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978-0-521-86734-4 - Deliberative Democracy and the Institutions of Judicial Review

Christopher F. Zurn

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Deliberative Democracy and the Institutions of Judicial Review

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

CHRISTOPHER F. ZURN is associate professor of philosophy at the University of Kentucky. The recipient of a Humboldt Fellowship in 2004, he has published articles on deliberative democracy, judicial review, critical theory, feminism, moral theory, and aesthetics. One of his articles on democracy and judicial review was chosen as one of the ten best philosophy articles published in 2002 by the editors of *Philosopher's Annual*.

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Acknowledgments

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

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

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

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