally-relevant politics are not so specific.}
should improve somewhat the internal systematicity of the legal corpus, since it can be expected that the work of the panels will be in part oriented towards possible conflicts between existing law and the pending law under consideration. This would reduce, to some extent the work of the judiciary in detecting and correcting for inconsistencies, both for ordinary and constitutional courts. I would expect no significant effect one way or another on the scale of settlement, as the panels are not conceived of as having final or dispositive control over the constitutionality of the legal norms they find constitutionally acceptable. As panels internal to the politically-accountable branches, they will not have the kind of independence desired for guaranteeing procedural correctness, and this is a central reason for denying them final and dispositive control over the constitutionality of the decisions of the relevant branch. This also means that, although they would be relevantly empowered to intervene in decision-making processes that ensue in unconstitutional results, their jurisdiction will not be able to extend to the full gamut of the six areas that a constitutional court would ideally handle. A legislative self-review panel would review statutes but not regulations; an executive panel the contrary. Although there might be relevant opinions concerning laws ensuing from other national branches, sub-national laws, and boundary disputes between the national branches, neither type of self-review panel could have control over such areas. I see no reason, however, why such panels would not have the capacity to consider seriously fundamental constitutional rights, and in particular how they are to be specified, secured, and operationalized through concrete legal schemes. After all, it is precisely here where we can expect a significant degree of reasonable disagreement amongst citizens, such that the epistemic benefits of wide exposure to those disagreements is directly

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4 This also points to the basic problem of strict schemes of coordinate construction. To the extent that a political branch has final authority over its own procedures for law-making, the worries about its ability for systematically blocking the channels of political change and distorting representativeness are greatly magnified. As a concrete example, consider the practical upshot of allowing the current legislative majority to have control
relevant to the legitimacy of the final decision. Finally, such panels would be poorly located structurally to adequately police the rules of the democratic process narrowly construed. As to the last assessment value of sensitivity, it would seem that given both the heightened electoral accountability and the vastly superior reason and information collection capabilities and resources of the legislative and executive branches in comparison with a constitutional court or courts, such self-review panels would be quite a bit more sensitive to constitutionally relevant opinions, arguments and information encountered throughout the diverse sectors of society.

One more important point. It is clear that, even in the absence of such panels, constitutional politics and positive constitutional elaboration do occur in the ordinary course of legislative and regulatory law-making. Blinded by a one-sided focus on the supremacy and finality of constitutional court decisions, there is sometimes a tendency, especially in legal scholarship, to identify the production of constitutional law entirely with the juridical production of decisions and accompanying doctrine.\(^5\) This identification makes it quite hard to explain how it is, for instance, that there could be effectively entrenched legal rules that were, nevertheless, enacted through ordinary legislative channels. In the United States, for instance, signal achievements of the democratic practice of constitutionalism include the legislative extension of equal protection and anti-discrimination principles to African Americans, women, and handicapped persons,\(^6\) although none of these elaborations of constitutional principles, entrenched above the level of ordinary statutory law, are the

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\(^5\) Recall the discussion of the pathological concepts of constitutionalism often employed in the United States juridical context in Chapter I, Section B3.

\(^6\) I am thinking here especially of the signal Civil Rights Act of 1964, which, among other things, prohibited discrimination in many areas of economic and social life on the basis of race, religion, national origin, and sex. Also important are the later extensions of Title VII of that act to include government employers; Title IX of the Education Amendments Act of 1972 concerning sex discrimination in educational institutions; the Americans
exclusive products of juridical rule-making. Self-review panels are a way of formalizing the constitutional responsibilities of politically-accountable officials, and thereby hopefully improving the character, quality, and outcomes of already existing practices of democratic constitutional elaboration.

B. Mechanisms for Inter-branch Debate and Decisional Dispersal

The next proposal, or rather type of proposal, is to structure inter-branch debate concerning proposed constitutional elaborations that occur outside of formal amendment modalities, in part by injecting time for inter-branch deliberations on issues before full settlement and in part by dispersing constitutional decisional powers beyond the constitutional court alone. The kinds of institutional arrangements I have in mind here include devices like the Canadian ‘not-withstanding’ clause, requirements for legislative specification and elaboration of constitutional provisions, and various jurisprudential doctrines that cede significant decisional room to politically-accountable officials in specified constitutional areas.

As discussed in chapter IV, the Canadian constitution scheme allows the legislative branch to pass a statute that would be otherwise be in conflict with specific judicial decisions concerning the requirements of fundamental freedoms, legal rights, and equality rights, though not concerning democratic rights and mobility rights. Such an exceptional act by the legislature in passing a law ‘notwithstanding’ existing judicial specifications of rights with Disabilities Act of 1990; and numerous regulations both structuring new agencies for oversight of anti-discrimination compliance and providing substantive content to the various acts and provisions.

7 Pickerill, Constitutional Deliberation in Congress. Jeffrey K. Tullis, "Deliberation between Institutions," in Debating Deliberative Democracy, ed. James S. Fishkin and Peter Laslett (Malden, MA: Blackwell, 2003). give important empirical evidence that such processes of inter-branch debate on constitutional essentials exist in the United States context. While Pickerill focuses on inter-branch debates about principles of federalism, Tullis gives a focused case study of a particular type of back-and-forth between the executive and the legislature practiced in the late 18th and 19th centuries. I think there are significant benefits to be achieved by formalizing such processes. See Gardbaum, "The New Commonwealth Model of Constitutionalism." for an illuminating discussion of three different ways of institutionalizing this kind of debate between constitutional courts and
becomes inoperative after five years unless legislatively restated (for yet another five years). In principle, such mechanisms appear intended to allow the legislature to temporarily block the final interpretive judgments of the constitutional court, and thereby have sufficient time for initiating and carrying out a formal amendment process that would overrule the court’s interpretation. Although, then, the mechanism is in principle consistent with the court’s interpretive finality (and with the people’s supreme constitutional powers), in practice the mechanism would seem to decrease the court’s interpretive finality, ceding some significant powers of constitutional-decision making to the political branches. More important from a normative point of view than reducing the finality, however, such a mechanism can play a positively catalytic role in spurring further democratic debate and discussion about the precise meaning and import of the constitutional terms of mutual consociation. This is especially important on questions of fundamental individual rights where their precise specification, as well as the exact terms of their legal interactions with other rights provisions, are both open to persistent, reasonable disagreement amongst citizens. The exceptional nature of such a mechanism, when invoked, should be expected to signal to the broader informal public spheres that significant issues of fundamental law are at stake, hopefully catalyzing there as well focused consideration and debate on the constitutional legislatures in Canada, New Zealand, and the United Kingdom, at least with respect to issues of how to legally specify and operationalize basic individual rights.

8 Section 33 of the Canadian Charter of Rights and Freedoms. It is a bit odd that, in phrasing the notwithstanding clause, the Charter makes a distressing semantic elision between the actual content of the Charter and judicial decisions concerning its meaning. Though the provisions is specifically intended to give the legislature a formal response mechanism to constitutional court rulings, the court is nowhere mentioned: “33. (1) Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature, as the case may be, that the Act or a provision thereof shall operate notwithstanding a provision included in section 2 or sections 7 to 15 of this Charter.”

9 Recall that the clause exempts democratic and mobility rights from the mechanism, recognizing that there needs to be a politically-independent body in order to adequately protect the very processes of political representation. The provision, in other words, seems to precisely to embody a proceduralist conception of the place of independent constitutional courts, not a substantialist one.
terms of consociation. In summary then, such mechanisms would ideally promote both the participatory and deliberative values of deliberative democratic constitutionalism.\textsuperscript{10}

The second kinds of mechanism allocating constitutional elaboration powers horizontally across the branches of government I have in mind are explicit clauses in a constitutional provision for legislative elaboration and specification of the particular legal means that are to be used to put the provision into force.\textsuperscript{11} Such requirements for legislative specification are a way of explicitly acknowledging that constitutional provisions are neither self-evidently self-interpreting, nor legally operationalizable without tailoring less abstract legal norms to contextually specific cultural, historic, social, and economic conditions. They also acknowledge that the on-going democratic character of constitutional elaboration, outside of formal amendment procedures, is a power of self-government to be carried out through the closest approximation to a constituent assembly: the people’s elected representatives. Another way of thinking of this point is to consider possible reasons one

\textsuperscript{10} Perhaps such mechanisms for generating inter-branch dialogue are also recommended in those cases where we have reason to think that both legislative and judicial processes of constitutional specification may have simultaneous defects on a particular issue: for instance, where we have reason to think that the information gathering capacities of the legislature are superior to those of the courts, but we also have worries about normal political pressures closing out relevant groups or cutting off the channels of change.

\textsuperscript{11} Most European constitutions contain not only individual rights provisions, but also positive duties provisions. Not only do citizens have constitutionally specified duties (say, to military service) but, central for the considerations here, so do states: for a clear chart comparing the rights and duties of various parties in the French, German, Italian, and Spanish constitutional systems, see Sweet, \textit{Governing with Judges}, 42-43. For example, the national state may have the constitutional duty to provide public education or protect the environment. In effect, these state duties are constitutional commands requiring state legislative and regulative action for positively fulfilling the government’s obligation. Where the performance of such duties comes into possible conflict with other constitutional provisions (say education arrangements with rights of free expression or environmental protections with property rights), the dynamics of constitutional elaboration characteristic to the nation’s system will be put into motion, with the legislatively- or the administratively-specified laws taking a lead role. Of the 12 amendments to the Constitution of the United States before the civil war in the second half of the 19\textsuperscript{th} century, none contained any provisions for legislative specification. Ten limited the power of the national legislature (among other thing), one limited the power of the national judiciary, and one reconstructed the scheme for presidential elections. Of the 15 post-civil war amendments, eight contain explicit provisions that (with minor syntactical variations) “Congress shall have power to enforce this article by appropriate legislation.” One gives the legislature a new power it did not have before (to enact a national income tax), and five of the others restructure the rules for politically-accountable representation in the national political system. Of the remaining two, one repeals one of the previous fifteen, and the other, although ratified in 1992, started its life at the end of the 18\textsuperscript{th} century. It seems then that American amendment practices after the civil war, and post World War II European constitutional settlements are fully in line with the proposal put
might want to constitutionally enact such provisions in the first place. There may well exist, at the point of constitutional enactment, clear and well-established agreement upon what abstract principles a people wants enshrined in its constitution. It may, nevertheless, be helpful in various ways to both forestall specific elaboration to the future, and to make the content of such elaborations subject to easier change than the abstract principles of the provision themselves. First, the original agreement on the content of the provision may be the result of an under-theorized agreement, namely by agreement on an abstraction formulation over disagreement about appropriate specifications or grounding reasons;\textsuperscript{12} drafters and ratifiers may have insufficient information to comprehend how concrete applications might work; there may be some expected benefits of experimenting with different legal regimes for the realization of the provisions’ principles; and/or, there might be a reasonable expectation that the relevant social and political conditions will continue to change over time in such a way that it would be unwise to specify at the time of ratification determinate solutions for all future situations.\textsuperscript{13}

Of course, there are real questions concerning the extent to which a constitutional court might in fact allow legislatures to actively employ these provisions and whether a legislature might actually exercise (and exercise appropriately) such allocated powers,\textsuperscript{14} but these are not problems generated by the structure of the proposal, but by the standard political


\textsuperscript{13} Two examples that might make these points vivid include free speech and intellectual property regimes. In both cases, it is clear that transformations in information and communications technologies and modalities will, in the future, continually revolutionize the socio-economic and political conditions relevant to the application of broad principles for upholding intellectual property rights and free speech rights. Yet in both cases, all four reasons for deferring specification canvassed here appear evident: there are competing justifications and understandings of property and free speech principles under wide agreement on their basic value and significance, insufficient information is guaranteed by future transformations of the relevant socio-political conditions, and so there may well be strong benefits accruing from a more experimental approach to various specification regimes.
problem of getting any branch of government to properly carry out its constitutionally allocated powers. The language of the provisions should, at any rate, go some way toward limiting encroachments on such delegated legislative powers and toward encouraging legislatures to use them appropriately.

The third kinds of inter-branch dialogue and decisional dispersal mechanism are various doctrines imposed on a constitutional court, either through explicit constitutional provision or by the court’s own jurisprudence, that would require the court to defer certain kinds of judgments to the more politically-accountable branches. Examples here include the German constitutional court’s practice of ruling some laws ‘not compatible’ with the constitution rather than strictly ‘unconstitutional’, thereby permitting the law to remain in effect for some period of time with the understanding that it will be suitably revised by the legislature; the Italian constitutional court’s similar practice of declaring that a law will be struck down in the future if not properly changed by the legislature in the meantime; the United States judicial doctrine of constitutional issues that pose ‘non-justiciable political questions’; and, the widespread constitutional court practice of selectively amputating, as it

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14 The overall historical record of the United States Supreme Court, especially with regard to Section 5 of the 14th Amendment, should give one serious pause here. For a striking recent example, see City of Boerne V. Flores, 521 U.S. Reports 507 (1997).

16 The scheme inaugurated by the New Zealand Bill of Rights Act of 1990 is particularly interesting in this regard. Effectively, this sub-constitutional ordinary statute established a set of individual fundamental rights that do not have their effect through their status as higher-law vis-à-vis ordinary law. Quite the contrary; Section 4 of the Act specifically establishes that it does not function to override and invalidate conflicting laws, and bars courts from so ruling: “No court shall, in relation to any enactment (whether passed or made before or after the commencement of this Bill of Rights), (a) Hold any provision of the enactment to be impliedly repealed or revoked, or to be in any way invalid or ineffective; or (b) Decline to apply any provision of this enactment by reason only that the provision is inconsistent with any provision of this Bill of Rights.” What the Act does in Section 6, however, is establish a judicial duty to attempt to construe statutes in accordance with the rights listed: “Wherever an enactment can be given a meaning that is consistent with the rights and freedoms contained in this Bill of Rights, that meaning shall be preferred to any other meaning.” The New Zealand Bill of Rights, then, acts as a set of (legislatively mandated) substantive interpretive canons for the judiciary. See the discussion at Gardbaum, “The New Commonwealth Model of Constitutionalism,” 27-33. Section 3 of the newly inaugurated Human Rights Act of 1998 in the United Kingdom—yet another statutory elaboration of a constitutional system—also requires judges to construe ordinary laws, as far as possible, in accordance with the provisions of the European Convention of Human Rights: Gardbaum, “The New Commonwealth Model of Constitutionalism,” 33-43. What is particularly interesting about the United Kingdom scheme is what happens when such an accommodating construction of a law cannot be achieved, when, that is, the law is facially
were, offending sections of a statute rather than annulling the law as a whole. Mention should also be made here of the recently inaugurated arrangements in New Zealand and the United Kingdom that, on the one hand, require courts to interpret laws in accordance with fundamental rights provisions, but do not allow them the power to nullify or significantly rewrite ordinary laws, ceding to legislatures final authority for significant rewriting of ordinary laws and the elaboration of the system of fundamental rights. Constitutional law scholars can no doubt point to many other such strategies. Both the actual effectiveness and the normative worth of such strategies in any particular national context will, of course, depend on the content of the particular doctrines, the individual history, traditions and current membership of the court, and the relative power and assertiveness of the various branches. At any rate, they do promise some degree of inter-branch debate and decisional diffusion of constitutional elaboration processes.

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incompatible with the ECHR. At that point, the relevant higher court must formally declare to Parliament that the law is incompatible (Section 4), though that declaration has no nullifying force. The scheme thus analytically and institutionally separates the function of detecting conflicts—placed in the appellate judiciary—and the function of correcting the problem—which, in accordance with traditional notions of parliamentary sovereignty, is reserved to the legislature. Both the New Zealand and the United Kingdom arrangements, then, mandate fundamental rights-conforming interpretive powers to the judiciary, but ultimately leave the final power of rights specification to politically-accountable branches. Both schemes also, it should be noted, are restricted to the domain of individual fundamental rights; they thus do not address or affect the other jurisdictional areas I have suggested independent constitutional courts should be concerned with.
Given the diversity of mechanism canvassed here, and their particular interactions with specific national cultures, political arrangements, and legal systems, the possibilities for reliable general assessments are limited. Nevertheless, to the extent that each type of proposal aims at stimulating inter-branch discussion and dispersing decisional authority, some general tendencies are observable when comparing systems with such arrangements against ones without. To begin, the proposals would appear to have no significant effect with respect to the internal systematicity of the legal corpus. Allowing a greater role for legislative constitutional elaboration in legal systems where independent constitutional courts play an important role in detecting conflicts of laws would increase legal incoherence only where legislatures were incapable of responsibly considering the legal effects of proposals in addition to their other consequences. If legislatures are systematically deaf to such worries, then it’s hard to imagine how they can play any role in the elaboration of the ordinary legal system. The proposals do, however, promise to decrease to some extent the degree of authoritative settlement of constitutional law. To the extent that there is back-and-forth between variously authorized constitutional elaborators, there will be some greater uncertainty over time about the specific shape and implications of constitutional law. While a system employing only provisions requiring legislative elaboration would not affect settlement significantly—after all, the state of the law is authoritatively determined—systems employing doctrinal deference mechanisms will involve decisional exchanges between branches and thereby decrease systematicity somewhat, with the greatest decrease occurring in systems with formal not-withstanding type mechanisms. Notably however, even in the latter case, the actual arrangements can mitigate this problem by setting relatively long time-frames for the inter-branch interaction: systematicity, it should be noted, is temporally indexed.  

Clearly all three solutions will be weakly detrimental with respect to political

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17 Recall that the Canadian system allows a law resulting from a not-withstanding response by the legislature to
independence. We should not expect the proposals, then, to work well for the review and/or constitutional elaboration of inter-branch branch boundaries and laws directly affecting democratic participation. Depending on the specific arrangements adopted and numerous variables affecting the way they would actually function, it seems that the proposals could relevantly and sufficiently empower the legislature to participate actively in a system of constitutional elaboration where constitutional courts also play a significant role. Of course, to the extent that such courts are involved, the empowerment increase should not be expected to be either tremendous or overwhelming—these are not systems of pure coordinate construction after all. As already indicated, such proposals are well-tailored only to a subset of the jurisdiction recommended above for independent constitutional courts and, should they be so limited, we can expect them to perform well on the jurisdictional assessment scale.  

Finally, important improvements on the sensitivity scale should be discernible with the various arrangements. Given that we should expect legislatures to have significantly greater information and relevant reason collecting resources and capabilities than courts—not only because of their much greater staffs, but also because of their representative makeup, the diversity of their membership, and their structural sensitivity to public input—the proposals are specifically tailored to taking advantage of these differences. They are designed to ensure that the elaboration of constitutional law, especially with respect to fundamental private autonomy rights, is better capable of fulfilling the demanding requirements for the

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18 Recall that the Canadian not-withstanding clause, and the New Zealand and United Kingdom doctrinal schemes are specifically focused on private autonomy rights, but not extended in general, to include rights to democratic participation and the bounds of national citizenship. Recall that a similar distinction underlies the doctrinal recommendations that Ely makes with respect to where and when the United States Supreme Court should and should not be comparatively deferential to the judgments of Congress. Ely bases his preferred interpretive strategy, and resulting doctrinal recommendations, on Justice Stone’s famous footnote four to *Carolene Products*, which reads in part: “It is unnecessary to consider now [for the present case] whether legislation which restricts those political processes which can ordinarily be expected to bring repeal of undesirable legislation, is to be subjected to more exact judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation,” 152. See further discussion in Chapter II, Section B1.
justification of democratic law. In normative terms, laws are illegitimate to the extent that
their processes of justification ignore the expected consequences and side-effects such laws
can be foreseen to have on the interests of all affected by them. At least in principle,
legislatures are structurally more open to the ‘full blast of sundry opinions and interest-
ariculations’ than courts, and such sensitivity is a primary reason to increase inter-branch
debate and decisional dispersal concerning constitutional essentials.

A few comments on the potential effectiveness of such mechanisms—inevitably
inadequate—seem apropos. First, with respect to the Canadian innovation, one should note
that, in practice, it has not worked as foreseen here. To make a long story short, the regional
legislature of Quebec made “a blanket and preemptive use of Section 33 to immunize itself as
much as possible against the constitutionalized Charter.”\footnote{Gardbaum, "The New Commonwealth Model of Constitutionalism," 23.} After the Canadian Supreme
Court upheld this extraordinarily assertive use of the not-withstanding clause, it has not been
used again. There appears to have arisen, therefore, a sort of informal convention amongst
political officials in Canada against the further use of the provision, arising out of the
background particularities of the rather polarized inter-regional politics in Canada. It remains
an open question, however, to what extent this unfortunate history is due to structural and
procedural deficiencies inherent in any such provision, as opposed to the general difficulties
of trans-regional constitutionalism in a nation-state deeply divided into culturally-
differentiated regions. The effectiveness of the two other inter-branch proposals is, to some
extent, intertwined. This is because the degree to which legislative-specification provisions
will be effectively allowed to operate depends on the assertiveness of constitutional courts,
and the latter is tied at least in part to the particular doctrines that courts take themselves to be
bound to. In general, I am more hopeful concerning arrangements that not only formally

\footnote{Gardbaum, "The New Commonwealth Model of Constitutionalism," 23.}
structure inter-branch dialogue and decisional authority, but also that provide institutionally-based incentives for their effective operation. Conversely, strategies that rely on either the individual self-limitation of officials or more informal conventions appear less promising.\textsuperscript{20}

It should go without saying, of course, that institutional structures do not run themselves, but depend upon, among other factors, “the support of an accommodating political culture.”\textsuperscript{21}

They do not, in other words, guarantee the results desired theoretically. Finally, note should be taken of the empirical dynamics of the authoritative elaboration of rule-systems themselves, in particular the apparent tendency of constitutional courts, when given the power to selectively interpret and amputate statutes in the light of their own understandings of constitutional provisions, to adopt a somewhat tutelary role towards legislatures, more or less dictating to the latter the results and policy regimes desired.\textsuperscript{22} This final point should not be taken, however, as a demonization of constitutional courts, for the dynamic only plays out to the extent that electorally-accountable political officials are unwilling to challenge that tutelage, happy rather to delegate entirely their duties for law-making within constitutional bounds and for constitutional elaboration itself. The problem then is not simply designing structures for possible inter-branch constitutionalism, but structuring institutional incentives for those structures to operate in the manner intended.\textsuperscript{23}

\textsuperscript{20} In an interesting consideration of contrasts between the United States system of constitutional review (labeled “strong-form review”) and the Canadian (“weak-form review”) from the point of view of sensitivity to wide public reasons and information, Tushnet renders this contrast as one between relying on psychology versus structure: “the institutional design of strong-form systems may make dialogue depend on personal decisions by individual judges regarding their understanding of their role. I offer weak-form systems as possibly better, from Michelman’s point of view, because they make the possibility of dialogue a structural feature of their design,” Mark Tushnet, "Forms of Judicial Review as Expressions of Constitutional Patriotism," \textit{Law and Philosophy} 22, no. 3-4 (2003): 355-56, emphasis added. He ultimately concludes, apparently in a disappointed way, that both Habermas’s and Michelman’s respective theories of judicial review are fully compatible with, and in fact positively supportive of, the strong-form extant in the United States. Obviously, I disagree with this assessment.

\textsuperscript{21} Habermas, \textit{Between Facts and Norms}, 487.

\textsuperscript{22} Sweet, \textit{Governing with Judges}, 63-114, gives numerous examples of this phenomenon in four European countries; many could be added from United States history. I doubt it is localized only to these five.

\textsuperscript{23} Unfortunately on this latter problem of incentive design, I’ve no concrete ideas that seem both workable and normatively acceptable.
C. **Easing Formal Amendability Requirements**

Thus far the three types of proposal considered have dealt with the allocation of powers for constitutional elaboration at the horizontal level of the national government. Although they have been designed with an eye to the character of the interactions between the informal public spheres and the formally institutionalized public spheres of state decision, they have not systematically tried to establish a reliable vertical link between the two. If we recall Habermas’s ‘two-track’ conception of deliberative democratic politics I endorsed in the previous chapter, however, we can see that such links are absolutely crucial to ensuring the legitimacy of exercises of political power. On the rich deliberative model of democracy, it is not enough to simply secure the electoral accountability of public officials who are then licensed with basically plenary powers to decide upon policy choices, which choices are taken as consented to in the absence of electoral revolt. This thin conception of democracy relies on an aggregative conception of the public good and is, as I argued in Chapters II and III, not particularly convincing on either normative or empirical grounds. Even if we ‘thicken’ up this conception by structuring certain intra-governmental processes of deliberation and dispersed decision-making—say by adopting various separation of powers and/or federalist schemes—this still leaves deliberative democracy largely up to the interactions between variously positioned and incentivized political elites and the diverse holders of expert knowledge they may rely on in choosing amongst policy alternatives. In order, however, for democratic processes to meet the demanding idealized condition that their outcomes be based upon a sufficient gathering of and serious, reasons-responsive consideration of the likely consequences and side-effects for all affected by policy choices, there must be a set of vertical channels through which those affected can not only have their arguments and concerns heard, but can expect that they will have some significant effect on the agenda, procedures, and outcomes of official processes of political decision. To put the
point in Habermas’s suggestive metaphors, there must be a way in which the communicative power of the citizens can be collected and channeled in the broad, diverse and relatively anarchic realm of the informal public spheres, and forced through the sluice gates of the official policy-making processes, thereby transforming communicative into legitimate political power through the medium of law. The administrative power of the state—which is necessarily coercive at many points—is then legitimated to the extent to which it is directed by political power in the form of legitimate statutes and regulations, where this power in turn has been constituted and directed by communicative power of the citizenry.

To be sure, this idealization of a legitimate circulation of power is overly demanding as an empirical description of reality, and so as a normative criterion for everyday exercise of state power. Here Habermas, rightly to my mind, suggests that as long as this circuit can in fact be mobilized by citizens—as evidenced by its more or less frequent use by a national public when sufficiently motivated and mobilized—the fact that some exercises of power might exhibit a top-down ‘counter-circulation’ from political elites and experts does not invalidate the democratic character of the political system as a whole. The relation that this picture of the circulation of power has to a constitutional democracy’s system of constitutional elaboration becomes clear once we consider the basic modalities of constitutional change. As Lutz succinctly puts it, “a constitution may be altered by means of (1) a formal amendment process; (2) periodic replacement of the entire document; (3) judicial interpretation; and (4) legislative revision.”

Assuming the soundness of the argument for a constitutional court, and even adopting the various horizontal proposals above, formal amendment procedures that are relatively easy to use leave open a crucial option for the people to assume their constituent power and thereby actuate, as it were, the official

circulation of constitution-making power. Amendment procedures, that is to say, formally institutionalize the possibility of a vertical employment of the people’s constituent power, in particular to correct for deficiencies in the horizontal system of normal constitutional elaboration. On the one hand, they allow for the democratic development of fundamental law and, on the other, the ease can ease the democratic deficits caused by bleed from constitutional protection into elaboration.

If then formal amendment procedures provide a mode by which the people’s constituent power can actuate the official democratic circulation of power with respect to constitutional essentials, how exactly should they be designed? Here, given the complexity of the issues involved, I have no specific metrics, only some general suggestions. Centrally relevant complexities here concern, at the least, structural factors such as the length of the constitution itself, the variety and specificity of government functions covered in the constitution, the various initiative and ratification modalities allowed by the amendment procedures, and the roles and techniques adopted by various governmental agencies in the processes of informal constitutional elaboration outside of formal amendment processes.

But there are also a host of external factors to consider, concerning, for instance, the degree of ideological and political polarization in the nation, levels of inequality as they relate especially to individuals’ resources and capacities for civic competence, the character of the nation’s political culture broadly construed (including officials’ adherence to rule of law

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25 I leave out of consideration here the possibility of entirely new constitutional beginnings for reasons of complexity. Nevertheless, it should be clear that the criteria of deliberative democratic legitimacy retain their force even for constitutional conventions, requiring real democracy not only in the selection of a constituent assembly, but in the ratification process as well. Perhaps the widely noted ‘democratic deficit’ in the writing of the proposed European Constitution explains, to some extent, its recent apparent defeat at the ratification stage through the popular rejection, by referendum, in France and the Netherlands. As of this writing (June 2005), the future of that political project is quite uncertain. There remains a set of interesting conceptual, normative, and factual questions concerning whether a constitution should include, in itself, specified procedures for its own overcoming through the writing of a new constitution.

26 Even these suggestions are undoubtedly colored by my provincial understanding as a citizen of the United States, one who finds his own nation’s constitution much too difficult to amend.
values, the social acceptance of various forms of rule, and the degree of enthusiasm for
democratic as opposed to autocratic institutions and officials), the prospects for constitutional
sustainability over time, the relative levels of power between government and other sectors of
society such as the economy, the military, civil society and various forms of secondary
associations, just to name a few.\footnote{Lutz, "Toward a Theory of Constitutional Amendment."}

Given these complexities, the following insufficient platitudes will have to substitute
here for what should be a more robust theory of constitutional amendment that could warrant
my recommendation for relatively easy amendment procedures. To begin with, it is clear that
the central issue is striking an appropriate balance between unchangeable obduracy and
mercurial transformability. On the one hand, a constitution has to be sufficiently difficult to
change in order to maintain a basic distinction between constitutional higher-law and the
subordinate status of ordinary law. On the other hand, it cannot be so hard to change that
democratically achieved changes to the constitution are effectively foreclosed, except through
wholesale constitutional replacement. Some attention should also be paid to differences in
the way in which the relevant difficulties of formal amendment are set up. I have in mind
here, in particular, a distinction between the procedural hurdles established by various levels
of super-majoritarian rules, and those hurdles which are established either by extending the
amendment process over time or by increasing the diversity of representative points of view.
While in terms of a numerical metric of difficulty of amendability both may be equivalent,\footnote{Lutz, "Toward a Theory of Constitutional Amendment," 254-60. for his derivation of an index measuring the relative difficulty of various amendment procedures, and his assignment of a value to various mechanisms.} from a deliberative perspective, the constitution is not conceived of as a simple counter-

\footnote{This is a distillation of the many factors that Lutz considers in his very important theoretical and empirical analysis of constitutional amendments: Lutz, "Toward a Theory of Constitutional Amendment."}

\footnote{Several of these factors are distilled out of the rather surprising advice rendered from a deliberative
democratic perspective to constitutional designers in a set of newly emergent constitutional democracies, by
Stephen Holmes and Cass R. Sunstein, "The Politics of Constitutional Revision in Eastern Europe," in
Responding to Imperfection: The Theory and Practice of Constitutional Amendment, ed. Sanford Levinson
majoritarian instrument, but as a facilitator of legitimate democratic decisions procedures. Thus amendment hurdles that encourage the collection and rational assessment of relevant reasons and information are to be favored over ones that simply make it difficult for a majority to get its way, even as the former will undoubtedly do that as well.\textsuperscript{30} Finally, the normative framework embraced here would also appear to favor popular referenda mechanisms for the initiation of constitutional amendment processes in general, though legislative initiative procedures would also be acceptable. Popular ratification procedures should be the norm, though this does not exclude adding representative institutions to the ratification mix on top of popular ones.

But designing amendment procedures is not just a matter of linking up normative theory with structural data at an abstract level; one must also take into account the particular dynamics of constitutional elaboration fostered by different amendment schemas. From the proceduralist conception of deliberative democratic constitutionalism adopted here, it appears that there may be good reasons for differential levels of entrenchment correlated to different kinds of issues constitutions deal with. Ideally, the system of rights, rights to both private and public autonomy, should be equally strong and resistant to change. But, in practice, it is quite difficult to strike the correct semantic balance, when writing constitutional provisions, between requisite abstract formulation and controlling determinacy. And this difficulty seems significantly increased for adequately guaranteeing the substance of many individual private liberty rights, as opposed, say to the more procedural character of the guarantees

\textsuperscript{30} Compare, for instance, the equivalent values Lutz assigns for difficulty in amendment approval modalities where those modalities nevertheless would promise different deliberative benefits Ibid., Table 10, 258-59. While an absolute majority popular referendum should be as hard to pass as (bicameral) legislative approval twice by an absolute majority with an intervening election, the latter seems recommended by its longer time frame allowing for greater deliberation. Greater deliberative benefits should also flow from having approval follow from a majority of state (sub-national) legislatures as opposed to from a combination of executive action plus a 2/3 majority of the national legislature, even though both receive closely equivalent scores on the difficulty index. In this case, the former solution is recommended by the possibility for a greater diversity of viewpoints possibly represented.
necessary to ensure equal individual rights to democratic participation. It is precisely in the former case that constitutional courts have been particularly assertive in taking on the tasks of constitutional elaboration, to the detriment of the people’s constituent power for the same. When a constitution is particularly difficult to amend, the pressures for constitutional elaboration outside of the normal amendment process will grow and, to the extent that this task is taken on by a constitutional court, a positive feedback loop is created between court specification, doctrinal elaboration of various balancing tests, and the unwarranted judicial injection of substantive content into the constitutional system. In short, when constitutional provisions protecting individual liberty rights are increasingly entrenched, it seems that the problem of bleed from constitutional protection to elaboration is reciprocally increased over time. Its an open empirical question whether or not similar effects can be detected with respect to a constitutional court’s enforcement of provisions concerning governmental structure and individual rights of democratic participation; my sense is to the contrary. If that sense is correct, then different degrees of amendability might be tailored to different kinds of constitutional provisions.

Turning to the assessment values, much will depend on the specific details of the schemes being compared and the socio-political and legal contexts in which they are employed. Having left much of this detail out, it still seems possible to say that easing and/or restructuring formal amend processes, if properly carried out, should have no discernible effect on systematicity, since normal amendment procedures incorporate various methods for

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32 My considerations here suggest that combining open-textured constitutional provisions with their, as it were, supra-constitutional entrenchment against amendability, whether through explicit constitutional text or developing judicial doctrine, is not advisable. This combination—as evinced for instance in much European jurisprudence with respect to rights—has led, in practice, to the use of judicial construction methodologies that invite expansive judicial law-making in the area. See Sweet, ibid.
33 This provides one way of thinking about the justification of the structure of the Canadian not-withstanding clause. By allowing legislative response to constitutional elaboration by constitutional courts in the areas of
vetting the specific text proposed in amendments by relevant legal and policy experts.

Perhaps overly-permissive procedures would lead to the constitution turning into something akin to an overly-fulsome and specific civil code, thereby engendering increased numbers of potential legal conflicts at the constitutional level. This potential systematicity deficit should, then, be a consideration against setting the difficulty of amendability too low.

Amendments may, in addition, have a small but important positive effect in terms of settlement, since they definitively decide certain constitutional issues. I would expect this positive settlement benefit to be greater in diffuse judicial review systems, where there is a lower degree of settlement than in concentrated systems.

Amendments processes should, in principle, have just the kind of independence from political officials that the proceduralist model of constitutional review prizes. If we want especially to ensure that the rules of the democratic process, especially in their constitutional form, are not being systematically deformed, abused or ignored by those currently in office to either close off the channels of political change or systematically disfavor the interests of underrepresented sub-sections of society, then the structural dependence of amendment procedures on the people, not on their governmental agents, seems particularly appropriate.

To put it in a slogan, in a system of constitutional elaboration including constitutional courts, amendments look like the way that ‘the guardians of democracy’ can themselves be guarded. Of course, this ideal picture of independence does not entirely match up with reality. After all, if amendment proposals are initiated by legislative bodies or other forms of special bodies of governmental officials, then independence is undercut. Further, the need for the vetting of substantive individual liberties, but debarring such responses with respect to membership and democratic rights, the provision recognizes the special democratic danger of juridical elaboration with respect to the former.

34 Lutz, "Toward a Theory of Constitutional Amendment," 247-50 and 60-61. presents compelling evidence from comparisons between both United States state constitutions and across 30 nation-state constitutions, that the length of the constitutional text is strongly correlated to the rate at which it is amended over time. He also provides the standard explanation for this strong correlation: “Commentators frequently note that the more
amendment proposal texts may provide significant room for ‘recapture’ of the proposal by political officials. Perhaps, however, the real threat to the necessary independence of the amendment procedure is the apparent ease and success by which it can be captured by social powers looking to promote their own sectional interests to the detriment of others. Because some of the most prevalent mechanisms for such capture result from the structural transformations of the informal public sphere that have made wide-spread, high-quality public deliberation so hard to achieve, I return to this issue below in considering the assessment value of sensitivity.

In a political system where the full gamut of the constitution is amendable, easing overly-obdurate amendment procedures would have clear benefits with respect to sufficient and relevant empowerment. One might be worried here, however, about the costs of over-empowerment promised by relatively easy amendability, as repeated and continuous changes in the overall constitutional system may produce deleterious consequences from the point of view of both systematicity and settlement. It should be noted, however, that the problem of over-empowerment does not derive from the fact that amendments are directly subject to popular will. Although there is a frequent invocation of the specter of unbridled populism, especially evident in many debates over ordinary referenda, Lutz’s data from a decade of American state amendment patterns make clear that the more ‘populist’ route for initiating a constitutional amendment—namely through various popular referenda, rather than through the legislature or through special constitutional convention—has not been notably easy or successful.\textsuperscript{35} Worries, then, about amendments and mercurial populism, and the resulting provisions a constitution has, the more targets there are for amendment, and the more likely the constitution will be targeted because it deals with too many details that are subject to change,” 244.

\textsuperscript{35} “Many believe that the initiative, by making the process of proposing an amendment too easy, has led to a flood of proposals that are then more readily adopted by the electorate that initiated them. … As Table 7 shows, during the period 1970-79, relatively few amendments [8.5%, with only 2.2% by popular initiative] were proposed by other than a legislature [91.5%]. One-third of the states use popular initiative as a method of proposing amendments, and yet even in these states the legislative method was greatly preferred. The popular
threat of over-empowerment, seem overstated and perhaps misplaced. Furthermore, easing amendability is clearly recommended from the point of view of jurisdiction: constitutional elaboration is rightly the province and duty of democratic citizens themselves.

Ideally, it would seem that the same strong positive conclusion would follow on the sensitivity scale as well, since the legitimacy of the process of constitutional elaboration itself depends crucially on the extent to which its outcomes are responsive to relevant reasons and information stemming from the people themselves. What better way to be sensitive to the people’s inputs, then, than a direct vote or series of votes by them? Elaboration by amendment need not, for instance, be defended through those circuitous, counterfactual, or hypothetical accounts of how people themselves are better represented by those who they are not, namely their governmental agents. And this would entail that constitutional elaboration through amendment is not susceptible to the paternalist worries about judicial elaboration, canvassed throughout this book, that arise from the evident gap between the people’s will as expressed in the constitution and the particular use made of the constitution by judicial interpreters.

As any astute observer of contemporary politics realizes, however, sensitivity to the simple electoral desires of the public is, quite often, not sensitivity to the people’s considered initiative has received a lot of attention, especially in California, but in fact it has thus far had a minimal impact. What has been the relative success of these competing modes of proposing constitutions? Table 8 shows that the relatively few amendments proposed through popular initiative have a success rate [32%] roughly half that of the two prominent alternatives [64% initiated by legislatures, 71% by special conventions]. The popular initiative is in fact more difficult to use than legislative initiative,” Ibid., 254. Extension of Lutz’s research to cross-national comparisons, and over a longer time frame, would be quite welcome.

Recall that this is a common strategy for justifying both representative government by virtuous elites, and judicial review itself, where judges are taken to be more representative of (some crucial, fundamental, and theory-specific aspect of) the will of the people. See the venerable line of such arguments canvassed in Chapter VI, Section A4.

A classic denial of this gap is contained, for instance, in Hamilton’s justification stemming from the constitution as the expressed will of the people. The argument for judicial review does not “by any means suppose a superiority of the judicial to the legislative power. It only supposes that the power of the people is superior to both; and that where the will of the legislature declared in its statutes, stands in opposition to that of the people declared in the constitution, the judges ought to be governed by the latter, rather than the former,” Hamilton, Madison, and Jay, The Federalist with Letters of "Brutus", #78, 380.
opinions, but rather to those who can most effectively make use of the myriad techniques of
“the scientific marketing of candidates [and amendment proposals!] by soundbite
specialists.”38 The problem with the ideal account of the sensitivity of amendment
procedures presupposed in the previous paragraph is that attends only to the aggregative
mechanism of voting as a measure of sensitivity. But, to adopt the terminology I laid out in
Chapter III, this is a one-sided focus on whether the structures of accountability are more
populist or expertocratic; it entirely leaves out the notion that democratic processes ought to
be sufficiently deliberative. As currently institutionalized and practiced, amendment
procedures take for granted that there is an effectively functioning informal deliberative
public sphere that can be expected to help and to encourage citizens collectively weigh
amendment proposals in the light of relevant information and reasons. Thanks however, to
the work of deliberative democratic scholars from many different research traditions and
domains, we can now be fairly certain that this presupposition is seriously undermined by any
number of actual “deliberative troubles.”39

The kinds and sources of such troubles are manifold, and I do not propose to review
them all here. But even a partial list would have to start with a problem that lies at the level
of individual citizen incentives. What Anthony Downs memorably termed “rational
ignorance” refers to the strategic calculations that an individual might make with respect to
becoming informed about complex political questions and proposals currently before the
public. On the one hand, in polities with high populations, my single vote will not make
much of a difference to the outcome of an election. On the other hand, the personal
informational costs of sorting the various facts, values, reasons, and so on that ought ideally
to be taken into account are quite high. Thus I have strong ‘rational’ incentives to remain

38 Ackerman and Fishkin, Deliberation Day, 10.
However, this should not be considered an atemporal general phenomenon of all circumstances of political citizenship, for it is quite clear that individuals have a diversity of motivations and incentives that may override the two identified by Downs, and changes in social context may significantly alter the relevant personal ‘calculations.’

It is precisely here, in identifying the historic structural changes in the informal public spheres and the ways they have shaped individuals’ incentive structure and environment, that much of the most interesting applied work in deliberative democratic theory has occurred. To begin, the rise and refinement of modern opinion polling, and its close connection to the commodified packaging of candidates and proposals in superficial but motivationally effective advertising packages—think soundbites—have significantly raised the political salience of reasons-unresponsive or even reasons-resistant desires, fears, biases, ideologies and mythologies. This is further fostered, of course, by the fact that modern mass media are more-or-less push phenomena, disseminating the soundbites that both political elites, socially powerful actors and groups, and their image consultants desire to have disseminated, media driven, furthermore, not by the interest in promoting public discussion but by selling advertising. Furthermore, the increasing diversification of outlets and venues for politically-relevant information and opinion—both in the old media markets of newspapers, radio and television, and through the development of the internet—leads to the segmentation of broader public spheres into limited ‘deliberative enclaves’ (Sunstein) of those with like-minded values and opinions, increasingly insensitive to the information, opinions and arguments coming from other quarters of society, and simultaneously more likely to reinforce the pre-

39 The phrase is from Sunstein, *Designing Democracy: What Constitutions Do*, but I use it here to pick out a wider variety of phenomena than he analyzes.


41 I draw the following account from a variety of sources. However, four crucial works in the area deserve special mention as particularly important and insightful: Bohman, *Public Deliberation: Pluralism, Complexity, and Democracy*, Fishkin, *Democracy and Deliberation*, Jürgen Habermas, *The Structural Transformation of the*
discussion errors and biases of the group members. The diversification of society itself, in particular the value pluralization, may also contribute to such deliberative troubles, while increases in the overall degree of social complexity—with clear analogues in the internal development of a constitutionally-structured legal corpus—make it more difficult to comprehend and evaluate relevant political alternatives. Finally, all of these various phenomena are overlaid with and permeated by the existing social inequalities in a society. Not only are the agenda, content and character of public flows of information, opinions and arguments highly structured by asymmetrical distributions of wealth and power, but also—precisely because the distribution of deliberative capacities and resources is strongly correlated with such asymmetries—the ‘deliberative’ outcomes of public opinion tend to promote policies and alternatives that reinforce asymmetries of wealth and power. Mere sensitivity to the pre- or non-deliberative opinions of the public, then, may be a form of populist sensitivity, but it does not adequately attend to the deliberative troubles extant under current social conditions, or to the ideals of a reasons-responsive employment of the state’s coercive power. It is important that one not draw overly pessimistic conclusions from these contemporary obstacles. High-quality, widely dispersed popular constitutional debate and decision-making can and has occurred, though usually only under propitious and extraordinary historical conditions.

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Ackerman, Ackerman, We the People: Foundations.

Ackerman, Ackerman, We the People: Transformations.
Amendment proposal and ratification processes as currently structured, then, are sensitive to popular opinion in what has been variously called its raw or unfiltered form, but this is not the full type of sensitivity a theory of deliberative democratic constitutionalism should be concerned to rely on, especially when considering the fundamental procedures that structure democratic forms of consociation—when they are called on, that is to continue to carry on the process of constitutional elaboration. What Ackerman and Fishkin say in the context of candidate elections seems even more important when it comes to constitutional matters:

Raw opinion of the entire mass public is the realization of plebiscitary democracy. The long-term trajectory of American democracy, and indeed of most democracies around the world, has been to consult the mass public more and more directly. This process has brought power to the people—with referendums and other plebiscites, with primaries in candidate selection, with the elimination of indirect modes of election of some office-holders, and with the expansion of the office-holders who are directly elected, etc. The end result has been that innumerable decisions that were once made … through a select or elite group deliberating, are now subject to the incentives for rational ignorance on the part of the mass public. Increasingly, we have brought power to the people under conditions where the people have little reason to think about the power we would have them exercise.44

Well-structured amendment procedures are designed to reflect the diversity and disagreement evident amongst citizens seeking to mediate their social life through legitimate law, and to provide an effective means for citizens to employ their constituent power in the light of the inevitable elaboration of a constitutional scheme in the normal course of everyday processes of law-making and law-applying. I doubt however that, in their present form, they can be particularly effective in achieving these laudable goals, unless they are transformed to take account of the deliberative troubles that undermine the idea that sensitivity to popular voting

44 Ackerman and Fishkin, Deliberation Day, 29.
is enough to ensure the democratic character of constitutionalism. The problem of institutional design is, once again, one of mediating between the ideal and the real.

D. Establishing Civic Constitutional Fora

I mentioned at the end of Section A of Chapter VIII that we should expect tensions and tradeoffs between the various assessment values as realized in different institutional mechanisms for constitutional review. Having worked through four types of proposals, some general patterns emerge. First, all four proposals appear to have either no substantial effect or a moderate positive effect on the overall systematicity of the legal corpus. Second, with the exception of some modes of inter-branch decisional dispersal (particularly temporary legislative overrides of constitutional court decisions), the same can be said with respect to settlement: either no effect or a moderate positive effect. If correct, these two findings should go a fair way to rebutting claims for locating extraordinarily strong powers of constitutional decision exclusively in the judiciary that are based on the specter of lawlessness, anarchy, and confusion said to ensue in the absence of such rigorous and exclusive control. All four proposals sufficiently and relevantly empowered various different actors to have a role in the scheme of constitutional elaboration. Empowerment, however is often tied to the jurisdictional reach of each proposal: while I claim that none of the proposals overstep their proper jurisdiction, the reach of each is variable, from the more extensive jurisdiction over the constitutional corpus as a whole granted to constitutional courts and amendment procedures, to the more limited domain of authority granted to self-review panels and inter-branch mechanisms of decision. In sum, on the four measures of systematicity, settlement, empowerment and jurisdiction there does not seem to be the kind of tradeoffs and compromises that we might have suspected in the absence of a more thorough consideration of each proposal.
However, the predicted tensions between independence and sensitivity do repeatedly surface. Thus the scheme that does well in terms of independence—constitutional courts—turns out to have serious deficits with respect to sensitivity. Conversely, the schemes that do well on the sensitivity scale—self-review panels and inter-branch mechanisms—do poorly on the independence scale, and apparently precisely because of their electoral sensitivity. The one proposal that held out the promise for achieving both requisite independence and sensitivity—easing amendability—does not achieve it: its ideal promise wilts significantly in the light of the real conditions of current democratic politics. What looked to be not only an independent mechanism for guarding the guardians of the procedures of democracy, but also the one mechanism most closely tied to the will of the people, seems to be neither sufficiently independent nor sensitive in the right way. Should we then resign ourselves to an irreconcilable tension between the ideal and the real, and give up hopes for a fully democratic process of constitutional self-government? I think not, and precisely because the actual independence and sensitivity deficits of amendment procedures as currently structured are, in fact, linked to one another. The hinge is the character and quality of public democratic deliberation witnessed in modern informal political public spheres. On both assessment scales, although amendment procedures look good ideally, in reality it seems that they will be subject to just the kind of mercurial and uninformed populism that has always lingered as the spectral foil to more elitist forms of organizing governmental decisions. If, however, there are achievable and effective ways of significantly improving public democratic deliberation, then there is the prospect for transforming processes of constitutional elaboration in ways to avoid the independence-sensitivity tradeoff, thus belying its supposed inevitability.

The same point can be made another way: the independence-sensitivity tradeoff looks inevitable at the horizontal level of government because, no matter how reasons-responsive
various government organs are, independence and sensitivity are both structurally tied to the influence of elections at the horizontal level of national government. The move to the vertical relationship between the constituent power of the people, the constitution, and the organs of government—via the amendment process—ideally promised to change the independence-sensitivity dynamic but fails to do so because of deliberative troubles. We need not accept the current state of political public spheres as an unchangeable given, however. Diverse avenues of contemporary institutional design for improving deliberation—and the empirical research which provisionally supports its effectiveness—promise ways of overcoming or mitigating much of the deliberative trouble, and thereby reinvigorating the promise truly democratic deliberative constitutionalism.45 As an exploratory and not fully developed set of proposals, I suggest the establishment of various kinds of civic constitutional fora: intentionally structured locations for focused and high-quality citizen deliberation and decision concerning constitutional matters, especially those that arise from the ongoing processes of constitutional elaboration, but not necessarily limited to those. To get an idea of the shape of this proposal, I turn first to some very exciting work ensuing from deliberative democrats.

The most promising directions begin with Fishkin’s proposals—and tested and researched practices—for deliberative public opinion polls.46 I summarize these polls just

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45 An excellent overview of much of the empirical literature concerning the effects of public deliberation is provided by Michael X. Delli Carpini, Fay Lomax Cook, and Lawrence R. Jacobs, "Public Deliberation, Discursive Participation, and Citizen Engagement: A Review of the Empirical Literature," Annual Review of Political Science 7, no. 1 (2004). The authors conclude that deliberation in and of itself is not always an unalloyed good, or even a good at all when poorly structured: “The impact of deliberation and other forms of discursive politics is highly context-dependent. It varies with the purpose of the deliberation, the subject under discussion, who participates, the connection to authoritative decision makers, the rules governing interactions, the information provided, prior beliefs, substantive outcomes, and real-world conditions. As a result, although the research summarized in this essay demonstrates numerous positive benefits of deliberation, it also suggests that deliberation, under less optimal circumstances, can be ineffective at best and counterproductive at worst.” 336. My proposals for civic constitutional fora are specifically tailored to optimizing these circumstances for the consideration and ratification of constitutional amendments.

46 An early formulation can be found in Fishkin, Democracy and Deliberation, 1-10, 82-104. Much fuller details, including empirical data collected in running numerous deliberative polls in diverse policy and national
enough to familiarize one with their basic ideas, processes, and results—abjuring a full analysis here. Fishkin summarizes the basic process as follows:

The Problem—Citizens are often uninformed about key public issues. Conventional polls represent the public's surface impressions of sound bites and headlines. The public, subject to what social scientists have called "rational ignorance," has little reason to confront trade-offs or invest time and effort in acquiring information or coming to a considered judgment.

The Process—Deliberative Polling® is an attempt to use television and public opinion research in a new and constructive way. A random, representative sample is first polled on the targeted issues. After this baseline poll, members of the sample are invited to gather at a single place for a weekend in order to discuss the issues. Carefully balanced briefing materials are sent to the participants and are also made publicly available. The participants engage in dialogue with competing experts and political leaders based on questions they develop in small group discussions with trained moderators. Parts of the weekend events are broadcast on television, either live or in taped and edited form. After the deliberations, the sample is again asked the original questions. The resulting changes in opinion represent the conclusions the public would reach, if people had opportunity to become more informed and more engaged by the issues.47

A few more details: the whole group usually ranges between 200 to 500 participants (similar in size to modern representative legislatures); participants are given material incentives for participation; small group deliberations occur amongst 12-15 persons with procedural moderators looking to ensure civility, and balanced equality between the contributions of members and between the major arguments canvassed in the briefing documents. Fishkin and Luskin summarize the results of comparing pre-event polls (both of the participants and often a different, larger control group) to exit polls conducted after deliberations:

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1. The participants are representative. ...
2. Opinions often change. ...
3. Vote intentions often change. ...
4. The participants gain information. ...
5. The changes in opinions and votes and the information gains are related. ...
6. The changes in opinions and votes are unrelated to social location. ...
7. Policy attitudes and vote intentions tend to be more predictable, and predictable on the basis of normatively preferable criteria after deliberation than before. Thus regressions of policy attitudes on collections of values and empirical premises that ought to affect them carry bigger adjusted $R^2$'s after deliberation than before. Similarly, U.S. primary election voters tend to give much greater weight than the control group to the candidates’ policy positions in deciding how to vote.
8. Single-Peakedness increases. Defining single-peakedness as a matter of degree (as the size of the largest subset whose policy preferences are single-peaked in the traditional binary sense, divided by the size of the sample), we find that deliberation increases single-peakedness, at least on issues that are not already highly salient and where preferences are not already single-peaked. The participants may not agree more after deliberating, but they do seem to agree more in this sense about what they are agreeing or disagreeing about. ...
9. The increases in single-peakedness and information gains are related. The increases in single-peakedness stem primarily from those participants emerging most informed.
10. Preferences do not necessarily “polarize” across discussion groups. ...
11. Preferences do not necessarily homogenize within groups. ...
12. Balanced deliberation tends to promote balanced learning.48

In short, remarkable increases in the quality of the outcomes of opinion-formation processes can be achieved through the astute institutional design of deliberations amongst a representative cross-section of ordinary citizens. Although the results, to some extent speak for themselves, a few comments are particularly relevant here. First, result 6 is quite significant as a rebuttal to claims (now unfashionable to make explicitly) that deliberation is the special province of elite, well-off or well-educated citizens alone: “That the changes of opinion and vote intention are largely uninfluenced by sociodemographic factors, including

48 Fishkin and Luskin, Experimenting with a Democratic Ideal: Deliberative Polling and Public Opinion ([cited]. references omitted.
education suggests that the process seems accessible to all social strata.”

Second, result 7 can be reformulated in terms of the notion of reasons-responsiveness: after engaging in the deliberative polls, participants’ policy preferences were brought into much closer line with the information, values, and reasons that they found to be directly relevant to supporting or undermining those preferences. Given that a large measure of the structure of deliberative polling is oriented towards civic education this should not be surprising, but it is important to underline in the face of skepticism about the worth or import of deliberation when compared to other factors motivating belief and preference formation: preferences may not be fully reasons-responsive, but they are not fully insensitive to reasons either. Results 8 and 9 go a fair way to answering charges about the mercurial and unstable nature of public opinion, at least when the latter has been anchored in robust, actual processes of deliberation:

“deliberation lessens the collective confusions of mass democracy, creating a shared public space for public opinion. ... If anything, the desirability of avoiding preference cycles argues for deliberation.”

Finally, results 10 and 11 follow from the facts that communication in deliberative polls occurs across lines that typically separate citizens in their ordinary lives, and that the pool of available information and arguments that participants must contend with is not limited to the socially and ideologically bounded pools increasingly produced in niche-marketed mass-media productions.

This is related to one final important point. We should not expect high quality deliberation to result in or tend towards consensus on policy alternatives, or more grandly yet, on questions of basic values, worldviews, and moral systems. “In the Deliberative Polls we have found that the items that change are not fundamental values, but rather specific policy attitudes, factual knowledge and what we have called ‘empirical premises’ (typically,

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49 Ibid. ([cited].

50 Ibid. ([cited].
assumptions about causal connections between policy choices and valued outputs).

Fundamental values seem to have greater stability than any of the items just mentioned. 51

To put the same point another way, deliberation is not a panacea for reasonable, persistent disagreement tied to modern conditions of value pluralism, nor can we expect it to produce a utopia of unanimous consent on substantive principles of justice. It is rather a process by which citizens’ fundamental disagreements can become clear, while stripping away the confusions caused by myths, false beliefs, and simple lack of relevant information. As I have been arguing throughout this book, it is precisely the problem of reasonable substantive disagreement, coupled with the fact that the use of state power is inevitably coercive and so demands justification, which should encourage us to adopt a proceduralist conception of democratic constitutional legitimacy. Deliberative polls give us no empirical reasons, additional to the standard theoretical ones, 52 to believe that consensus on relatively specific fundamental values or on encompassing value systems would be forthcoming, if we could only deliberate better together.

Returning now to the design problem concerning institutions of constitutional elaboration, is there any place for deliberative polls or their derivatives, and if so where? Fishkin’s original design for deliberative polls was specifically structured to improve the public opinion that policy makers rely on in the ordinary course of politics. The idea was to move from the raw and unfiltered preferences that traditional opinion polls gauge to well-formed preferences that are reasons-responsive and the outcome of a fair confrontation with the opinions, beliefs, and arguments of other citizens from diverse sectors of society. It was hoped that such deliberative polls would not only have beneficial effects for the participants, however, but might also be able to go some way towards restructuring the broader informal

51 Ackerman and Fishkin, Deliberation Day, 30, footnote 9.
public spheres. In principle they seem well-suited to correcting the kinds of deliberative
troubles undermining the ideal independence and sensitivity of actual amendment procedures.

Deliberative opinion polls could easily focus on constitutional issues, without any
changes in their current format. They might then play a consultative role in extant structures
for constitutional elaboration: constitutional courts, self-review panels and inter-branch
constitutional decision-makers could all draw on their results (perhaps in different ways and
with respect to different jurisdictional areas) to gauge “the conclusions the public would
reach, if people had opportunity to become more informed and more engaged by the
issues.” Of course, the claim that the outcomes of one or several deliberative opinion polls
each involving 500-odd citizens are the opinions of the public at large are counterfactual.
This might lead to some skepticism concerning both their actual representativeness and, as a
consequence, the degree to which the opinions of a small sample of the public fulfill the
democratic demand for political equality. Fishkin’s central rejoinder here is that
contemporary scientific survey techniques, employing robust random sampling, enable a high
degree of confidence in the representativeness of the participants of deliberative polls. This
is then tied to an equal impact standard of formal political equality: the preferences of each
citizen are to have an equal chance at affecting outcomes. Majority rule in mass elections is
only one way of operationalizing this conception of political equality—of special importance

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52 A canonical formulation of such theoretical reasons is Rawls’s list of the ‘burdens of judgment’: Rawls,
*Political Liberalism*, 54-58.

53 Fishkin, *Deliberative Polling®: Toward a Better-Informed Democracy* ([cited]).

54 Fishkin defines formal political equality thus: “a procedure which gives equal consideration to the preferences
of each citizen. … The basic idea is that formal political equality is achieved when every voter has an equal
probability of being the decisive voter, assuming that we know nothing about the actual distribution of
preferences of other voters (and so that every alternative is equally likely). The definition captures the root
notion of various formal indexes for equal voting power,” Fishkin, *Democracy and Deliberation*, 31. It is
important to note here that he does not think that political equality can be fully secured through formal
procedures alone: certain conditions for insulating individuals from external threats or rewards for voting
compliance, and for an effective hearing of the full range of interest involved must also be met. Nevertheless,
his conception of political equality is essentially akin to the aggregative conceptions that underlie majoritarian
conceptions of democratic political equality, conceptions I distinguished from deliberative conceptions in
Chapter III, Section A.
here, so are random samples and lottery systems (discussed below). While it is true that deliberative democracy employs a more robust notion of political equality centered on the reasons-responsiveness of government action, in particular its responsiveness to a full consideration of the interests of all affected, this does not undermine the claim of constitutional consultation polling to adequately model political equality. If in fact all that we want out of such a process is a good idea of what the public would think if sufficiently informed and given the opportunity to deliberate adequately, and the representativeness of deliberative polling is sufficiently robust, then it seems that we achieve as much political equality as needed in this consultative context. There is one remaining element that might undermine our confidence in that representativeness however, and that is the problem of self-selection. Participation in deliberative polling is voluntary, and although encouraged by material incentives for partaking, we should expect a higher-degree of participation by ‘political junkies’ and other active citizens instead of a full cross-section of the population. As we have no reason to think that the distribution of the effects of constitutional decisions mirrors the self-selection distributions of deliberative poll participants, relevant representativeness might be undermined and thereby the political equality that random selection was intended to ensure. To put it in terms of the assessment values, relevant sensitivity may be undermined not by the small number of participants, but by the self-selection problem.55

There are two more significant concerns about deliberative opinion polls that concern their actual effectiveness, but may mitigate our hopes for them as means for correcting the deliberative troubles identified above. First, they have not had a significant impact, at least in the United States, in the broader informal public spheres through which facts, opinions and

55 Here one should note that the voluntary participation evinced in deliberative polling—in part an artifact of the civil society form of Fishkin’s experiments—is one significant disanalogy from the ancient Athenian practices
reasons circulate, especially with respect to the mass media.\textsuperscript{56} Political events are still, if not
to an even greater degree than before, covered and reported in terms of horseraces between
political personalities, rather than in terms of the substantive issues and relevant
considerations. If deliberative opinion polls do not receive significant uptake in the mass
media and the informal public spheres more generally, their salubrious deliberative effects
will be limited mostly to participants themselves. Not surprisingly, this also means that their
impact on decision-makers in the formal public sphere will also be attenuated. Their effects
on decisional outcomes may be magnified in the case of constitutional consultation polling,
however, as they are specifically initiated by political officials. Where analogous initiatives
have been taken by decision makers to employ deliberative polling techniques, there do seem
to have been discernible impacts on policy decisions.\textsuperscript{57}

More recently, in collaboration with Ackerman, Fishkin has extended the basic
structure of deliberative opinion polling into a much more ambitious call for

Deliberation Day—a new national holiday [in the United States]. It will be
held one week before major national elections. Registered voters will be
called together in neighborhood meeting places, in small groups of 15, and
larger groups of 500, to discuss the central issues raised by the campaign.
Each deliberator will be paid $150 for the day’s work of citizenship, on
condition that he or she shows up at the polls the next week. All other work,
except the most essential, will be prohibited by law.\textsuperscript{58}
Clearly this proposal also focuses on the educative effects on individual voters to be expected from structured deliberations with other citizens. The major increase in scale, however, supports their hope that it would have significant transformative effects not only on individual citizens, but also on the broader political public spheres: the structure of campaign strategies for information dissemination, advertising and spending, the revitalization of local political organizations, the character and quality of mass-media coverage of campaigns, and so on. Hopes for significant structural transformations of the political public spheres are much more secure here than in the case of small group deliberative opinion polls, no matter how great the uptake the latter receive in the informal public spheres. Furthermore, the extensive citizen participation mandated for deliberation day—secured through the requirement of deliberative participation in order to vote—would vitiate the worry about self-selection biases that threaten the fully representative character of deliberative opinion polls.

Deliberation day could easily be adopted in the run-up to voting for constitutional amendments, while leaving the rest of the formal procedures for amendment unchanged. Adoption of deliberation day at first only for constitutional amendments might even be considered as an experiment for testing its worth and experimenting with details on the way to full adoption of the innovation for general elections.\textsuperscript{59} I believe such a proposal would go a long way to ameliorating the most egregious deliberative troubles plaguing current formal amendment procedures. Recall that one problem is simply the structure of incentives for voters in ordinary elections that lead to rational ignorance. Deliberative polling techniques

\textsuperscript{59} Ackerman and Fishkin estimate that deliberation day, held biannually for all major national elections, would cost about $15 billion annually, Ibid., 26. Deliberation day only for constitutional amendments, assuming continuation of the United States annual amendment rate of 0.13 (Lutz, “Toward a Theory of Constitutional Amendment,” 261.) would be significantly less. Even factoring in a significantly eased amendment requirement and the additional deliberation days needed for failed amendment proposals, I would expect the annual rate of amendment deliberation days to remain below 0.5. Moreover, as Ackerman and Fishkin rightly note “instead of measuring the benefits of Deliberation Day in terms of dollars [through the narrow lens of standard cost-benefit analysis], we should instead measure the legitimacy of the present distribution of dollars in terms of its capacity to gain the deliberative consent of citizens on Deliberation Day,” Ackerman and Fishkin, \textit{Deliberation Day}, 26.
undermine this incentive structure by providing a set of incentives for becoming informed, most of which operate directly or indirectly through participants’ concern with maintaining social recognition in the interpersonal context of the small groups. They also combat rational ignorance incentives by providing opportunities for learning about the relevant issues through the briefing materials, one’s communicative interlocutors, and relevant policy experts and/or candidates, party representatives or special interest representatives. The face-to-face structure of the small groups, furthermore, greatly reduces the salience, for opinion- and preference-formation, of reasons-unresponsive forms of advertising and political persuasion. The contemporary constellation of modern opinion-polling feeding into candidate packaging that then drives mass-media campaign coverage is, then, much less likely to be effective in the face of deliberating citizens. The deleterious effects of deliberative enclaving and the contribution of media segmentation to such, should both be significantly decreased by means of deliberative interactions across the standard lines of social division and ideology.

Deliberative polling techniques open up much broader argument pools for interlocutors than they might otherwise encounter through self-selected media consumption, and they foster a context that supports taking important considerations and arguments seriously. Deliberation between individuals of heterogeneous backgrounds and class positions should also undermine some of the positive feedback cycles often noted between inequalities in deliberative capacities and resources and inequalities in the distributive mechanisms of government.

Finally, the required association of deliberation day with elections on amendment proposals will dispel the need to wait upon exceptional ‘constitutional moments’ (Ackerman) and propitious historical conditions for realizing the benefits of citizen deliberation on the fundamental structures of their political consociation. Even if pre-amendment deliberation days cannot solve or eliminate all of these deliberative troubles—especially those deeply
rooted in social cleavages and inequalities—they do promise some quantum improvement by mitigating their deleterious effects.

Both deliberative polling and deliberation day are focused almost entirely on political opinion-formation, leaving intact extant structures for decisive will-formation. They are focused, then, on changing the environment of opinion within which candidates and/or policies are chosen by normal electoral majorities, not on changing the basic structures of decision-making themselves. If a constitutional amendment deliberation day were adopted, it might well contribute to the independence and sensitivity deficits of standard amendment practices. I think that their advantages could be leveraged further, however, by exploring how such deliberative structures might become empowered: using them, that is, not only for opinion-formation but also decisive will-formation as well. I start with Leib’s intriguing proposal to use deliberative polling techniques in a new form of ordinary law-making, in order to highlight some specific challenges of adapting the techniques to the system of democratic constitutional elaboration.

In his proposal for a new ‘popular’ branch of government to add to the other three branches of government in the United States, Leib takes the idea of deliberative polls one step further, by giving them decisive legislative powers. The basic idea is to replace existing procedures for national initiatives and referenda with a mechanism for periodic meetings of 525 randomly selected citizens, who are required to come together to deliberate about and decide upon legislative proposals. Although they would employ many of the techniques developed for deliberative polls—small group interactions guided by trained and impartial mediators, feeding into larger plenary sessions, briefings by political representatives and experts, and so on—the key difference is that, at the end of their sessions, they must take

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60 Leib, "Towards a Practice of Deliberative Democracy." His proposed fourth popular branch has other functions than producing national legislation, though I don’t focus on those here.
a decision on the proposal before them by voting (under various super-majority rules) and thereby enact new national law. Leib rightly emphasizes that requiring a decision by the deliberative assemblies should have significant salubrious effects on the deliberations themselves: the change from mere talk to action restructures the expectations and orientations of participants, and the need for a decision significantly increases the focus of the discussions.61 I can’t begin to do justice to his thoroughly-elaborated and detailed proposal here—I use it rather as a springboard to articulate some of the key design issues posed in attempting to conceive of civic constitutional fora as having authorized powers for constitutional amendment and elaboration.

There first issue concerns jurisdiction: while Leib’s popular branch is specifically designed to produce ordinary law, my aim is to think about how to influence and produce constitutional law. He does speculate briefly about a possible role for the popular branch in extant United States amendment procedures, but his focus is elsewhere.62 This focus on the production of ordinary law leads him to envision an entirely new branch of government, and to consider many important details about how this would be integrated into standard separation of powers arrangements. As I want to think about how to use structured deliberations in the context of a system of constitutional elaboration, there is not as great a need to go into such details—the proposal is to rethink and redesign constitutional amendment procedures. As I expect to be somewhat rarer than correcting for felt failures of the ordinary legislative process, a separate new branch of government is unnecessary. In tailoring structured deliberation to constitutional issues, one cannot have the constant recourse, as Leib does, to the backstop of judicial review as a response to worries about

61 Delli Carpini, Cook, and Jacobs, "Public Deliberation, Discursive Participation, and Citizen Engagement.” also note that mere deliberative talk without a need for decision can often lead to worse outcomes than would be expected in the absence of deliberation: “The findings also suggest that in the absence of real influence, the illusion of voice can lead to even greater frustration and disenchantment than having no voice at all,” 333.
getting bad outcomes from given decision procedures.\textsuperscript{63} If Fishkin-style techniques are going
to be applied in the system of constitutional elaboration, constitutional review is not an
option: what is at issue may well be the limitation or overruling of the judgments of
constitutional court or other constitutional actors about the correct way to carry out
constitutional elaboration.

Given that changes in fundamental law are at stake, how can the institutions mirror
the significance of this jurisdiction? In part this raises similar issues as arose with respect to
normal amendment procedures: a matter of tailoring the degree of obdurancy to constitutional
significance. I’ve no more substantive details to add here to the discussion above, but it is
worth taking up again one aspect of the problem: how to model political equality in decision
procedures. Recall that Fishkin’s original design for deliberative opinion polling employed
an equal impact standard to argue for random selection as a guarantor of requisite political
equality. While there are clear self-selection problems with the polls, these don’t seem so
important when we are using them in civic constitutional consultation fora. But if we expect
such civic fora to have some degree of control over amendment decisions, the problem is
more acute. Leib’s solution is to adopt the ancient Greek modeling of political equality in the
form of mandatory duties for serving on randomly selected juries in his popular branch, with

\textsuperscript{62} Leib, "Towards a Practice of Deliberative Democracy," 413-14.

\textsuperscript{63} For all of his careful attention to the potential benefits of citizen deliberation, Leib consistently presupposes
the standard American conception of constitutional democracy as majoritarian aggregation restrained by
minoritarian side-constraints. Unsurprisingly, he then consistently endorses the substantivist defense of judicial
review as better at getting the right answers with respect to the minoritarian side constraints. And like the
substantivist defenses encountered in Chapter II, he also vacillates about where those side-constraints come
from and what they are intended to protect. See Ibid.: 369-70, 74-75, 408-14, 22. to get the full panoply of
worries motivating his requirement that the popular branch to be subject to strict judicial review: protect against
majority tyranny (the most common phrase used throughout); provide a substantial degree of equal protection
review; reject illiberal decisions; reject ‘undemocratic’ outcomes; protect individual liberty; use Dworkin-style
principled substantive reason to ensure that unacceptable, bad, and unjust laws don’t get passed; prevent abuse
of power; balance republicanism and liberalism; redress discrimination; ensure the continuance of the nation’s
traditions and their crucial role in steering constitutional doctrine; protect fundamental rights; keep the people in
touch with their fundamental values; maintain the multiple legs of governmental legitimacy in general; protect
against the majority passage of a law condemning all lawyers to death. In short, almost the full gamut of
525 members. It thus uses random sampling—choice by lottery—to achieve political equality, while correcting for self-selection through mandatory service.\textsuperscript{64} To this general scheme, he simply adds in more and fancier forms of supermajority rules for those decisions when amendment proposals are on the agenda of the popular branch.\textsuperscript{65}

Mandatory service does correct for self-selection, and a selection by lot is one plausible theoretical way to model a conception of political equality in terms of equal impact, but I find the proposal insufficient. There is first a concern of whether any small group of citizens—whether in a random jury or a body or of elected representatives—can really be expected to fully represent that ‘full blast’ of the opinions, values, interests and reasons in a large heterogeneous nation state. Perhaps ‘scientific random selection’ and the astute collection of relevant briefing materials and selection of experts that deliberative juries would be exposed go some way to mitigating this worry in the face of recognition of the impossibility of full citizen assemblies. But there is a deeper problem, one located in the notion of conceiving political equality in terms of equal impact in the first place. Recall Learned Hand’s formulation of the paternalist objection to judicial review: “If [a bevy of Platonic Guardians] were in charge, I should miss the stimulus of living in a society where I have, at least theoretically, some part in the direction of public affairs. Of course I know how specters canvassed in the history of American debates about the proper function and jurisdiction of judicial review is included.\textsuperscript{64} Another interesting proposal drawing on the notion of lottery to model political equality is put forward by Spector: use of randomly selected juries (of 12, 36, or more citizens) for the function of constitutional review. Spector, "Judicial Review, Rights, and Democracy," 331-33. I take it that this proposal has the same problems as those I identify presently with respect to Leib’s juries.\textsuperscript{65} Leib, "Towards a Practice of Deliberative Democracy," 413-14. As I discussed above with respect to ordinary amendment procedures, I find this focus on supermajoritarianism as the right way to think about obduracy somewhat misplaced. To be sure, we will need more difficult procedures for amendments than for ordinary laws, but its not simply a numbers game of allowing more minority vetoes or making it harder for majorities to win. Difficulty should be tailored rather to the deliberative virtues of allowing sufficient time for deliberation, encouraging the deliberative inputs of heterogeneous actors and agencies with diverse viewpoints and specialized competencies, and, spreading out decisional authority across those heterogeneous actors and agencies.
illuminary 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.”

One way to take Hand’s notion of democratic satisfaction is to see it as pointing out a
crucial connection between a subjective sense of being involved in a decision making process
and the legitimacy of the process of democratic government itself. Exposure to the full blast
of sundry considerations of one’s fellow citizens is then, not something that can be entirely or
satisfactorily fulfilled virtually, through the theoretical abstractions of randomized sampling
or lotteries. If exercises of government power are legitimated to the extent that their decision
procedures are reasons-responsive to a full consideration of the interests of all affected, and if
this can only occur democratically to the extent that citizens are ultimately responsible for
carrying out that reasons-responsiveness, then there is an inexpugnable normative element of
mutual consociation involved in constitutional democracy. As thinkers as diverse as
Rousseau, Dewey, Hand, Dworkin and Habermas—and many others beside—point out in
diverse ways, democracy is a common venture, a form of mutual consociation through law.

It is precisely this interactive, participatory, and common character of democracy that gets
left out of Leib’s popular branch, no matter how participatory, interactive and common it is
for the small fraction of the population involved.

Traditional forms of civic republicanism, and their contemporary descendents in
participatory democracy and communitarianism, have been centrally concerned with
fostering this particular sense of democracy as a joint venture. Their institutional solutions
for achieving it have, however, suffered from a certain degree of unreality. In particular,
there seems little hope for reconstituting political communities on the scale of the Greek polis
or Rousseau’s Geneva under contemporary socio-political conditions, nor is devolution of
democracy to locally autonomous communities acceptable given the scale and scope of

Deliberation day, does however, hold out the promise of realizing the sense of being involved in a common venture through small-group deliberative interactions, all the while maintaining most of the efficiency and simplicity of normal electoral mechanisms. I propose, speculatively then, to combine Leib’s civic juries with Ackerman and Fishkin’s deliberation day into a new type of process for constitutional amendment. The basic idea is that we can use deliberative juries for certifying amendment proposals for the ballot, and require deliberation day for the ratification or rejection of those amendment proposals. Without getting overly specific about detailed mechanisms, let me suggest that there are three important stages that institutional design would need to focus on in working out the details: selection of amendment proposals, certification of proposals for voter consideration, and ratification or rejection of the proposals.  

The selection stage is one of the more difficult ones from the perspective of deliberative democratic constitutionalism. Rather than delineating new procedures here, I take mostly for granted standard ways of initiating national amendment proposals, for instance by garnering a sufficient number of citizen signatures (perhaps geographically distributed) or on referral from national legislatures. Given that civic constitutional fora are intended in part to act as a check on constitutional elaboration carried out by the various branches of the government, it is crucial to maintain the popular initiation route, though I see no reason why government initiated proposals should be excluded. It is often the case that, for instance, legislators recognize that there are changes needed in the procedures of

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67 One might legitimately wonder here whether the nation-state is sufficiently capacious to deal with these coordination problems. Here again, the limitations of this study to constitutional democracy in extant nation-states come to the fore. The limitations of the nation-state concern not only empirical worries about feasibility, but also serious normative worries given the contingent historical reasons for its particular way of drawing boundaries between citizens, subjects and outsiders—boundaries which increasingly widen the gap between the borders around those affected and those with authoritative power in an interconnected world.

68 In thinking about the problems of these three stages, I have found Leib’s much more detailed work quite stimulating in identifying the problems and promise of standard initiative and referenda processes, and in
democratic representation even though they face insurmountable political obstacles to solution in legislatures themselves: procedures for political districting are a good example here.

If the selection phase is considered as embodying the problem of agenda-setting, then there are at least two quite different kinds of worries about the initiative process that puts an amendment proposal to deliberative constitutional juries. First, from a more expertocratic direction, there is a worry about the quality of whatever proposal makes it through. Since what is being considered is a law that will change the conditions of democratic law-making itself—a constitutional amendment—the proposal ought to be carefully considered from the viewpoint of its foreseeable impact, including its specifically legal impact on the overall systematicity of constitutional and ordinary law, and its long-term institutional and substantive consequences for society in general. From this perspective, we would want any proposal to receive some legal consideration and vetting to prevent, at least, proposals that are sloppily drafted or would destabilize the legal system. However, a constitution is not simply a lawyer’s document; it is the people’s structuring of the procedural conditions for their mutual consociation through higher law. There is, then, second, a worry coming from a more populist direction about a pre-selection of the agenda by lawyers and/or other elites. And this worry will be increased to the extent that the vetting process extends into consideration of the substantive consequences of such a proposal for society in general. My intuition here, at least, is that at the selection stage we should err on the side of allowing proposals to go forward that might look unwise, trusting in the deliberative qualities of the later two stages of certification and ratification to weed out ones that turn out so to be, in the light of the considered judgment of democratic citizens themselves. Thus, perhaps all that is exploring how structured deliberation can go a long way towards correcting or significantly mitigating many of their problems.
needed at this early selection phase is a politically independent panel of legal experts—including, say, appointed national judges and law professors—to vet proposals for minimal legal soundness and clarity.

Perhaps there is a different worry about the agenda-setting, one focused on the popular proposal means of setting the agenda of constitutional juries. The same concerns about the outsized influence of social powers and deep-pocketed private interests that arise in normal popular referenda—and that troubled ideal claims for the independence and sensitivity of normal amendment processes—might be thought to arise with the modified system I am recommending here. There are two important reasons I think this worry is misplaced however. First, the popular initiative does not put a proposal directly on the ballot, it rather selects a proposal for constitutional deliberative juries to consider. My proposal then interposes a deliberative filter between the selection and certification stages. In order to fully utilize the deliberative advantages of the system, I recommend further that three successive constitutional juries would be required to certify an amendment proposal for the national ballot. The three juries should be spaced out over a significant time span, and each should be composed of a different group of randomly selected jurors. The relative obduracy of this proposal is not recommended simply to make the process difficult, but to draw on the extensive deliberative resources of informal public spheres, extended over the time period from the original selection of the proposal until its possible certification. The remarkable information and argument collecting resources of informal public spheres—and in particular those of the diverse civil society associations that support its vibrancy and effectiveness—should not be discounted simply because of worries about the possibly deleterious influence of social powers and moneyed interests. At the end of the day, what should determine whether a proposal is selected for the ballot is the quality and strength of
the reasons and arguments that can be marshaled in support of it. Said another way, amendment proposals cannot be simply dismissed out of hand because of who they were originated by or how they first came before the public. In sum, worries about the character of the agenda-setting process are to be largely addressed through the reasons-responsiveness of the certification and ratification stages.

Might similar problems reappear once an amendment proposal has been certified for the ballot by three successive constitutional juries? Shouldn’t we expect a return of all of the deliberative troubles of mass-mediated informal public spheres and the disproportionate influence of well-funded pressure groups utilizing the techniques of modern political slogan advertising? This is a significant part of the reason for requiring national deliberation day before voting on a constitutional amendment. Recall that Ackerman and Fishkin’s arguments for deliberation day are not focused only on changing the current incentives for rational ignorance on the part of individual voters. They also hope—a reasonable hope I believe, given the relevant evidence—that there will be significant changes in the incentive structures for information providers in the public sphere generally: political officials, civil society groups, moneyed interests, and the mass media will all need to reorient their current dissemination and persuasion mechanisms and techniques with a view to reasonably well-informed voters, who would be much more aware of the difference between fact and hyperbole, weak reasons and strong reasons. In short, hopes for the democratic worth and

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69 See the thoughtful discussion of the way in which deliberative assemblies change the political incentives for interest groups operating in the informal public spheres, and thus their role in setting the agenda of deliberative juries, at Leib, "Towards a Practice of Deliberative Democracy," 441-56. “One can see how money and inequality of access sneak their way back into my model through civil society. The interest groups with the biggest advertising funds can conceivably rally the most support; they can then get better access to the agenda-setters and influence deliberative assemblies, albeit in a much more indirect fashion than they influence policy in our current regime. But it is important to note against such objections that giving civil societies (or interest groups) the indirect power to set the agenda should be considered more democratic than providing them with the direct power ultimately to decide issues, which is the sort of power they often enjoy now,” Leib, "Towards a Practice of Deliberative Democracy," 446.

70 This is what Ackerman and Fishkin refer to as the “leveraging strategy” that deliberation day would employ: “by inserting a formal moment for collective deliberation into the larger process, the community [would have]
quality of civic constitutional fora are ultimately based in part in hopes for a structural
transformation of the public sphere and in part in a belief in the capacity of democratic
citizens to actually set their own constitutional terms of mutual consociation. To be sure,
such considerations will never sufficiently satisfy those who, for normative or empirical
reasons, have a hypertrophied distrust of the reasoning powers of ordinary people and/or of
the capacity for even well-informed citizens to govern themselves, but then no democratic
theory—deliberative, constitutional, or otherwise—could.

By way of a recapitulation, it may help to see how the elements of this proposal for
civic constitutional fora support the six assessment values I set out for mechanisms of
constitutional review. First, I expect it to have no significant effect on the overall
systematicity of the legal corpus, since those amendment proposals that make it onto the
ballot and are ratified would be analyzed at each step along the way for their legal effects.
Expert legal opinions would play a role not only in the minimal vetting process of selecting
proposals for consideration by constitutional juries, but also would surely be injected in the
general argumentation processes carried on both in the public spheres and within deliberative
assemblies themselves—both constitutional juries and deliberation day assemblies. With
respect to settlement, we might well expect the same modest positive effect witnessed by
standard amendment procedures, where unresolved constitutional issues are definitively
settled by authority of the people’s constituent power. Or perhaps the relative ease of the
procedure would lead to its frequent use, thus somewhat undercutting settlement as measured
over a long time span. At any rate, such modest settlement deficits, would they occur, are not

managed to leverage its entire political conversation onto a higher plane,” Ackerman and Fishkin, Deliberation
Day, 13. Leib shares the same idea: “The shift of the nexus of power from the voter to the deliberator should
have substantial effects on how the individual is treated by the mass media. … The media, if it aims to shape
public will [and not just opinion], would need to undertake its own transformation to fit better with the decision
procedure. Since the aggregation of uninformed votes would no longer win policy elections, it is no longer in
the media-manipulator’s interest to use techniques that avoid intelligent and more detailed information,” Leib,
“Towards a Practice of Deliberative Democracy,” 455.
themselves cause for concern: democratic constitutionalism is a process of permanent, peaceful, procedurally-structured revolution that does not rely on legal stability and its associated values alone for legitimacy. Like normal amendment procedures, civic constitutional fora would be strongly contributory with respect both to empowerment—it would allow democratic citizens to take the powers of constitutional elaboration into their own hands—and to jurisdiction—exercising the constituent power to set the procedural conditions of law-making, citizens would have the same jurisdiction as constitutional assemblies.

The real improvement over traditional amendment mechanisms comes from drawing on and leveraging the techniques of deliberative polling in order to operationalize a practice of deliberative democratic constitutionalism. By making amendment processes systematically reasons-responsive to the full blast of information, opinions, values, and arguments available in the informal and formal public spheres, the deliberative troubles that appear to actually undermine the ideal sensitivity and independence of normal amendment mechanisms can be largely mitigated. Rather than placing gag-rules on public sphere communicators, they employ basic techniques for improving the processes of considering and weighing those communications that would greatly reduce the salience of hype, soundbites, fictions, pandering, threats, and so on. Deliberation then addresses worries about social powers capturing normal amendment referenda and rendering them insufficiently independent. But civic constitutional fora should also greatly increase the sensitivity of amendment processes to the wide diversity of information and reasons available in the public spheres, and change what that sensitivity is to: not the raw voting power of the citizenry, but their voting power as reflective citizens engaged in the common venture of coordinating their

71 For example, would it have been better to prefer settlement over the United States people’s capacity to repeal the 18th Amendment (prohibiting the manufacture, sale, and commerce of alcohol) only 14 years later through
mutual political lives through the medium of constitutional law. This entails finally that, unlike in the case of the other three types of proposals I endorsed that operate at the horizontal level of formal government—concentrated judicial review, self-review panels, and inter-branch dispersal—civic constitutional fora could overcome the otherwise ineliminable tension between political independence and popular sensitivity. Drawing on the vertical relationship between the informal and formal public spheres, we can institutionally structure a truly independent ‘guardianship of the guardians’ of the constitution that is, at the same time, much more sensitive to the interests, opinions, and values of all affected than any form of elite platonic guardians.

Let me be clear: I am not claiming that civic constitutional fora can solve all of the ills of contemporary political public spheres, nor more grandly yet, that it can solve the problems of constitutional self-government. I don’t think, for instance, that such proposals will lead to enlightened unanimity or near-consensus throughout a diverse nation-state on obviously rational political goals and clear and indubitable policy implementations. Deliberation alone cannot liquefy the facts of reasonable pluralism or social complexity, or the difficulties of practical reasoning in general, through the solvent of unfettered Reason. I am claiming, however, that significant improvements can be made through relatively modest changes in current incentive structures for citizens, political actors, and the supporting political public spheres, and that these changes can be implemented through modest proposals to improve the procedures of democratic constitutional elaboration. After all, if deliberative democratic legitimacy aims at a system of law where citizens can understand themselves as both subjects and authors of that law, and if that is only achievable under modern conditions on the supposition that democratic procedures alone warrant the expectation of better decisions, then we cannot simply take inherited procedures for granted as the best possible. And this is

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precisely what democratic constitutions acknowledge explicitly by allowing for amendment in the first place: it may well be that there are mechanisms for improving the basic procedures of democratic law-making itself. We owe it to ourselves as democratic citizens to seek out and foster those procedures that can best fulfill the aspirations of deliberative democratic constitutionalism.