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The Coming of Age of Deliberative Constitutionalism

C. Ignacio Giuffré
Pompeu Fabra University, Barcelona, Spain
Email: ignacio.giuffre@upf.edu

Abstract

In a 1998 article, Bohman argued that the contemporary deliberative turn in democratic theory had reached its 'coming of age', as deliberative democrats began to show greater interest in the institutionalization of their proposal. Moreover, Bohman referred to this growing interest with an expression that was unprecedented at the time: 'deliberative constitutionalism'. At present, deliberative constitutionalism has become one of the most original and relevant contemporary proposals. In this context, my article proceeds as follows. I begin by arguing that the contemporary deliberative turn in democratic theory also gave rise to a deliberative turn in constitutionalism—that is, a trend aimed at orienting constitutionalism and judicial review towards democratic deliberation. Next, I argue that, at that embryonic yet promising stage, deliberative constitutionalism had shortcomings that hindered the aim assumed since its origins. Finally, I argue that, over recent decades, these shortcomings have been finessed, which shows that deliberative constitutionalism has also reached its *coming of age*.

Keywords: *Deliberative democracy; Deliberative constitutionalism; Judicial review; Constitutional dialogue; Counter-majoritarian difficulty*

1. Introduction

In his seminal article of 1998, Bohman argued that the contemporary deliberative turn in democratic theory, initiated in 1980, had reached its 'coming of age'.[1] According to his argument, this development was due to the fact that "deliberative democrats have become increasingly interested in the problems of institutionalization."[2] This practical concern for the feasibility of deliberative democracy led Bohman to introduce a new and powerful notion: "deliberative constitutionalism."[3] This is a trend that has emerged with the aim of "making institutions such as … courts and constitutional law more deliberative rather than rejecting them for more direct democracy."[4]

1. See James Bohman, "Survey Article: The Coming of Age of Deliberative Democracy" (1998) 6:4 J Political Philosophy 400.
2. *Ibid* at 401.
3. *Ibid* at 413. See also John J Worley, "Deliberative Constitutionalism" (2009) 2009:2 BYUL Rev 431 at 433, n 5.
4. Bohman, *supra* note 1 at 401.

Since the emergence of deliberative constitutionalism, the remarkable number and significant influence of institutional experiences and academic contributions in this trend have placed it among one of the most original and studied.[5] At present, almost all theoretical developments and institutional practices appeal to some notion of constitutional dialogue. Beyond its attractiveness and popularity, deliberative constitutionalism has become broad, heterogeneous, and complex, rather than uniform. Theories of deliberative constitutionalism "are not . . . unified or in agreement upon how to understand the concepts of democracy, constitutionalism, and their interrelations,"[6] since, "although scholars are pointing in interesting directions in bringing together constitutionalism and deliberation, there is plenty of room for further reflection."[7] In a nutshell, there are disagreements in the many studies about most specific questions of deliberative constitutionalism.[8] Therefore, this article starts on the basis of a thin notion or common denominator of deliberative constitutionalism that contrasts with the predominant constitutional culture: a link between constitutionalism and the principles of deliberative democracy.

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5. This premise is supported by a large number of scholars. See Christopher P Manfredi & James B Kelly, "Six Degrees of Dialogue: A Response to Hogg and Bushell" (1999) 37:3 Osgoode Hall LJ 513 at 524; Christine Bateup, "Expanding the Conversation: American and Canadian Experiences of Constitutional Dialogue in Comparative Perspective" (2007) New York University School of Law, Working Paper No 06-37; Rosalind Dixon, "Creating Dialogue about Socioeconomic Rights: Strong-form versus Weak-Form Judicial Review Revisited" (2007) 5:3 Intl J Constitutional L 391 at 393; Aruna Sathanapally, *Beyond Disagreement: Open Remedies in Human Rights Adjudication* (Oxford University Press, 2012) at 36-37; Roberto Gargarella, *The Law as a Conversation Among Equals* (Cambridge University Press, 2022) at 246; Sandra Fredman, "From Dialogue to Deliberation: Human Rights Adjudication and Prisoners' Rights to Vote" in Murray Hunt, Hayley J Hooper & Paul Yowell, eds, *Parliaments and Human Rights: Redressing the Democratic Deficit* (Hart, 2015) 447; Po Jen Yap, *Constitutional Dialogue in Common Law Asia* (Oxford University Press, 2015); Dimitrios Kyritsis, *Where Our Protection Lies: Separation of Powers and Constitutional Review* (Oxford University Press, 2017); Hoi L Kong & Ron Levy, "Deliberative Constitutionalism" in André Bächtiger et al, eds, *The Oxford Handbook of Deliberative Democracy* (Oxford University Press, 2018) 625 [Kong & Levy, "Deliberative Constitutionalism"]; Stephen Elstub & Gianfranco Pomatto, "Mini-publics and Deliberative Constitutionalism" in Ron Levy et al, eds, *The Cambridge Handbook of Deliberative Constitutionalism* (Cambridge University Press, 2018) 295; Ron Levy & Hoi Kong, "Introduction: Fusion and Creation" in Ron Levy et al, *supra* note 5, 2 [Levy & Kong, "Introduction"]; Ron Levy, "The 'Elite Problem' in Deliberative Constitutionalism" in Ron Levy et al, *supra* note 5, 351 [Levy, "The 'Elite Problem'"]; Kent Roach, "Dialogue in Canada and the Dangers of Simplified Comparative Law and Populism" in Geoffrey Sigalet, Grégoire Webber & Rosalind Dixon, eds, *Constitutional Dialogue: Rights, Democracy, Institutions* (Cambridge University Press, 2019) 267; Donald Bello Hutt, "The Deliberative Constitutionalism Debate and a Republican Way Forward" (2021) 12:1 Jurisprudence 69; Alison L Young, "Dialogue and Its Myths: 'Whatever People Say I Am, That's What I'm Not'" in Sigalet, Webber & Dixon, *supra* note 5, 35; Frederick Schauer, "Dialogue and Its Discontents. Constitutional Dialogue: Rights, Democracy, Institutions" in in Sigalet, Webber & Dixon, *supra* note 5, 423 at 435; Aileen Kavanagh, "The Lure and the Limits of Dialogue" (2016) 66:1 UTLJ 83 at 95.

6. Christopher F Zurn, *Deliberative Democracy and the Institutions of Judicial Review* (Cambridge University Press, 2007) at 66-67.

7. Bello Hutt, *supra* note 5 at 79.

8. See Swati Jhaveri, "Interrogating Dialogic Theories of Judicial Review" (2019) 17:3 Intl J Constitutional L 811 at 815.

In this context, the article has the following structure. In section 2, I explain how the deliberative turn in democratic theory gave rise to a deliberative turn in constitutionalism. Deliberative constitutionalism, then, emerged from the connection between constitutionalism and the normative principles of deliberative democracy—such as equality, inclusiveness, dialogue, reciprocity, legitimacy, and impartiality, among others. On this basis, deliberative constitutionalism assumed the objective of placing constitutionalism in general and judicial review in particular at the service of dialogue.

In section 3, I highlight the shortcomings of this emerging deliberative constitutionalism. At its incipient yet promising stage, deliberative constitutionalism was far from being consolidated, mainly because of the following shortcomings. First, although a deliberative conception of democracy was defended at the democratic level, a strong conception of constitutionalism was maintained at the constitutional level, which did not manage to overcome the objections to judicial review. Second, the deliberative agenda was limited to exceptional times, to specific issues, and to certain types of reasons. Third, the institutional issues of constitutionalism and judicial review were analysed on a theoretical and ideal level. Fourth, the approach to these issues, in turn, was abstract, general, and detached from any particular traditions. These four shortcomings, in sum, hindered the goal that was assumed by deliberative constitutionalism from its beginnings.

Finally, in section 4, I identify some of the main institutional (4.1) and theoretical (4.2) developments of deliberative constitutionalism, which, over the last decades, have finessed the aforementioned shortcomings. First, along with a deliberative conception of democracy, a conception of constitutionalism has been adopted that takes seriously the objections to strong judicial review. Second, the deliberative agenda has extended the times at which constitutional dialogue can be opened, the issues that can be debated, and the reasons that can be admitted. Third, the theory has taken an institutional turn and has analysed more thoroughly and systematically the institutional issues of constitutionalism and judicial review. Fourth, the theory has inaugurated a contextual turn and has addressed the possibilities and limits of orienting constitutionalism and judicial review toward democratic deliberation in situated contexts. These four developments, in sum, show that deliberative constitutionalism has finally reached its *coming of age*.

This paper makes the following contributions. First, it provides a more complete view of the fragmentary research on the origins, development, and expansion of deliberative constitutionalism. Second, it analyses the present challenges of deliberative constitutionalism, understanding its present to be the result of a plurality of transformations and events. Finally, it makes explicit—and makes up for the shortcomings of—both the deliberative democratic tradition in the analysis of constitutionalism and the objections to judicial review, as well as the constitutional tradition in the analysis of the principle of democratic deliberation.

2. From the Deliberative Turn in Democracy to the Deliberative Turn in Constitutionalism

The contemporary deliberative turn in democratic theory began in the 1980s with contributions like that of Joseph Bessette, who coined the term "deliberative democracy" in an influential article.[9] According to Bessette, between the democratic majority rule and its restraints—for example, bicameralism, president's veto power, and judicial review—in the American Constitution, there is only an "apparent contradiction," as the two principles are 'reconciled' through the "purpose to establish a 'deliberative democracy'."[10] In other words, he outlined the relevance of certain restraints established by the framers "to achieve the effective rule of the deliberative majority."[11] In this way, moreover, Bessette departed not only from different views of democracy, but also from a view of constitutionalism that "depreciate[s] the role of deliberation within the governing institutions."[12] So, Bessette not only first applied the adjective 'deliberative' to democracy, but also used the expression 'deliberative democracy' to describe the principles of the U.S. Constitution that guarantee public debate.

This shows some connection between deliberative democracy and constitutionalism, albeit with limitations (see section 3). In effect, a certain reference to constitutionalism has been present since the beginning of the contemporary deliberative turn in democratic theory.[13] Notwithstanding that a certain idea of deliberation has also been present since the origin of modern constitutionalism,[14] from this contemporary turn the traditions of deliberative democracy and constitutionalism have begun to intensify their interconnection in a common field: deliberative constitutionalism. This interconnection, more specifically, has involved the reciprocal influence between the institutional tools of constitutionalism— i.e., judicial review, constitutional creation and reform, the law-making process, *inter alia*—and the principles of deliberative democracy—i.e., discussion, inclusion of society and public authorities, reasoned justification, reciprocity, publicity, the egalitarian conception of impartiality, and the dialogical and inclusive conception of legitimacy, *inter alia*.

Since then, "a body of established deliberative democratic constitutional theory—of deliberative constitutionalism"—has emerged.[15] In effect, some legal and constitutional theories, after 1980, began to take note of democracy's

9. Joseph M Bessette, "Deliberative Democracy: The Majority Principle in Republican Government" in Robert A Goldwin & William A Schambra, eds, *How Democratic is the Constitution?* (American Enterprise Institute for Public Policy Research, 1980)102 at 102ff.
10. *Ibid* at 102, 104.
11. *Ibid* at 111.
12. *Ibid* at 112.
13. See John S Dryzek, *Deliberative Democracy and Beyond: Liberals, Critics, Contestations* (Oxford University Press, 2000) at 8, 28; Levy & Kong, "Introduction", *supra* note 5 at 1.
14. On this, in addition to Bessette's work, see for example Cass R Sunstein, "Interest Groups in American Public Law" (1985) 38:1 Stan L Rev 29; Stephen Holmes, "Precommitment and the Paradox of Democracy" in Jon Elster & Rune Slagstad, eds, *Constitutionalism and Democracy* (Cambridge University Press, 1988) 195.
15. Levy & Kong, "Introduction", *supra* note 5 at 2.

deliberative turn. Thus, as will be detailed in what follows, precursor theories began to consider constitutionalism through the lens of the deliberative wave of democracy; or rather, began to take their own deliberative turn in constitutionalism: that is, the analysis and correction of decision-making processes and political institutions, using the above-mentioned normative tools of deliberative democracy.[16]

Of course, there have been not one but multiple notions of deliberative constitutionalism. Indeed, on the question of who can engage in constitutional dialogue to legitimise political decision in general and assuage objections to judicial review in particular, deliberative constitutionalism has offered different answers: judges of a court (intrajudicial dialogue), the courts (transjudicial dialogue), the institutions (interinstitutional dialogue), or all the institutions with the people potentially affected (inclusive dialogue).[17] But despite this diversity, there has been a common core: linking constitutionalism with democratic deliberation in general and addressing criticisms of judicial review through institutional remedies at the service of democratic deliberation in particular. Thus, "incorporating insights from deliberative democracy can dissipate some of the force of the constitutional legitimacy dilemma (the 'counter-majoritarian' problem)."[18] In these terms, deliberative constitutionalism allows us "to recast the counter-majoritarian difficulty," as it does not limit itself to "the question of whether judicial review is illegitimate because it frustrates democratic will," but rather claims that "judicial review is legitimate to the extent that it facilitates democratic deliberation, both within institutions of public power (including the courts) and within wider society."[19]

Aside from more remote examples, one of the most impactful and early institutional experiences of deliberative constitutionalism was the 1982 *Canadian Charter of Rights and Freedoms*.[20] 'Dialogic judicial review' potentially emerges

16. See Simone Chambers, "Deliberative Democratic Theory" (2003) 6:1 Annual Rev Political Science 307 at 309; Antonio Floridia, "The Origins of the Deliberative Turn" in Bächtiger et al, *supra* note 5, 35 at 38.

17. See C Ignacio Giuffré, "Pushing the Boundaries of Deliberative Constitutionalism: From Judicial Dialogue to Inclusive Dialogue" (2023) 50 Revus: J Constitutional Theory & Philosophy L 1.

18. Kong & Levy, "Deliberative Constitutionalism", *supra* note 5 at 626. The idea that the theory of dialogue constitutes an answer to the legitimacy problems of judicial review is mentioned by, among many others, Luc Tremblay, "The Legitimacy of Judicial Review: The Limits of Dialogue Between Courts and Legislatures" (2005) 3:4 Intl J Constitutional L 617 at 622; Christine Bateup, "The Dialogic Promise: Assessing the Normative Potential of Theories of Constitutional Dialogue" (2006) 71:3 Brook L Rev 1109 at 1118; Conrado H Mendes, "Not the Last Word, but Dialogue: Deliberative Separation of Powers II" (2009) 3:2 Legisprudence 191 at 193; Alison L Young, "Dialogue, Deliberation and Human Rights" (2018) in Ron Levy et al, *supra* note 5, 125.

19. Kong & Levy, "Deliberative Constitutionalism", *supra* note 5 at 634.

20. See *Canadian Charter of Rights and Freedoms*, s 7, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*]. The precursor of the Canadian *Charter* is the *Canadian Bill of Rights*, SC 1960, c 44, ss 1-3. An earlier precedent was the Constitution of the Republic of Ecuador of 1945, which, although it only lasted one year, provided that the courts could "suspend the validity" of a norm "until the Congress makes a decision on its validity" (art. 160). Earlier examples were the *Constitution of the State of Venezuela* of 1830, Title XXVI arts 186, 187, and 224, and *Constitution for the Granadine Confederation*

from two provisions of this *Charter*.[21] First, although section 33 allows the courts to declare the unconstitutionality of a norm, they do not necessarily have the last word. In effect, the national or provincial legislative power can invoke this clause both *preventively*, that is, to shield a law at the time of approving it and before the exercise of any eventual judicial review, and also *reactively*, that is, to reverse a decision contrary to the validity of the law issued by a court in order to temporarily maintain its constitutionality.[22] Second, the *Charter* rights are subject to "such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."[23] This has meant that the national and regional legislature can, whenever justified by fundamental collective purposes, regulate the *Charter* rights in an argumentative dialogue with the courts. The Canadian *Charter* was drafted with the purpose of overcoming the democratic deficit of judicial review.[24] This development is considered "a wonderful example of an essentially Bickellian constitution."[25] This "revolution"[26] sparked a "fabulous academic controversy"[27] and "a new era of constitutionalism."[28] The former Chief Justice of the Supreme Court of Canada, Antonio Lamer, declared that "the introduction of the Charter has been nothing less than a revolution on the scale of the introduction of the metric system, the great medical discoveries of Louis Pasteur, and the invention of penicillin and the laser."[29] Regardless of the tenor of this claim, section 33 was fundamental to the approval of the new constitution.[30] Far from being seen as an attack by majorities on fundamental rights, this reform was the result of the criticism of strong judicial review,

of 1858 art 50. A more remote antecedent was the *référé législatif* of the French revolutionary period, where the courts had in some cases the obligation and in other cases the power to refer disputes over the interpretation of the law to parliament.

21. See Mark Tushnet, "Dialogic Judicial Review" (2009) 61:2 Ark L Rev 205.
22. The first mechanism is not attractive in terms of dialogue, since it closes it in advance, but the second is revolutionary.
23. *Charter*, *supra* note 20 at s 1.
24. See Bateup, *supra* note 18 at 1119-20; Richard Clayton, "Judicial Deference and 'Democratic Dialogue': The Legitimacy of Judicial Intervention under the Human Rights Act 1998" (2004) 2004:1 Public Law 33 at 41.
25. Guido Calabresi, "The Supreme Court 1990 Term—Foreword: Antidiscrimination and Constitutional Accountability (What the Bork-Brennan Debate Ignores)" (1991) 105:1 Harv L Rev 80 at 124.
26. Kent Roach, "Constitutional and Common Law Dialogues Between the Supreme Court and Canadian Legislatures" (2001) 80:1-2 Can Bar Rev 481 at 482.
27. Gargarella, *supra* note 5 at 251.
28. Tsvi Kahana, "Understanding the Notwithstanding Mechanism" (2002) 52:2 UTLJ 221 at 273-74.
29. Ran Hirschl, *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism* (Harvard University Press, 2007) at 18, citing a quotation of Chief Justice Lamer in "How the Charter Changes Justice", *The Globe and Mail* (17 April 1992) at A11. Chief Justice Lamer made his comment on the tenth anniversary of the Canadian *Charter*'s entry into force.
30. See Peter H Russell, "The Notwithstanding Clause: The Charter's Homage to Parliamentary Democracy" *Policy Options* (February 2007) 65 at 66, online (pdf): policyoptions.irpp.org/wp-content/uploads/sites/2/assets/po/the-charter-25/russell.pdf; Janet L Hiebert, "Compromise and the Notwithstanding Clause: Why the Dominant Narrative Distorts Our Understanding" in James B Kelly & Christopher P Manfredi, eds, *Contested Constitutionalism: Reflections on the Canadian Charter of Rights and Freedoms* (UBC Press, 2009) 107 at 115.

consideration of the fact of disagreements over rights, and the reliance on parliament for the protection of rights.[31]

Some years later, the invention of the expression "dialogic constitutionalism" emerged with a seminal article by Michelman in 1988.[32] There, he reframed and justified constitutional adjudication in terms of a "republican constitutionalism" as a "dialogic practice," aimed at "listening for voices from the margins" and promoting positive liberty in the civil sphere, all of which is encompassed in what he calls a "dialogic-republican constitutional theory."[33] More specifically, he took up the idea of the procedural judicial review proposed by Ely, but instead of its "pluralist" approach, Michelman adopted a "republican" approach.[34] Moreover, his ideas of "dialogic engagement" and "republican dialogue" were "non-state centered," as his ideas were expanded to the informal public sphere, to what he called "all arenas of potentially transformative dialogue"—for example, in "town meetings … clubs … schools … organizations of all kinds … workplaces … street life," *inter alia*.[35]

Sunstein, along with Michelman, was one of the most pioneering contemporary scholars to have employed republican ideas on constitutional matters. In this line of thought, he argued in 1990 that

> courts should develop interpretive strategies to promote deliberation in government—by, for example, remanding issues involving constitutionally sensitive interests or groups for reconsideration by the legislature or by regulatory agencies when deliberation appears to have been absent.[36]

He explored a kind of remand of controversial constitutional issues, from the court to the parliament or obliged authorities, for them to deliberate when they have not: "One of the distinctive features of this approach is that the outcome of the legislative process becomes secondary. What is important is whether it is deliberation—undistorted by private power—that gave rise to that outcome."[37] He thus suggested a judicial review "that inspects legislation to determine whether representatives have attempted to act deliberatively."[38] In this regard, Habermas stated that Sunstein hasn't conceived the court in terms of

31. See Mark Tushnet, "New Forms of Judicial Review and the Persistence of Rights- and Democracy-Based Worries" (2003) 38:2 Wake Forest L Rev 813 at 819-20; Hiebert, *supra* note 30 at 112-13. The same holds with respect to the British reform: see Sathanapally, *supra* note 5 at 4; Aileen Kavanagh, "What's So Weak about 'Weak-Form Review'? The Case of the UK Human Rights Act 1998" (2015) 13:4 Intl J Constitutional L 1008 at 1028-29.
32. Frank Michelman, "Law's Republic" (1988) 97:8 Yale LJ 1493 at 1524.
33. *Ibid* at 1494,1524, 1537, 1494 [footnotes omitted].
34. *Ibid* at 1525, citing John Ely, *Democracy and Distrust: A Theory of Judicial Review* (Harvard University Press, 1980).
35. Michelman, supra note 32 at 1531 [footnote omitted].
36. Cass R Sunstein, *After the Rights Revolution: Reconceiving the Regulatory State* (Harvard University Press, 1990) at 164.
37. Sunstein, *supra* note 14 at 58 [footnote omitted].
38. *Ibid* at 59.

self-restraint, but rather as a "custodian of the deliberative democracy" and "[t]he discursive character of opinion- and will-formation."[39]

In *Between Facts and Norms*, Habermas followed the linguistic turn within philosophy of language with a deliberative turn within philosophy of law. This early and influential book contributed to the understanding of law from a discursive perspective, as well as to the articulation of judicial review with deliberative democracy. Habermas also took up Ely's procedural theory and, on that basis, argued that the court should not limit itself to analysing the moral principles of norms, but should also analyse the conditions of the law-making process. Habermas, however, gave a deliberative turn to Ely's theory of democracy and judicial review. He did not conceive of the democratic process in pluralistic terms, i.e., as the rules of the market for free competition, but rather as the conditions for inclusion and dialogue in the institutional and social public spheres. Moreover, he did not visualize the court as a referee that should protect free competition, but rather as being in the service of protecting and even promoting inclusive dialogue.[40] Thus Habermas provided "one of the most productive and robust theories of deliberative democratic constitutionalism available."[41]

Another early figure who used and developed in greater detail the expression "dialogic constitutionalism" was Friedman in an important article from 1993.[42] His thesis was that the "counter-majoritarian difficulty" does not adequately describe constitutionalism because judicial decisions "are not final," and the court is not a distant institution that imposes its will and shuts down the interpretative process.[43] In contrast, for Friedman, the term "dialogue" best describes the constitutional dynamics, since the meaning of the constitution is modulated through a daily and continuous process of interpretation between the three branches of government and society.[44] Unlike theories of inter-institutional dialogue, he argued that not only the political branches, but also "the people" give content to the constitution.[45] In this context, although the court has an "essential voice," it is not the only one; rather it "participates," "facilitates," and "promotes" a constitutional dialogue with society and the political branches.[46] So Friedman's contribution to a deliberative constitutionalism was twofold: an advanced explanation of the constitutional model through the idea of dialogue, and the inclusion of the society in this dialogue.[47]

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39. Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*, translated by William Rehg (MIT Press, 1996) at 275, 151.

40. *Ibid* at 326-40. See also Christopher F Zurn, "A Question of Institutionalization: Habermas on the Justification of Court-Based Constitutional Review" (23 May 2011), online: *Social Science Research Network* ssrn.com/abstract=1845872.

41. *Ibid* at ii.

42. Barry Friedman, "Dialogue and Judicial Review" (1993) 91:4 Mich L Rev 577 at 617.

43. *Ibid* at 617, 668. See also *ibid* at 585, 653.

44. *Ibid* at 580, 616, 629. See also *ibid* at 585, 655.

45. *Ibid* at 658, n 410.

46. *Ibid* at 581-84, 653, 658, 668, 670.

47. Friedman's problem is that he does not offer a normative ideal of democratic deliberation, nor does he criticize the current institutional designs from any such ideal. He instead limits himself to redescribing and justifying strong constitutionalism, which is not very favourable to

Then, as I mentioned above, the deliberative democrat Bohman first introduced the notion of 'deliberative constitutionalism' in a seminal 1998 article. He stated that deliberative democracy had reached its 'coming of age' because it had begun to concern itself with the institutional details necessary for its practical viability. This concern implied, instead of discarding institutions such as judicial review, orienting them towards democratic deliberation. Among these deliberative democratic theories, Bohman referred to Nino's—particularly to his "detailed consideration of constitutional and institutional arrangements"—to put the deliberative democratic ideal into practice.[48]

Indeed, Nino's theory, one of the most pioneering and detailed, was also crucial to the emergence of deliberative constitutionalism. In 1991, Nino argued that "the intervention of the judiciary should not consist in the definitive disqualification of a law," but rather "in the adoption of institutional procedures that broaden the public debate on the issue."[49] Thus, he stressed that "the possibility—partly implemented in the Canadian Constitution—of judges stimulating parliamentary intervention with a suspensive veto power *deserves to be studied*," since through this mechanism, "judges would have an active role in improving the quality of the democratic debate and decision-making process."[50] However, he warned that his

> *tentative suggestions* may be shocking under the prevailing conception of a judiciary that ... must remain isolated from the democratic political process. But the necessary independence of the judiciary does not imply isolation: on the contrary, such isolation from the democratic process weakens legitimacy.[51]

In this way, he criticized the recurrent "idea that one arrives at [valid] moral principles ... by one's own isolated individual reflection" as "a very internalized conception, including in many justifications of 'judicial review.'"[52] In a later book, Nino pointed out that the relationship between constitutional supremacy and judicial supremacy is "contingent" rather than logico-conceptual.[53] On this basis, his "general" argument was against the justification of judicial review, although he admitted "three exceptions": judicial review of the deliberative democratic process, judicial review of the protection of personal autonomy, and

democratic deliberation under conditions of equality, insofar as there are marginalized actors, agents, and institutions with very unequal powers, as well as judicial decisions that cannot be answered. See Roberto Gargarella, "'We the People' Outside the Constitution: The Dialogic Model of Constitutionalism and the System of Checks and Balances" (2014) 67:1 Current Leg Probs 1 at 14-15.

48. Bohman, *supra* note 1 at 413.

49. Carlos Nino, "Los fundamentos del control judicial de constitucionalidad" (1991) 29 Cuadernos y debates, Centro de Estudios Constitucionales 97 at 135-36.

50. *Ibid* at 136 [emphasis added].

51. *Ibid* at 136-37 [emphasis added].

52. Carlos Santiago Nino, "Derecho, Moral, Política" (1993) 14 Doxa 35 at 43.

53. Carlos Santiago Nino, *The Constitution of Deliberative Democracy* (Yale University Press, 1996) at 196.

judicial review of the continuity of the constitutional practice.[54] Therefore, not only did he take note of the deliberative turn at the level of democracy, but he also noted the need to deepen the study of dialogic judicial review, thus positioning himself in the avant-garde.

Within this context of early contributions, Guttman and Thompson stated in 1996 that the "purpose of constitutionalism—to limit majoritarianism by moral constraints based on nonprocedural considerations—does not necessarily depend on a written constitution and judicial review."[55] Thus they suggested that constitutionalists "need to qualify their claims in ways that move constitutional democracy in the direction of deliberative democracy."[56] Hence they proposed a constitutionalism in which "[s]ome basic liberties and opportunities ... may be better protected by deliberative majorities themselves."[57] This has contributed to clarify that constitutionalism does not necessarily require a judicial review with the last word; nor does it require a constitution with a rigid and counter-majoritarian reform procedure.

In sum, these works began to examine constitutionalism and the objections to judicial review through the standards of deliberative democracy, while at the same time beginning to evaluate the potential and scope of constitutionalism for promoting and developing more deliberative forms of democracy.[58] Gradually, the mutual contributions of deliberative democracy and constitutionalism, as well as their institutional implications, began to be theorized.[59]

In this way, deliberative constitutionalism has often been conceptualized as a "deliberative democratic approach to constitutionalism,"[60] a project "to combine constitutional and deliberative principles by developing an account of deliberative democracy within the context of a liberal constitutional framework,"[61] a "subfield of deliberative democracy,"[62] a "hybrid of constitutional and deliberative democracy theory"[63] that offers "a more complete picture of constitutional legitimacy,"[64] a "field of scholarship that attempts to infuse constitutionalism with insights and teachings from deliberative democratic theory in order to strengthen the legitimacy of public power,"[65] or a theory "that conceives of

54. Carlos Santiago Nino, *Fundamentos de derecho constitucional: análisis filosófico, jurídico y politológico de la práctica constitucional* [Fundamentals of Constitutional Law: Philosophical, Legal and Political Analysis of Constitutional Practice] (Astrea, 1992) at 657-706.
55. Amy Gutmann & Dennis Thompson, *Democracy and Disagreement* (Harvard University Press, 1996) at 34.
56. *Ibid* at 28.
57. *Ibid* at 34.
58. See Levy & Kong, "Introduction", *supra* note 5 at 2.
59. See Levy, "The 'Elite Problem'", *supra* note 5 at 351.
60. Eric Ghosh, "Deliberative Constitutionalism: An Empirical Dimension" in Levy et al, *supra* note 5, 220 at 222.
61. Worley, *supra* note 3 at 433 [footnote omitted].
62. Levy, "The 'Elite Problem'", *supra* note 5 at 351, 354.
63. Kong & Levy, "Deliberative Constitutionalism", *supra* note 5 at 625 [footnote omitted].
64. Levy & Kong, "Introduction", *supra* note 5 at 7.
65. Geneviève Cartier, "Deliberative Ideals and Constitutionalism in the Administrative State" in Levy et al, *supra* note 5, 57 at 58.

the principles of democracy and constitutionalism as mutually reinforcing."[66] This shows that the link between the deliberative approaches to constitutionalism and democracy have been very strong, since the aforementioned definitions of deliberative constitutionalism are based on and constantly appeal to inclusive dialogue.

However, at this incipient yet promising stage, deliberative constitutionalism was far from its consolidation or maturity. Although the works discussed here were both advanced and crucial, a consistent, broad, institutional, and contextually adjusted conception was not yet in sight. These limitations will be addressed next (section 3).

3. The Inconsistencies Between Deliberative Democracy and Constitutionalism

Notwithstanding the reciprocal contributions of deliberative democracy and constitutionalism (section 2), the intersection between these two traditions has had, at least, the following four inconsistencies.

First, many theories that have taken note of the deliberative turn in democracy have maintained a strong conception of constitutionalism, which is inconsistent with that conception of democracy. Thus several theories have endorsed deliberative democracy and, at the same time, strong judicial review, arguing that the court is an "exemplar of public reason,"[67] a "forum of principle,"[68] or an institution of "argumentative representation."[69] In similar terms, Lafont's recent book accepts, rather than criticises, the "highest authority" of the court.[70] According to such theories, if "we are trying to locate the institutions where reasoning and deliberation play an important role in public life, it is apt to begin with courts and especially with courts dealing with constitutional issues."[71]

The problem, then, is that at the level of constitutionalism they have not managed to move away from a juriscentric and juristocratic conception.[72] Strong constitutionalism is at odds with deliberative democracy,[73] especially with the

66. Zurn, *supra* note 6 at 223. In another work, Zurn insists that this is "the most persuasive conceptualization of the ideals embedded in constitutional democracy." Christopher F Zurn, "Judicial Review, Constitutional Juries and Civic Constitutional Fora: Rights, Democracy and Law" (2011) 58:127 Theoria 63 at 66.

67. John Rawls, *Political Liberalism* (Columbia University Press, 1996) at 231.

68. Ronald Dworkin, *A Matter of Principle* (Harvard University, 1985) at 32.

69. Robert Alexy, "Balancing, Constitutional Review, and Representation" (2005) 3:4 Intl J Constitutional L 572 at 578.

70. Cristina Lafont, *Democracy Without Shortcuts: A Participatory Conception of Deliberative Democracy* (Oxford University Press, 2020) at 221.

71. John Ferejohn & Pasquale Pasquino, "Constitutional Courts as Deliberative Institutions: Towards an Institutional Theory of Constitutional Justice" in Wojciech Sadurski, ed, *Constitutional Justice, East and West: Democratic Legitimacy and Constitutional Courts in Post-Communist Europe in a Comparative Perspective* (Kluwer Law International, 2002) 21 at 22.

72. See C Ignacio Giuffré, "Constitucionalismo fuerte y democracia deliberativa: inconsistencias en Rawls, Dworkin y Alexy" (2023) 21:5 Intl J Constitutional L 1273.

73. See Jose Luis Martí, "Is Constitutional Rigidity the Problem: Democratic Legitimacy and the Last Word" (2014) 27:4 Ratio Juris 550 at 552, 556.

systemic turn in deliberative democracy.[74] While deliberative democracy advocates continuous and inclusive dialogue, strong constitutionalism hinders dialogue through the privileged voice of judges over a rigid and counter-majoritarian constitution. In this way, "[d]eliberative democrats have generally been sanguine about strong-form judicial review, or have openly supported it," and the objections to judicial review have had "little resonance" in deliberative democracy.[75] So, although the "deliberative turn in democratic theory promises a renewed focus, … that promise remains unfulfilled so long as deliberative democracy remains confined" to the strong model of constitutionalism.[76]

Of course, some judicial review can be justified by a deliberative conception of democracy, particularly on the basis of its contributions to inclusive dialogue. What is problematic is to argue that this contribution to the public discourse of constitutionalism can only be made through a (strong) judicial review that retains the last word about the content of the constitution, whose reform procedure is rigid and counter-majoritarian. On the contrary, "weak-form review is a good conceptual fit" for the deliberative understanding of democracy:

> [It] has the potential to advance the processes of reason-giving that are central to a deliberative democracy, and support the entry of alternative points of view into political decision-making … [and] is a promising method of human rights protection—one which supports human rights protection against majorities yet invites representative institutions to engage in principled deliberation on what rights require.[77]

Certainly, weak constitutionalism does not imply a deliberative conception of democracy or constitutionalism. Weak constitutionalism can be endorsed from a majority view of democracy,[78] while a weak constitutional model may not operate deliberatively in practice.[79] Nevertheless, a weak constitutional model has, in normative terms, greater potential than a strong one to contribute to inclusive dialogue, insofar as it is not limited to establishing privileged voices, but rather is susceptible to the force of the arguments that society or any public authority may

74. See Donald Bello Hutt, "Deliberation and Courts: The Role of the Judiciary in a Deliberative System" (2017) 64:3 Theoria 77 at 78.
75. Sathanapally, *supra* note 5 at 60.
76. Dryzek, *supra* note 13 at 175. See also Dryzek, *supra* note 13 at 6, 19, 28.
77. Sathanapally, *supra* note 5 at 57, 60, 63.
78. Many theories of constitutional dialogue have not paid due attention to the theory of democracy in general, nor have they engaged with the deliberative turn in democratic theory in particular; they have largely remained linked to an aggregative or majoritarian conception of democracy. See e.g. Sathanapally, *supra* note 5 at 55-56. For example, Gardbaum's weak constitutional theory seems to be grounded in the pluralist conception of democracy provided by Ely. See Stephen Gardbaum, "Comparative Political Process Theory" (2020) 18:4 Intl J Constitutional L 1429). Hence, it has been objected that his conception of democracy reduces to the rules of the market. See Roberto Gargarella, "From 'democracy and distrust' to a contextually situated dialogic theory" (2020) 18:4 Intl J Constitutional L 1466 at 1467-69, 1473. In the same vein, Sunstein departs from Ely's pluralist conception on the grounds that the deliberative aspirations of the constitutional system require the courts to do more than simply ensure free and pluralistic competition. See Cass R Sunstein, *The Partial Constitution* (Harvard University Press, 1993) at 104, 144.
79. See e.g. Tushnet, *supra* note 31 at 813-14.

offer. Notwithstanding that it does not necessarily guarantee the development of dialogue in practice, weak constitutionalism offers an institutional framework that makes dialogue possible, as long as it keeps the channels of dialogue open. At the same time, in descriptive terms, weak constitutionalism can best be explained via the notion of democratic deliberation.

Secondly, various theories have maintained a restrictive agenda about the times at which constitutional dialogue can be opened, the issues that can be discussed, and the reasons that can be admitted. Ackerman, for example, has argued that constitutionalism does not enthrone a "monistic" model of decision-making that prioritizes democratic authority, or a 'fundamentalist' one that prioritizes rights.[80] Instead, it establishes a 'dualistic model', in which decisions are taken by the people and by political representatives on behalf of the people.[81] The first expression of democracy, i.e., 'constitutional politics', occurs exceptionally and under special conditions of deliberation when the people rise up;[82] whereas the second, i.e., 'normal politics', occurs frequently when representatives govern.[83] Through this distinction, Ackerman has sought to blur the tension between rights and democracy, since, given the value of constitutional decisions—for example, those aimed at establishing rights—which are the result of widespread democratic agreements, they must be protected from ordinary decisions.[84] More specifically, rights must be safeguarded because they are precisely the result of democracy. In this way, Ackerman has also justified judicial review: its task is to preserve the decisions made by the people at extraordinary times from the everyday decisions made by their political representatives.

Ackerman's agenda has been criticized. First, the distinction between only two levels of deliberation and democratic decision-making omits multiple nuances and degrees. Second, it does not explain why the court would be best positioned to distinguish between these two levels and protect the 'extraordinary decisions' of the past from the 'ordinary decisions' of the present. Third, it merely accepts the lack of civil participation as an autonomous attitude, when this lack of participation is rather due to the absence of institutional channels suitable for this purpose, or the shortcomings of the system of checks and balances for achieving decisions with deep agreements. Fourth, even if the people's disengagement was an autonomous decision, participation should be promoted in order to enhance the legitimacy of political decisions.[85]

Rawls has agreed with Ackerman that "constitutional democracy is dualist," and distinguished constituent power and ordinary power as well as the higher law of the people and the ordinary law of legislative bodies.[86] In this context, for him,

80. Bruce Ackerman, *We the People: Foundations* (Harvard University Press, 1991) at 7, 10-16.
81. See *ibid* at 3ff.
82. See *ibid* at ch 10.
83. See *ibid* at ch 9.
84. See Bruce Ackerman & Carlos Rosenkrantz, "Tres concepciones de la democracia constitucional" (1991) 29 Cuadernos y debates 15, 25.
85. See Nino, *supra* note 54 at 690-92; Roberto Gargarella, *La justicia frente al gobierno* [Justice versus Government] (Corte Constitucional para el Período de Transición, 2011) at 196.
86. Rawls, *supra* note 67 at 233.

'public reason' is the guide to deliberation and decision-making that concerns not questions of ordinary government, but of 'constitutional essentials' and 'matters of basic justice', i.e., those matters linked both to the structure of power and to the political process, as well as to the basic rights and freedoms of citizens.[87] Under these circumstances, Rawls has conceived the court as an "exemplar of public reason," which "fits into this idea of dualist constitutional democracy as one of the institutional devices to protect the higher law."[88]

Rawls's deliberative agenda has also been criticized. As for the content of this agenda, it has been criticized for restricting conversation and public reason to 'constitutional essentials' and 'matters of basic justice'.[89] This has led to the conclusion that "[t]he liberal model of public space transforms the political dialogue of empowerment far too quickly into a juridical discourse about basic rights and liberties."[90] In addition, it has been objected that, in the deliberation of basic constitutional questions, Rawls has only admitted "public reasons."[91] Another problem is that Rawls has located the exemplarity of public reason primarily in a single place or institution: the court.[92] Beyond this last issue, these criticisms can be extended to Raz's exclusive positivism. In his view, law must be identified by reference to social sources that provide authoritative legal reasons and preclude deliberation on the moral reasons raised during the creation of law.[93]

Rawls and Ackerman's deliberative agenda is restricted because "the capacity to deliberate is a scarce resource, so reasons of economy dictate that most issues and occasions cannot and should not receive this sort of treatment."[94] Despite these criticisms, the ideas of Ackerman and Rawls have been recently taken up by Lafont. In temporal terms, Lafont's deliberative agenda is limited by its "diachronic perspective," in that it appeals to constitutional dialogues at extraordinary or exceptional times and over the long term.[95] By accepting, rather than criticising, that the court has the 'highest authority', the alternatives to reverse judicial decisions are constitutional amendments and international courts,[96] so that the times at which dialogue on judgements can be opened are reduced.[97]

87. *Ibid* at 227-30. See also *ibid* at 151-52, 161.
88. *Ibid* at 231, 233 [footnote omitted].
89. See Seyla Benhabib, "Toward a Deliberative Model of Democratic Legitimacy" in Seyla Benhabib, ed, *Democracy and Difference: Contesting the Boundaries of the Political* (Princeton University Press, 1996) 67 at 74-77; Roberto Gargarella, *Las teorías de la justicia después de Rawls* [Theories of Justice after Rawls] (Paidós, 1999) at 198, 205-208.
90. Seyla Benhabib, *Situating the Self: Gender, Community, and Postmodernism in Contemporary Ethics* (Polity Press 1992) at 113.
91. Gargarella, *supra* note 89 at 205.
92. See Jürgen Habermas, "Law and Morality", translated by Kenneth Baynes (The Tanner Lectures on Human Values delivered at Harvard University, 1 & 2 October 1986) 217 at 242, online (pdf): *University of Utah: Tanner Lecture Library* tannerlectures.utah.edu/lecture-library.php.
93. See Joseph Raz, *The Morality of Freedom* (Oxford University Press, 1986) at 58.
94. Dryzek, *supra* note 13 at 14.
95. Lafont, *supra* note 70 at 225 [emphasis removed].
96. See *ibid* at ch 8.
97. See C Ignacio Giuffré, "Deliberative Constitutionalism 'Without Shortcuts': On the Deliberative Potential of Cristina Lafont's Judicial Review Theory" 12:2 Global Constitutionalism 215.

A dualism similar to Ackerman's is thus evident, for although Lafont conceives of constitutional politics as an ongoing, everyday process, it seems separate from everyday dialogue or ordinary politics, and more linked to transformations that are generated over the long term. However, "deliberative democracy has much to say about everyday politics."[98] In terms of content, Lafont's deliberative agenda is limited to constitutional issues, since public reason must operate within the constitutional framework, i.e., citizens must deliberate on their preferences with reference to the constitutional norms in force.[99]

Thirdly, several deliberative studies have largely been limited to a level of theoretical and idealized abstraction, which has omitted a detailed study of their institutional implications for constitutionalism in general and judicial review in particular. Having approached constitutionalism at a high level of abstraction, these studies have not offered institutional tools to overcome the objections to judicial review. Notwithstanding the large literature on deliberative democracy and its important institutional turn pointed out by Bohman, there have been very few detailed studies of the deliberative role of institutions. This is because "the primary focus of the debate remains on abstract conceptions of deliberation, without much attention to how deliberative democracy can actually be institutionalized and maintained."[100] Many discussions within deliberative democracy have been limited to theoretical and general questions, such as the desirable form of political discussion and decision-making by government elites.[101]

Under these circumstances, deliberative democracy did not go very far in systematically exploring the institutional designs of constitutions, such as division of powers or constitutional creation and reform.[102] In other words, deliberative democratic theory has not always recognized the entry, creation, and formation of deliberative democratic politics through constitutionalism.[103] The large number of disquisitions on deliberative democracy is not commensurate with the level of attention devoted to the constitutional dimension of democracy, which has been rather scattered.

The deliberative democracy tradition has alluded to a general understanding of the role and design of judicial review. Although some works have studied these issues, they have mainly been conducted at a normative or philosophical level, and have not comprehensively addressed how judicial review could improve its

98. Simone Chambers, "Citizens Without Robes: On the Deliberative Potential of Everyday Politics" (2020) 16:2 J Deliberative Democracy 73 at 79.
99. *Ibid* at 76-79.
100. Jack Knight, "Constitutionalism and Deliberative Democracy" in Stephen Macedo, ed, *Deliberative Politics: Essays on Democracy and Disagreement* (Oxford University Press, 1999) 303 at 304.
101. See Levy & Kong, "Introduction", *supra* note 5 at 2.
102. See Jeffrey Tulis, "Deliberation between Institutions" in Peter Laslett & James Fishkin, eds, *Debating Deliberative Democracy* (Blackwell, 2003) 200 at 207; Conrado H Mendes, "Neither Dialogue nor Last Word: Deliberative Separation of Powers III" (2011) 5:1 Legisprudence 1 at 20; Bello Hutt, *supra* note 5 at 69.
103. See Ron Levy & Graeme Orr, *The Law of Deliberative Democracy* (Routledge, 2017) at 13; Levy & Kong, "Introduction" *supra* note 5 at 2.

project.[104] In response to questions such as 'What is the practice of judicial review supposed to look like in a deliberative democracy?' and 'How much room, if any, should a deliberative democracy leave for that practice?', "theorists of democracy did not manage to offer a sufficiently seductive alternative to judicial review."[105]

It could be argued that deliberative democracy did address institutional issues. Among other examples, we may recall the aforementioned work of Habermas. However, he has analysed constitutionalism at a level of generality that overlooks the institutional details of judicial review.[106] His theory does not offer recommendations for how to institutionalize judicial review, but merely argues that it is required.[107] Notwithstanding its normative basis for articulating constitutionalism with deliberative democracy and, thus, finding better forms of institutionalization, "it is surprising that Habermas displays somewhat of a lack of imagination concerning the institutional design of constitutional review, preferring to take currently prevalent structures for granted."[108] His institutional proposals have not lived up to his normative premises.[109] Indeed, Habermas has taken up Günther's distinction between two types of discourse: one of justification, in which the people potentially affected by a decision must consent to it, and one of application, in which the norms that have already been endorsed in the discourse of justification are identified and applied to concrete cases.[110] In this framework, Habermas has taken for granted the legitimacy of judicial review by conceiving it as a discourse of application, which only requires the impartial application of the norms given beforehand. However, given that there are disagreements about the interpretation of constitutional norms, it is necessary for those potentially affected to participate, as if it were a discourse of justification.[111]

Even Rawls, discussing Habermas's thesis of 'co-originality' or equal weight of public autonomy and private autonomy, has objected that it seems "sketched too broadly to foresee to what family of liberties the ideal discourse procedure would lead. Indeed, it seems unclear whether it could lead to any very specific conclusion at all."[112] What is striking here is that Rawls not only criticized Habermas's level of abstraction, but also recognized that he has not extended his ideal approach to the institutional level either. In his words: "Admittedly, I have not done much of this

104. See Conrado H Mendes, *Constitutional Courts and Deliberative Democracy* (Oxford University Press, 2013) at 4, 226.
105. Gargarella, *supra* note 47 at 16.
106. See Chambers, *supra* note 16 at 310; Levy & Kong, "Introduction", *supra* note 5 at 4.
107. See Christopher F Zurn, "Deliberative Democracy and Constitutional Review" (2002) 21:4/5 Law & Phil 467 at 516.
108. *Ibid* at 531.
109. See *ibid* at 521-31; Rainer Nickel, "Constitutions and Constitutional Patriotism" in Hauke Brunkhorst, Regina Kreide & Cristina Lafont, eds, *The Habermas Handbook* (Columbia University Press, 2017) 513 at 513-14.
110. See Klaus Günther, *The Sense of Appropriateness: Application Discourses in Morality and Law* (State University of New York Press, 1993).
111. See Zurn, *supra* note 40 at 10, 15-18.
112. John Rawls, "Reply to Habermas" (1995) 92:3 J Philosophy 132 at 169 [footnote omitted].

myself."[113] In fact, Habermas himself similarly objected that "Rawls concentrates on questions of the legitimacy of law without an explicit concern for the legal form as such and hence for the *institutional dimension* of a law backed by sanctions. . . . He [does not refer] to actually institutionalized decision-making processes."[114]

These omissions regarding institutional arrangements have not been unique to the aforementioned scholars, but have been common within this democratic tradition.[115] Gutmann and Thompson, for example, have explicitly stated that their work, "[w]ithout trying to propose specific institutional reforms," is limited to "set[ting] out some implications of the continuity of theory and practice that should influence institutional design in a deliberative democracy."[116] Indeed, although the aforementioned theories—those of Sunstein, Nino, Gutmann and Thompson, *inter alia*—advanced with equally promising speculations, and although they were institutionally more detailed than the majority of their time, in order to orient judicial review towards deliberation, their impact was limited. First, because these works were an exceptional minority, rather than broad and widespread.[117] Second, because their research on the scope of both democratic deliberation in constitutions and constitutions in democratic deliberation was inconclusive and scattered.[118]

Fourthly, the theory has remained isolated from particular constitutional traditions, and has also failed to address the possibilities and limits of enacting institutional designs at the service of democratic deliberation in situated contexts. While deliberative democracy has considered existing constitutions, it has not always seen them as heterogeneous or varied in their sources, forms, and effects, but has "overlooked much of what is institutionally distinctive about constitutions."[119] The point is that certain "empirical problems and obstacles . . . cannot always be anticipated by conceptual argument alone."[120] This fourth problem is linked to the third one but is analytically differentiable. And so it is, as will be seen (section 4), with the refinements of both problems. Indeed, while deliberative democracy can be analysed with reference to a weak or strong constitutional model (the institutional aspect), such an analysis may still omit the features and demands of the constitutional culture of each specific place and time (the contextual aspect).[121] In effect, the way in which a constitutional model operates is not only determined by the institutional design, but also by the constitutional culture.[122]

In this respect, many of the cited theories (section 2) have not addressed the details and demands of different contexts. Nino himself, for example, declared that his 'objective' was "to contribute to the respect for human rights through

113. *Ibid* at 169, n 65.
114. Habermas, *supra* note 39 at 64, 65 [emphasis in original].
115. See Chambers, *supra* note 16 at 310.
116. Gutmann & Thompson, *supra* note 55 at 360.
117. See especially Levy & Kong, "Introduction", *supra* note 5 at 2, n 2.
118. See Gargarella, *supra* note 47 at 16.
119. Levy & Kong, "Introduction", *supra* note 5 at 2. See also Levy & Orr, *supra* note 103 at 12.
120. Bohman, *supra* note 1 at 401.
121. *Ibid*.
122. See Scott Stephenson, "Is the Commonwealth's Approach to Rights Constitutionalism Exportable?" (2019) 17:3 Intl J Constitutional L 884 at 885.

the *theoretical discussion of ideas* which are averse to them."[123] While this aim, as he noted, was ultimately 'practical', it also implied the omission of contextual details. The same happens with the cited works of Habermas, Rawls, Gutmann and Thompson, *inter alia*. In the same line, Lafont's recent theory, despite its novelty, does not get rid of these problems. Lafont's theory justifies judicial review by its contribution to triggering social dialogue.[124] However, her argument, although normative, is problematic as it neglects institutional designs and particular contexts. Indeed, standing rules make it difficult to initiate the process of judicial review and social participation. Moreover, almost every court in the world has a system of secret deliberation, so that, although the decision is widely disseminated, the prior discussion remains hidden to society, which cannot follow or openly participate in it, or access or discuss the various draft rulings.[125]

As a consequence of the limitation of deliberative democracy in the contextually adjusted analysis of constitutions, institutional problems have been generated, omitted, or aggravated. The lack of theoretical reflection on the deliberative orientation of institutions has led to practical difficulties in certain constitutional contexts.[126] It is this concern with feasibility that "leads to a richer normative theory and to a fuller conception of the problems and prospects for deliberation and democracy in the contemporary world."[127]

To recapitulate, although the connection between deliberative democracy and constitutionalism gave rise to a deliberative turn in constitutionalism (section 2), at that embryonic stage, the link between these two traditions suffered some shortcomings (section 3). However, as will be shown in what follows (section 4), the coming of age of deliberative constitutionalism is due to its finessing of such shortcomings.

4. The Coming of Age of Deliberative Constitutionalism

Bohman's terms can be applied again here, but some decades later and regarding deliberative constitutionalism. Specifically, the institutional (section 4.1) and theoretical (section 4.2) developments of deliberative constitutionalism should be made explicit in order to reveal its 'coming of age' insofar as they address the shortcomings mentioned above.

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123. Carlos Santiago Nino, *The Ethics of Human Rights* (Clarendon Press, 1991) at 4 [emphasis added].
124. See Lafont, *supra* note 70 at 13, 227.
125. On the difficulties of measuring judicial deliberation, see Donald Bello Hutt, "Measuring Popular and Judicial Deliberation: A Critical Comparison" (2018) 16:4 Intl J Constitutional L 1121.
126. See Gargarella, *supra* note 47 at 16-17. In this respect, Gargarella offers as an example the deficits of the first public hearings implemented by the Brazilian Supreme Court from the perspective of deliberative democracy.
127. Bohman, *supra* note 1 at 400.

4.1. The main institutional developments

As already illustrated (section 2), Canada was the country with the earliest institutionalization of the so-called 'new Commonwealth model of constitutionalism',[128] also called the 'weak-form'[129] or 'collaborative'[130] model. Based on the Canadian experience, multiple reforms are beginning to be implemented within the Commonwealth concerned with admitting rights, while at the same time being prone to deliberation as a way to mitigate the objections to judicial review. The Canadian *Charter* was followed by similar legislation in New Zealand, the United Kingdom, the Australian Capital Territory, the state of Victoria, and the state of Queensland.[131] Each reform took note of the previous ones and went a step further in configuring and elaborating this unique constitutional model.[132] Thus this series of reforms has come to be known as the "Canadianization" of constitutional systems.[133] Recently, this model has been widely expanded and adopted in order to analyse constitutional systems outside of the Commonwealth, such as Japan, India, Hong Kong, Greece, Poland, Mongolia, Belgium, Luxembourg, and Finland, among others.[134]

The new Commonwealth model is characterized by the following *elements* (E):

> (E1) The organization of power and the creation or reform of fundamental rights is provided for in a written and codified charter, as in Canada, or in numerous scattered normative texts, as in the United Kingdom, with constitutional or statutory status;
>
> (E2) That constitution and those normative texts have a flexible and majoritarian reform procedure, as in the United Kingdom and New Zealand, or a rigid and counter-majoritarian one, as in Canada;
>
> (E3) In order to guarantee constitutional supremacy, the courts have the authority to review the constitutionality of legislation, as in Canada, or to issue declarations of incompatibility, as in the United Kingdom; and

128. See Stephen Gardbaum, "The New Commonwealth Model of Constitutionalism" (2001) 49:4 Am J Comp L 707.
129. See Mark Tushnet, "Alternative Forms of Judicial Review" (2003) 101:8 Mich L Rev 2781.
130. See Aileen Kavanagh, *The Collaborative Constitution* (Cambridge University Press, 2024).
131. See *New Zealand Bill of Rights Act 1990* (NZ) 1990/109; *Human Rights Act 1998* (UK); *Human Rights Act 2004* (ACT); *Charter of Human Rights and Responsibilities Act 2006* (Vic) 2006/43; *Human Rights Act 2019* (Qld) 2019/5.
132. See Roach, *supra* note 26 at 483; Kent Roach, "Dialogic Judicial Review and its Critics" (2004) 23:2 SCLR 49 at 49-50 [Roach, "Dialogic Judicial Review"]; Clayton, *supra* note 24 at 45; Stephenson, *supra* note 122 at 887; Young, *supra* note 18 at 126.
133. Roach, *supra* note 26 at 483.
134. See Gideon Sapir, "Popular Constitutionalism and Constitutional Deliberation" in Levy et al, *supra* note 5, 311 at 315; Rosalind Dixon, "The Forms, Functions, and Varieties of Weak(ened) Judicial Review" (2019) 17:3 Intl J Constitutional L 904 at 905, 908.

(E4) Despite the aforementioned powers of the courts to review the legislation, the power of final decision remains in the hands of parliament, which it may or may not exercise.[135]

This model offers an 'eclectic' alternative, which is located halfway between two opposite extremes: the model of parliamentary sovereignty and the model of strong constitutionalism.[136] Canada, New Zealand, the United Kingdom, and Australia—at the subnational level—in line with the post-war constitutional trend, abandoned the model of parliamentary sovereignty that prevailed until 1945, but contrary to this trend, they avoided the strong constitutional model. They have not only departed from the two legacy systems,[137] but have embraced an 'intermediate model' that takes 'the best' while rejecting 'the worst' of each extreme.[138] This radical and innovative reform is based on the fact that both strong constitutionalism and parliamentary sovereignty constitutionalism have deficient legitimacy credentials, since there the authority of the law operates in terms of exclusivity and unilateralism: in the parliament or in the judiciary. The model establishes fundamental rights in constitutional texts with a higher hierarchy than ordinary legislation and incorporates judicial review—in line with the strong constitutional paradigm and unlike the constitutional paradigm of parliamentary sovereignty; but removes the last word from the court—unlike the strong constitutional paradigm.

The promise of this model is that it offers an institutional way out of objections to strong judicial review. [139] It creatively manages to dissociate the notion of constitutional supremacy from the notion of judicial supremacy. According to this constitutional model, the authorities operate in a complementary manner and on the basis of criteria of reciprocal deference that yield to the force of the best argument.[140] This idea is seen in the aforementioned power of parliament to exercise or not the last word (E4)—that is, in so-called "judicial 'penultimacy'," or

135. See Stephen Gardbaum, *The New Commonwealth Model of Constitutionalism: Theory and Practice* (Cambridge University Press, 2013) at 1, 13-14, 30. Needless to say, this model does not aspire to describe the full range of variations that could be adopted in each particular jurisdiction, as there is no single version of weak constitutionalism.

136. *Ibid* at 1, 25, 33-36, 44-46. See also Gardbaum, *supra* note 128 at 707-08, 760; Roach, "Dialogic Judicial Review", *supra* note 132 at 55; Mendes, *supra* note 18 at 193.

137. See Gardbaum, *supra* note 128 at 710.

138. See Kent Roach, *The Supreme Court on Trial: Judicial Activism or Democratic Dialogue* (Irwin Law, 2001) at 7; Jeffrey Goldsworthy, *Parliamentary Sovereignty: Contemporary Debates* (Cambridge University Press, 2010) at 12, 80, 105, 204. In this vein, Perry points out that "[a] system of judicial penultimacy represents an effort to have the best of two worlds: an opportunity for a deliberative judicial consideration of a difficult and perhaps divisive human rights issue and an opportunity for electorally accountable officials to respond, in the course of ordinary politics, in an effective way." Michael J Perry, "Protecting Human Rights in a Democracy: What Role for Courts?" (2003) 38:2 Wake Forest L Rev 635 at 691 [emphasis removed, footnote omitted].

139. This perspective is held by Clayton, *supra* note 24 at 46; Tremblay, *supra* note 18 at 617; Bateup, *supra* note 18 at 1109-10; Gardbaum, *supra* note 128 at 709-10, 719, 748, 752, 760; Gardbaum, *supra* note 135 at 7; Gargarella, *supra* note 47 at 3; Stephenson, *supra* note 122 at 884, 885; Jhaveri, *supra* note 8 at 834.

140. In Roach's words, the dialogic model "rejects the idea that either the judges or the legislators are infallible." Roach, "Dialogic Judicial Review", *supra* note 132 at 103.

judicial review as the penultimate resort.[141] Judicial authority is not granted exclusive or monological functions, but instead exercises them in a complementary manner with parliament, to which the last authoritative word is reserved; but again, which it may or may not exercise.[142]

This model not only seeks to reverse the criticism of judicial review, but also commits to dialogue between the courts and the branches of government.[143] Its goal is to encourage deliberative interaction between the branches of government over which of the competing interpretations of the regulations is the correct one.[144] It therefore adopts a weak judicial review with the capacity to promote a dialogue that increases the legitimacy of the decisions. "In this way, beneficial dialogue between courts and legislatures would replace the American model's judicial monologue."[145] According to Bateup,

> when the judiciary speaks it does not simply tell the political branches what to do and expect them to fall into acquiescence. Rather, judicial decisions are part of a more constructive and equal conversation between judges, legislatures and executives about the appropriate balance between fundamental rights and other important interests. This conceptualization of dialogue proposes a forceful and novel answer to concerns about the democratic legitimacy of judicial review—if the political branches of government are able to respond to judicial decisions with which they disagree, the force of the countermajoritarian difficulty is overcome, or at the least, greatly attenuated.[146]

Given that in a model of strong constitutionalism, on the one hand, constitutional reform is very difficult and, on the other hand, the replacement of court members through impeachment and the appointment of new authorities is an unlikely option, a legislative response to judicial decisions becomes an ordinary and plausible alternative.[147] Hence this model allows for a deliberative and collaborative division of powers that was non-existent in the prevailing constitutional discourse.

Although in some works 'dialogue' and the new Commonwealth constitutional system are treated as synonymous, this is not the case.[148] The influence of dialogic rationality exceeds the context of the new Commonwealth model. On the one hand, the notion of deliberation is expanded within models of strong constitutionalism, where there are no notwithstanding clauses or declarations of incompatibility.[149] On the other hand, the notion of deliberation, while aspiring to

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141. Perry, *supra* note 138 at 673.
142. See Gardbaum, *supra* note 135 at 2, 26-27, 68-69.
143. See Gardbaum, *supra* note 128 at 710, 745, 747; Gargarella, *supra* note 47 at 3, 7. *Contra* Sapir, *supra* note 134 at 316, n 14.
144. See Mark Tushnet, *Weak Courts, Strong Rights* (Princeton University Press, 2008) at 209.
145. Gardbaum, *supra* note 128 at 724.
146. Bateup, *supra* note 5 at 2.
147. See Stephen Carter, "The Morgan 'Power' and the Forced Reconsideration of Constitutional Decisions" (1986) 53:3 U Chicago L Rev 819 at 819.
148. See Alison L Young, *Democratic Dialogue and the Constitution* (Oxford University Press, 2017) at 1; Young, *supra* note 18 at 126; Young, *supra* note 5 at 38.
149. See Geoffrey Sigalet, Grégoire Webber & Rosalind Dixon, "Introduction: The 'What' and 'Why' of Constitutional Dialogue" in Sigalet, Webber & Dixon, *supra* note 5, 1 at 16; Young, *supra* note 5 at 38, n 7.

remove the last word from the courts, is not limited to weak judicial review or judicial dialogue, but also extends to multiple deliberative channels among all public institutions and society.

Gradually, then, multiple reforms deepen the path of deliberative constitutionalism,[150] such as public hearings,[151] *amici curiae*,[152] collective and social standing in judicial review of legislation,[153] legislative consultations on constitutionality,[154] social participation in the process of selecting judges,[155] publicizing deliberations within courts,[156] among many others. Also, certain institutional practices appear along the same lines, such as judicial review over the process of legislative creation,[157] judicial warrant or the dialogic and inclusive resolution of structural reform disputes,[158] legislative response to declarations of unconstitutionality,[159] deliberative processes of legal[160] and

150. See C Ignacio Giuffré, "El constitucionalismo fuerte en la encrucijada. El constitucionalismo deliberativo como salida" (2023) 118 Revista de Derecho Político 289.

151. See e.g. Law 9.868/99 art 9 (Brazil); Law 9.882/99 art 6 (Brazil); Corte Suprema De Justicia De La Nación, 8 February 2007, Resolución 30/2007 (Argentina).

152. See the *The Supreme Court Rules 2009* (UK), SR & O 2009/1603, arts 27, 25.1 and 35.2; Rules of Procedure of the Inter-American Court of Human Rights (2009) at art 2(3), online: www.corteidh.or.cr/reglamento.cfm?lang=en; Corte Suprema De Justicia De La Nación, 8 February 2007, Resolución 7/2013 (Argentina); Supplementary Rules: Rules of Procedure of the Constitutional Court of the Italian Republic (2021) art 4, online (pdf): www.cortecostituzionale.it/documenti/download/pdf/Supplementary_Rules_Eng.pdf.

153. See e.g. art 241 Political Constitution of Colombia of 1991 (Colombia); art 10 and 48 Political Constitution of the Republic of Costa Rica (Costa Rica); art 43 Constitution of the Argentine Nation (Argentina).

154. See e.g. Constitution of Costa Rica, *supra* note 153 at art 10(b); art 438 Constitution of Ecuador (Ecuador); art 95 Spanish Constitution (Spain).

155. For example, the National Decree 222/2003 of Argentina (Argentina) provides for a procedure of citizen participation in the selection of candidates to fill vacancies in the Supreme Court.

156. For example, the Supreme Federal Court of Brazil, the Constitutional Court of Peru, and the Federal Supreme Court of Switzerland.

157. See e.g. *Doctors for Life International v Speaker of the National Assembly and Others*, [2006] ZACC 11, (12) 2006 BCLR 1399 (S Afr Const Ct); *SC-372*, [2004] Constitutional Court of Colombia; *Quintinsky v Knesset*, [2017] HCJ 802/17 (Israel); *Hirst v the United Kingdom (no 2)* [GC], 74025/01, [2005] ECHR 681, (2006) 42 EHRR 41; *Animal Defenders International v the United Kingdom* [GC], 48876/08, [2013] ECHR 362, (2013) 57 EHRR 21; *SAS v France* [GC], 43835/11 [2014] ECHR 695.

158. See e.g. *T-025*, [2004] Constitutional Court of Colombia; *Grootboom & Others v Government of the Republic of South Africa & Others*, [2000] ZACC 14 (S Afr Const Ct); *Occupiers of 51 Olivia Road & Others v City of Johannesburg & Others*, [2008] ZACC 1, 2008 (3) SA 208 (CC), 2008 (5) BCLR 475 (S Afr Const Ct); *Badaro, Adolfo Valentín c/ ANSES s/ Reajustes Varios*, [2007] FA07000202, Supreme Court of Justice of the Nation (Argentina); *Mendoza, Beatriz Silvia y otros c/ Estado Nacional y otros s/ Daños y Perjuicios (daños derivados de la contaminación ambiental del Río Matanza-Riachuelo)*, [2008] No FA08000047, Supreme Court of Justice of the Nation (Argentina); *Case on the Crime of Abortion*, [2019] Hun-Ba127 KCCR, Constitutional Court of Korea, (Korea).

159. See e.g. Organic Law 2/2010 (Spain) on sexual and reproductive health and voluntary interruption of pregnancy; Organic Law 5/2010 (Spain) on reform of the Criminal Code; National Law 27.362 (Argentina) *Criminal Conducts. Crimes Against Humanity, Genocide or War Crimes*.

160. See e.g. British Columbia Citizens' Assembly on Electoral Reform; the Ontario Citizens' Assembly on Election Reform of 2006, the Dutch Citizen Forum of 2006, and the Argentinean debate over abortion during the years until the national law of 2021.

constitutional[161] creation and reform through citizen assemblies, and the use of technologies to increase the effectiveness and quality of public regulations and policies.[162] Indeed, not only constitutional and international courts, but also multiple institutions are beginning to commit to communicative action.

In sum, these institutional reforms and practices, some more far-reaching than others in terms of inclusiveness, are aimed at legitimising political decisions in general and mitigating objections to judicial review in particular through a commitment to dialogue.

4.2. The main theoretical developments

After the incipient gestation of deliberative constitutional theory began in the mid-1980s—in the pioneering works already discussed—the following decades witnessed further consolidation. Since then, hundreds of articles and dozens of books devoted to the study of this novel constitutional tendency have appeared. Many works have provided meticulous analyses of its philosophical foundations, elements, virtues, alternatives, and institutional proposals. Through works like these, deliberative constitutionalism consolidated a prominent theoretical production which continues to simmer to this day.[163] Thus, deliberative constitutionalism has become a field of research that is increasingly systematic and attentive to the institutional phenomena of situated or compared contexts, which provides an intellectual framework for evaluating and proposing reforms to current institutions.

Under these circumstances, the deliberative theory of constitutionalism is not only based on the reciprocal contributions of deliberative democracy and constitutionalism (section 2), but also offers a way out of the aforementioned four shortcomings of these two trends (section 3).

Faced with the first problem, concerning the inconsistent nature of the connection between deliberative democracy and strong constitutionalism, the new generation within deliberative constitutionalism endorses weak constitutionalism as a more coherent institutional alternative to deliberative democracy. In this line, the result of weak constitutionalism is that the last word is not necessarily left to the courts. Hence the Canadian *Charter* and the subsequent institutional experiences have attracted academic attention from around the world,[164] and have quickly formed the basis of theoretical arguments in favour of a deliberative constitutionalism.[165] In other words, these experiences provided the institutional

161. See e.g. the Australian Constitutional Convention of 1998, the Icelandic Constitutional Reform of 2009, the Irish Constitutional Convention of 2012, the Assembly of Ireland 2016, and the current Chilean constitutional reform process.

162. See e.g. *Better Reykjavik* in Iceland, *Evidence Checks* in the United Kingdom, *vTaiwan* in Taiwan, *Decide Madrid* in Spain, and *MindLab* in Denmark.

163. See generally "Charter Dialogue: Ten Years Later" (2007) 45:1 Osgoode Hall LJ: Special Issue; "Symposium: Weak-form Review in Comparative Perspective" (2019) 17:3 Intl J Constitutional L 807; Levy et al, *supra* note 5.

164. See Kahana, *supra* note 28 at 273; Tushnet, *supra* note 31 at 820.

165. See Fredman, *supra* note 5 at 449.

basis for a theory of constitutionalism, judicial review, and rights protection that is different from the prevailing strong constitutional model.[166] From then on, it becomes clear that a theory that takes seriously the objections to judicial review and the premises of deliberative democracy is not only needed, but also possible. The provocative and disruptive nature of this theory does not imply ignoring that the idea of dialogue has been present since the origins of constitutionalism, albeit to a lesser extent. Nor does it imply omitting that many works from the end of the last century have addressed the idea of dialogue.[167] But, despite the potential of these works to address constitutional designs and practices using the idea of dialogue, they have been limited in their inclusive scope, their institutional detail, and their concern for situated contexts.

Under these circumstances, works like Hogg and Bushell's have come to reverse the trend of the deliberative democratic tradition that has mostly defended a constitutional model that was not very prone to dialogue.[168] This does not mean that Hogg and Bushell's article is a panacea, but simply that in it, unlike almost all the works alluded to above, the constitutional model of reference is no longer a strong one.[169] In similar terms, Tushnet has suggested that the "strong-form review … does not satisfy the conditions of dialogue," because its institutional design may "make dialogue depend on personal decisions by individual judges regarding their understanding of their role," which is why it is convenient to opt for "weak-form systems as possibly better … because they make the possibility of dialogue a structural feature of their design."[170]

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166. See Tushnet, *supra* note 129 at 2781; Tushnet, *supra* note 21 at 205-206; Gardbaum, *supra* note 128 at 724.

167. See e.g. Alexander M Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (Bobbs-Merrill, 1962); Bruce A Ackerman, *Social Justice in the Liberal State* (Yale University Press, 1980); Paul C Weiler, "Rights and Judges in a Democracy: A New Canadian Version" (1984) 18:1 U Mich JL Ref 51; Louis Fisher, *Constitutional Dialogues: Interpretation as Political Process* (Princeton University Press, 1988); Lorraine Eisenstat Weinrib, "Learning to Live With The Override" (1990) 35:3 McGill LJ 541; Habermas, supra note 39; Barry Friedman, "A Different Dialogue: The Supreme Court, Congress and Federal Jurisdiction" (1990) 85:1 Nw UL Rev 1; Rawls, *supra* note 67; Ronald Dworkin, *Freedom's Law: The Moral Reading of the American Constitution* (Oxford University Press, 1996). See also Harry Wellington, "Common Law Rules and Constitutional Double Standards: Some Notes on Adjudication" (1973) 83:2 Yale LJ 221 at 246-249; Abram Chayes, "The Role of the Judge in Public Law Litigation" (1976) 89:7 Harv L Rev 1281 at 1315-1316; Lawrence Gene Sager, "Fair Measure: The Status of Underenforced Constitutional Norms" (1978) 91:6 Harv L Rev 1212 at 1260; Owen Fiss, "Foreword: The Forms of Justice" (1979) 93:1 Harv L Rev 1 at 12-13, 34, 44-46, 51; Michael J Perry, *The Constitution, the Courts, and Human Rights: An Inquiry into the Legitimacy of Constitutional Policymaking by the Judiciary* (Yale University Press, 1982) at 25; Carter, *supra* note 147 at 819, 824.

168. See Peter W Hogg & Allison A Bushell, "The Charter Dialogue between Courts and Legislatures (Or Perhaps the Charter of Rights Isn't Such a Bad Thing after All)" (1997) 35:1 Osgoode Hall LJ 75.

169. While Nino's work predates that of Hogg and Bushell, when he emphasizes the importance of "studying" weak judicial review, he limits himself—as he puts it—to "tentative suggestions"; so his level of detail does not go very far. See Nino, *supra* note 49; Nino, *supra* note 52.

170. Mark Tushnet, "Forms of Judicial Review as Expressions of Constitutional Patriotism" (2003) 22:3/4 Law & Phil 353 at 355-56.

Although deliberative constitutionalism has developed with some connection to the Canadian *Charter*, it now has a broader scope.[171] This theory has become widely shared and developed not only by those who defend the new Commonwealth model of constitutionalism. Thus there has been a 'paradoxical' expansion in both weak and strong models of constitutionalism. In countries like Canada, it has been developed in order to explain "almost exclusively" the "inter-branch interactions" between parliament and the courts in terms of dialogue, in light of the Charter reform of 1982.[172] In countries like the United States, it has been developed in order to challenge the counter-majoritarian objection, and to explain the courts' relationship with the other branches and society, on the basis of a "broader dialogue."[173] Moreover, this theory has been advocated, with varying scopes, within models of strong constitutionalism, for example, through public hearings, legislative responses to rulings, judicial review of deliberation in law-making processes, dialogue between the political branches, citizens' assemblies, *inter alia*. [174] Consequently, the idea that deliberation confers a legitimizing force on the decisions of public institutions has become a recurring theme that goes beyond the theory of the new Commonwealth model of constitutionalism. Likewise, the weak constitutional model, together with the aforementioned experiences, can be better explained and justified through a deliberative constitutional theory.

Faced with the second problem, regarding the limited scope of the deliberative agenda, the new generation within deliberative constitutionalism offers a broader alternative. Appealing to a constitutional amendment, an international court's decision, or a political judgement before the members of the court implies relegating dialogue to exceptional and extraordinary times. The new generation within deliberative constitutionalism appeals to ordinary dialogue—that is, to the fact that judgements can be answered through legislative override, clauses of exception, or declarations of incompatibility. Thus, judgements can be discussed in daily agendas, with no need to resort to agonizing, counter-majoritarian, exceptional, or difficult-to-access mechanisms, although there is no obstacle to these alternatives also having a place.

To facilitate ordinary dialogue, "popular participation and deliberation in the context of constitutional reform" has also been suggested, leading to a constitution that "is permanently open to change and provides mechanisms for constituent power to manifest itself from time to time."[175] A "fully democratic process of constitutional self-government" has also been advocated, through flexible constitutional reform procedures that give the people not only the power of initiative,

171. See Tremblay, *supra* note 18 at 618.
172. Bateup, *supra* note 5 at 4.
173. *Ibid*. However, the "dialogue in the United States is necessarily more informal and extended," while a "short-term dialogue is more likely in Canada, due to the ability of the political branches to more rapidly override or revise judicial decisions." Bateup, *supra* note 18 at 1167.
174. See Roach, "Dialogic Judicial Review", *supra* note 132 at 63.
175. Joel Colón-Ríos, *La constitución de la democracia* [The Constitution of Democracy] (Universidad Externado de Colombia, 2013) at 24.

but also the final authority.[176] From this viewpoint, "deliberative democratic constitutionalism is the claim that the constituent power belongs ultimately to the citizens themselves."[177]

Likewise, deliberative constitutionalism departs from the Rawlsian idea that deliberative processes should be limited to 'constitutional essentials' and 'matters of basic justice', and that they should be debated exclusively with 'public reasons'. On the former view, public discussion should extend "to areas well beyond basic constitutional questions."[178] Moreover, public reason is not conceived here as an ideal that filters the admissible reasons on the deliberative agenda, but rather as 'a process of reasoning among citizens' where potentially affected persons or groups express their reasons.[179] In the same vein, it has been argued that constitutionalization "tends to degrade the process of the open consideration of the reasons that are relevant to the justification of the decisions."[180] Although constitutionalization may be a "recipe for peace" and "civic respect," it limits the dialogue to technical and formal issues, while excluding the issues that citizens really care about.[181]

Faced with the third problem, linked to the theoretical and ideal nature of the connection between deliberative democracy and constitutionalism, the new generation within deliberative constitutionalism offers more detailed proposals and analyses in institutional terms. In recent years, deliberative constitutionalism has expanded to fill in new institutional aspects that had not been systematically addressed by deliberative democratic theory, nor by constitutional theory.[182] Thus it "incorporates insights from constitutional and deliberative democratic theory in order to present a more complete picture of constitutional practice than either of its source disciplines can offer."[183] It provides an "institutional and legal" approach to the normative and general claims of deliberative democratic theory, and becomes a common ground where questions that in the past seemed limited to one tradition or another are addressed.[184]

Attention is redirected towards the analysis and practical implementation of democratic deliberation in institutional issues of constitutionalism, such as creation or reform of constitutions,[185] law-making process,[186] horizontal separation of

176. Zurn, *supra* note 6 at 324.
177. Zurn, *supra* note 66 at 70.
178. Gargarella, *supra* note 89 at 205.
179. See Benhabib, *supra* note 89 at 75.
180. Jeremy Waldron, "Public Reason and 'Justification' in the Courtroom" (2007) 1:1 JL Philosophy & Culture 107 at 133.
181. *Ibid* at 134.
182. See Levy, "The 'Elite' Problem", *supra* note 5 at 351; John Parkinson, "Ideas of Constitutions and Deliberative Democracy and How They Interact" in Levy et al, *supra* note 5, 246.
183. Kong & Levy, "Deliberative Constitutionalism", *supra* note 5 at 625.
184. *Ibid.* See also Levy & Kong, "Introduction", *supra* note 5 at 7.
185. See Min Reuchamps & Yanina Welp, eds, *Deliberative Constitution Making: Opportunities and Challenges* (Routledge, 2023).
186. See Andre Bächtiger, "Debate and Deliberation in Legislatures" in Shane Martin, Thomas Saalfeld & Kaare W Strøm, eds, *The Oxford Handbook of Legislative Studies* (Oxford, 2014) 145.

powers,[187] federalism and vertical decentralization,[188] application and adjudication of the law,[189] administrative law,[190] voting and referendums,[191] public hearings,[192] citizens' assemblies,[193] deliberation day,[194] popular branch of government,[195] civic constitutional fora,[196] popular juries (in civil, criminal,[197] and constitutional[198] cases), *inter alia*.

To demonstrate this with regard to judicial review, it is illustrative to compare the recognized studies that were offered early on, for example by Rawls, with those that were offered later, for example by Ferejohn and Pasquino.[199] Like Rawls, Ferejohn and Pasquino agree that the court is a paradigmatic deliberative arena. But, while Rawls omitted any detailed reference to the institutional features of the courts, Ferejohn and Pasquino highlighted the different argumentative potential of the courts according to the institutional models of Europe, which they consider lesser, and North America, which they consider greater. The same happens if one contrasts the scope of the institutional analysis—also from a deliberative perspective—that was carried out early on, for example by Nino's precursory study, with one that was carried out later, for example by Gargarella. In effect, while Nino stated that the *notwithstanding clause* of the Canadian *Charter* "deserves to be studied," Gargarella argued that it "tends to eliminate or moderate" objections to judicial review, promotes "institutional dialogue," urges "the legislature to rethink its decision," and diminishes "the current rigidity of the institutional system."[200] As will be discussed below, since the publication of his book in 1996, Gargarella's developments have reached a level of global reception and a philosophical, institutional, and contextual detail that have contributed to the coming of age of deliberative constitutionalism. He has not only upheld a deliberative vision of democracy but has also criticised a strong vision of constitutionalism. What is interesting, moreover, is that this vision both responds to the objections to judicial review, and also goes further than other works cited above (section 2) by suggesting the plausibility of a

187. See Mendes, *supra* note 18.
188. See Robyn Hollander & Haig Patapan, "Deliberative Federalism" in Levy et al, *supra* note 5, 101.
189. See Levy & Orr, *supra* note 103 at 11-16.
190. See Cartier, *supra* note 65.
191. See Stephen Tierney, *Constitutional Referendums: The Theory and Practice of Republican Deliberation* (Oxford University Press, 2012).
192. See Gargarella *supra* note 47.
193. See John Ferejohn, "Conclusion: the Citizens' Assembly model" in Mark E Warren & Hilary Pearse, eds, *Designing Deliberative Democracy: The British Columbia Citizens' Assembly* (Cambridge University Press, 2008) 192.
194. See Bruce A Ackerman & James S Fishkin, *Deliberation Day* (Yale University Press, 2004).
195. See Ethan J Leib, *Deliberative Democracy in America: A Proposal for a Popular Branch of Government* (Pennsylvania State University Press, 2004).
196. See Zurn, *supra* note 66.
197. See John Gastil & Dennis Hale, "The Jury System as a Cornerstone of Deliberative Democracy" in Levy et al, *supra* note 5, 233.
198. See Eric Ghosh, "Deliberative Democracy and the Countermajoritarian Difficulty: Considering Constitutional Juries" (2010) 30:2 Oxford J Leg Stud 327.
199. See Rawls, *supra* note 67; Ferejohn & Pasquino, *supra* note 71.
200. Gargarella, *supra* note 85 at 196.

democratic constitutional reform procedure. In short, contrasts such as these reveal advances in the field of institutional details.

Faced with the fourth problem, connected with the abstract and general character of the link between deliberative democracy and constitutionalism, the new generation within deliberative constitutional theory begins to analyse current constitutional institutions in specific contexts.[201] Once again, the early and influential article by Hogg and Bushell, far from limiting itself to addressing philosophical issues of judicial review, studies this institution in a specific context. In effect, they started with objections to the Canadian courts.[202] They wondered how it was possible in Canadian democracy to justify that the courts, run by unelected members who are not formally accountable to society, have the last word in disagreements about rights. Faced with this question, they took the Canadian clause to offer a dialogic response that qualified the counter-majoritarian objection.[203] In other words, they theorised a constitutional model in which judicial review does not operate as a "veto" but as "the beginning of a dialogue."[204]

Other examples are the cited works of Tushnet and Gargarella, which are equally informed by the cultural singularities and the concrete institutional experiences of their particular contexts. On the one hand, although Tushnet defends weak judicial review in normative terms, he does not omit the difficulties of implementing it in the US, as "the legal culture seems to support strong-form review with little qualification."[205] On the other hand, Gargarella emphasizes the importance of a contextual turn or an adjustment of deliberative democracy and constitutionalism towards the current framework of "defective democracies," i.e., with problems such as systematic inequality, violation of social rights, concentration of power, democratic dissonance, political and social violence, and the politics of moral perfectionism, among other issues.[206] For Gargarella, these difficulties require judicial review to focus, albeit not exhaustively, on the following aims: (1) democratic reconstruction of the constitutional system, rather than representation reinforcement; (2) promoting democratic deliberation—above all, while including marginalized groups—rather than simply clearing the channels of political change; (3) guaranteeing the material conditions of democracy or social rights for the impoverished majority, rather than worrying only about discrete and insular minorities; (4) safeguarding the procedures of deliberative democracy; (5) a presumption against a concentration of powers, and restoring

201. McDonald agrees that "a more fact-sensitive inquiry about the actual impact of judicial review" is something to be welcomed, but also warns that this goes hand in hand with caution in extrapolating such analyses to other contexts. Leighton McDonald, "Rights, 'Dialogue' and Democratic Objections to Judicial Review" (2004) 32:1 Federal L Rev 1 at 25. On the possibility of 'exporting' this constitutional model, see Stephenson, *supra* note 122.
202. See Hogg & Bushell, *supra* note 168 at 77.
203. See *ibid* at 79, 80, 105.
204. *Ibid* at 105.
205. Tushnet, *supra* note 31 at 824, n 42.
206. Gargarella, *supra* note 78 at 1472.

the system of checks and balances; and (6) protecting personal autonomy from policies of moral perfectionism.[207]

In short, these works have offered a contextual theory—one of the most advanced, most refined, and high-impact—which approaches, in terms of dialogue, a different form of constitutionalism. The twist, then, lies in the fact that works like these showed the interdependence between the empirical and normative analysis of constitutionalism,[208] since they made it clear that arguments about constitutional theory must be accompanied by an investigation that is "sensitive to the facts,"[209] and which attends to the institutional details of each context. Otherwise, constitutional theory is at risk of becoming a "fiction."[210]

To conclude, the coming of age of deliberative constitutionalism is due to the convergence of its institutional (section 4.1) and theoretical (section 4.2) developments, in order to guide constitutionalism and judicial review at the service of inclusive dialogue (section 2), and also to mitigate the shortcomings of deliberative democracy and constitutionalism (section 3).

5. Conclusion

As can be seen, the "epithet 'deliberative constitutionalism' has a complex genealogy."[211] This complexity is confirmed when it is said that dialogic judicial review was "invented in the Canadian Charter."[212] Or when it is said that dialogic theory "originated and has its strongest hold" in Canada,[213] or that it "originated in a highly influential article by Hogg and Bushell,"[214] or that the Canadian *Charter* was the "starting point of dialogic constitutionalism."[215] Claims such as these are not isolated, but are widely repeated.[216]

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207. See *ibid*.
208. See Kavanagh, *supra* note 5 at 108.
209. McDonald, *supra* note 201 at 24.
210. Robert Leckey, *Bills of Rights in the Common Law* (Cambridge University Press, 2015) at 181.
211. Cris Shore & David V Williams, "Deliberative or Performative? Constitutional Reform Proposals and the Politics of Public Engagement" in Levy et al, *supra* note 5, 337 at 338 [footnote omitted]. Notwithstanding the force of this claim, the authors do not address the reasons for the complexity of the genealogy of deliberative constitutionalism. Hence the need to fill this gap.
212. Tushnet, s*upra* note 21 at 205.
213. Gardbaum, *supra* note 135 at 27.
214. Fredman, *supra* note 5 at 448, citing Hogg & Bushell, *supra* note 168. See also Bateup, *supra* note 5 at 6; Stephen Gardbaum, "Weak-Form Review in Comparative Perspective: A Reply" (2019) 17:3 Intl J Constitutional L 931 at 932, n 3; Gardbaum, *supra* note 135 at 111.
215. Gargarella *supra* note 47 at 5. See also Roberto Gargarella, "Why Do We Care about Dialogue? 'Notwithstanding Clause', 'Meaningful Engagement' and Public Hearings: A Sympathetic but Critical Analysis" in Katharine G Young, ed, *The Future of Economic and Social Rights* (Cambridge University Press, 2019) 212.
216. Among others, see Manfredi & Kelly, *supra* note 5 at 524; Roach, "Dialogic Judicial Review", *supra* note 132 at 49; Adrienne Stone, "Judicial Review Without Rights: Some Problems for the Democratic Legitimacy of Structural Judicial Review" (2008) 28:1 Oxford J Leg Stud 1 at 2; Sathanapally, *supra* note 5 at 39; Katharine G Young, *Constituting Economic and Social Rights* (Oxford University Press 2012) at 148; Yap, *supra* note 5 at 1; Kavanaugh, *supra* note 130 at 60. See especially Bateup, who addresses this topic in two brief sections; see Bateup, *supra* note 18 at 1113-22; Bateup, *supra* note 5 at 6-14.

The assimilation of the origins and developments of deliberative constitutionalism with the new Commonwealth model of constitutionalism, as inaugurated by the Canadian *Charter*, can be explained, as it certainly implied a disruptive institutional milestone in the prevailing constitutional culture. It opened a debate. Against the tendency of most existing constitutional systems, it removed the courts' privileged voice on certain rights in order to promote a dialogue. In Hogg and Bushell's words: "Where a judicial decision is open to legislative reversal, modification, or avoidance, then it is meaningful to regard the relationship between the Court and the competent legislative body as a *dialogue*."[217]

In this context, the aim of this article was not to provide a history of deliberative constitutionalism, i.e., a reconstruction of a lineal, univocal, closed, and complete account, covering a series of ineluctable chronological stages from its origin to its coming of age. However, the question of its origin, development, and expansion is complex and deserves more attention than that devoted to it by the existing literature. Indeed, deliberative constitutionalism was not 'invented' from one day to the next, nor does it have a unique 'origin' or 'starting point' isolated from social problems and political and theoretical debates. Rather, it is the result of a series of institutional and cultural circumstances—political, historical, social, legal, academic, and constitutional—that have gradually contributed to its emergence and coming of age. Hence the significance of this paper, which has offered a general and open cartography, with some relevant circumstances, as well as some relationships of continuity and discontinuity, contextualized within the development of deliberative constitutionalism. In short, the aim was to contrast some shortcomings and advances through the origin, development, and expansion of deliberative constitutionalism.

However, despite the emergence and development of deliberative constitutionalism in multiple institutional and theoretical spheres, there is still a long way to go to achieve a more systematic, comprehensive, consistent, and contextually adjusted theory and practice.

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C. Ignacio Giuffré is a Postdoctoral Researcher at Pompeu Fabra University in Barcelona, Spain. This paper is part of a project that has received funding from the European Research Council (ERC) under the European Union's Horizon Europe research and innovation programme (grant agreement Nº 101096176 - ICDD); views and opinions expressed are however those of the author only and do not necessarily reflect those of the European Union. Email: ignacio.giuffre@upf.edu.

217. Hogg & Bushell, *supra* note 168 at 79 [emphasis added].