Introduction: Fusion and Creation

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This book aims in equal parts at fusion and creation. It combines insights from two vast and important fields – deliberative democracy and constitutionalism. And, taken as a whole, it yields not merely a sum of parts, but something singular and new. All of the book's chapters respond to aspects of the following questions: *how do judges, ordinary citizens, legislators and others deliberate about constitutional norms? And how do the features of a constitution, such as human rights, the separation of powers and federalism, affect how democracies deliberate?* These questions invite authors to describe two broad strands of connection between the fields, focusing at turns on how democratic deliberation shapes constitutionalism and how constitutionalism shapes democratic deliberation.

Deliberative democracy can be read as a reaction against traditional democratic models that principally sought to tally the fixed preferences of majorities or interest groups. Over time such preference-aggregating democratic practices began to look inadequate as they failed to provide opportunities for meaningful deliberation. Theory and practice alike fixated too much on who wields what power and by what means, yet not enough on thoughtful exchanges about policy. The decisions resulting from aggregative democracy appeared ill-informed and simplistic, as collective decision-making centred largely on the polarising contests of interest groups jostling for control of the levers of government. These problems intensified in recent decades as many matters of policy-making – the environment, healthcare and national security, to name a few – became at once more urgent and more complex.

A key consequence was the rapid rise of research into how political institutions can curb or correct traditional democracy's deliberative pathologies. Deliberative democratic theory imposes significant moral demands upon citizens, such as the requirement that each citizen remain open to other citizens' views: listening attentively and trying to understand them. Citizens should also be willing to change their views or preferences in light of what they learn from discussions. These moral demands respond directly to the concerns about democracy identified above. According to deliberative democratic theory, democratic choice should be not merely an exercise in majoritarianism or preference aggregation; it should also result from informed and reflective discussion and persuasion, which seeks to divorce policy-making from mere partisan loyalty and unreasoned power, and to meet the complexity of today's governance challenges.

Constitutionalism – the study and practice of constitutions and constitutional institutions – has long had a place in deliberative democratic theory. Early works assigned key deliberative functions to institutions in constitutional orders, such as high courts and legislatures. By accounting for constitutionalism, deliberative democratic theory refined its vision of how

democratic practices can be disciplined by deliberation. Yet, ideas about the roles of constitutionalism in democratic societies tended to be subsumed within larger debates about how governmental elites should deliberate in a democracy. While theorists of deliberative democracy often made note of the presence of constitutions in the societies they studied, they did not always see constitutions as heterogeneous sets of norms, varied in their sources and forms, as well as in their effects in the real world. Generic views overlooked much of what is institutionally distinctive about constitutions. To the extent that there was a body of established deliberative democratic constitutional theory – of *deliberative constitutionalism* – it remained abstract and largely unmoored from any 'particular legal and constitutional tradition'.[1]

Meanwhile, with some important exceptions,[2] constitutionalism has also largely neglected deliberation. Constitutions, and their legal elaborations in cases and convention, have expanded to colonise many, or even most, of the corners of politics in liberal-democratic states. Judicial and academic responses to this process of expansion have generally held to the aggregative view of democracy and thus often assumed that politics can only be an exercise in collecting and wielding power, or allocating it among competing groups. Rather than attending to the quality of public reasoning, constitutional adjudication and research still largely revolve around notions of liberty, equality and integrity (or anti-corruption) conceived narrowly as ways of curbing political power. Constitutionalism's limited set of substantive theories about politics tend, in turn, to entrench assumptions that the political process is indissociably linked to conflict and always closed to 'the possibility of agreement'.[3]

Hence, only a handful of works have examined in detail the roles that constitutions can play in contributing to and constructing – or at times frustrating – more deliberative forms of democracy.[4] However, work on deliberative constitutionalism has expanded of late, not least through the writing of many of this volume's contributors. This book is the product of a global series of workshops that involved many well-known authors, as well as promising early- and mid-career scholars who lent fresh perspectives to the project. All were experts in one, and some in both, of the fields of constitutionalism and deliberative democracy. Contributors sought to give direction to the emerging field of deliberative constitutionalism, collaborating towards a more systematic and complete description of the connections between two individually prominent areas of research.

The chapters examine an array of actors and subjects of constitutional decision-making, as we outline below. Some chapters have an empirical cast. Others explore the normative consequences of focusing on constitutional deliberation. And many chapters in the book propose reforms to bring practice closer to deliberative constitutional ideals. The book naturally omits certain topics that some readers would have liked to see included; no single work can

[1] Simone Chambers, 'Deliberative Democracy Theory' (2003) 6 *Annual Review of Political Science* 307, 310.

[2] See, e.g., Alexander Meiklejohn, *Political Freedom: The Constitutional Powers of the People* (Oxford University Press, 1965) 75; Cass R Sunstein, *The Partial Constitution* (Harvard University Press, 1994); Jeremy Waldron, *Law and Disagreement* (Oxford University Press, 1999); Stephen Tierney, *Constitutional Referendums: The Theory and Practice of Republican Deliberation* (Oxford University Press, 2012); Richard Bellamy, *Political Constitutionalism: A Republican Defense of the Constitutionality of Democracy* (Cambridge University Press, 2007); Frank Michelman, 'Law's Republic' (1988) 97 *Yale Law Journal* 1493.

[3] Andrew Geddis, 'Three Conceptions of the Electoral Moment' (2003) 28 *Australian Journal of Legal Philosophy* 53, 70–1.

[4] See Dennis F Thompson, *Just Elections: Creating a Fair Electoral Process in the United States* (University of Chicago Press, 2002); Carlos Niño, *The Constitution of Deliberative Democracy* (Yale University Press, 1996); Christopher F Zurn, *Deliberative Democracy and the Institutions of Judicial Review* (Cambridge University Press, 2007); Conrado H Mendes, *Constitutional Courts and Deliberative Democracy* (Oxford University Press, 2013).

cover or close off all avenues of inquiry. Nor should it seek to. More modestly, but still significantly, the book aims to cover the widest catalogue of topics yet assembled by drawing on established and original voices in deliberative constitutionalism's two source fields.

Apart from posing questions, the book also ventures some novel answers. As we have written previously, deliberative constitutionalism 'potentially mends some persistent conceptual faultlines, restarting and redirecting long-standing debates in constitutional theory' – often, in particular, about what determines legitimacy in a constitutional democracy with standard liberal institutions such as constitutional courts.[5] Of course, deliberative constitutionalism does not aim to eliminate the differences among the vast array of theories on questions of constitutional theory. But neither does it merely recap and reproduce established constitutional theories in a different form. As we elaborate further below, it stands as a capacious yet no less determined rival to dominant theories, presenting 'a meta-theory capable of unifying other constitutional theories about the legitimacy of public power arrangements'.[6]

In short, this collection aims to help establish deliberative constitutionalism as a systematic field of research bridging constitutional and deliberative political theory. We expect it to take its place alongside constitutional research viewing similar subjects through more conventional lenses. And we anticipate that the book will become a useful resource for scholars and other readers, of diverse backgrounds and jurisdictions, curious about the vital links between constitutionalism and democratic deliberation. We further hope that the volume will spark debate that will push constitutionalists and deliberative democrats alike to refine and rethink their own positions.

A. MAPPING DELIBERATIVE CONSTITUTIONALISM

For the purposes of this introductory chapter, we adopt Jon Elster's three-part definition of 'constitution':

> First, many countries have a set of laws collectively referred to as 'the constitution'. Second, some laws may be deemed 'constitutional' because they regulate matters that are in some sense more fundamental than others. And third, the constitution may be distinguished from ordinary legislation by more stringent amendment procedures.[7]

Elster's definition of course raises certain ambiguities, but it also provides useful background for what follows. To give structure to our subject, we next set out two of the field's key conceptual dichotomies and one of its central normative concerns.

1. *Deliberation and Constitutional Law*

In describing the relationship between deliberation and constitutional law, we can distinguish between two *directions* of influence:

- *Deliberation-to-law.* Deliberation may be necessary to generate legitimate constitutional law. Constitutions stipulate our fundamental political and legal commitments, and so, from the deliberative constitutionalist perspective, collective decision-making about constitutions

[5] Hoi Kong and Ron Levy, 'Deliberative Constitutionalism' in André Bächtiger, John Dryzek, Jane Mansbridge and Mark Warren (eds), *Oxford Handbook of Deliberative Democracy* (Oxford University Press, forthcoming).
[6] Ibid.
[7] Jon Elster, 'Forces and Mechanisms in the Constitution-Making Process' (1995) 45 *Duke Law Journal* 364, 366.

requires outsized levels of both democratic legitimacy and deliberative rigour. Broadly distributed and well-structured deliberation in society, and in the diverse offices of the state, about the constitution's contents and aspirations arguably contributes to the constitution's legitimacy.

- *Law-to-deliberation*. Constitutional law and practice might in turn enhance democratic deliberation. In the ideal case, in diverse settings – ranging from the chambers of supreme court justices to the pages of newspapers and the offices of administrative decision-makers – well-articulated constitutional norms can render debate and discussion more deliberative. This heightened deliberation might arise among citizens, between officials and citizens, and among officials in the various branches and levels of government.

Because of their training, scholars will have a tendency to explore either aspect of deliberative constitutionalism. For instance, legal scholars are particularly well-suited to studying the relationship of law-to-deliberation. Law – especially constitutional law – extensively colours and channels democratic decision-making. Tracing the deliberative effects of this influence is often aided by familiarity with legal practice. By contrast, scholars in other disciplines more attuned to the facts on the ground of democratic debate are well-suited to examining the practices of political actors, including parties and officials. These scholars may reveal how such practices reflect constitutional aspirations or contribute to the strengthening or erosion of constitutional norms. They will therefore contribute mainly to deliberation-to-law studies.

Scholars in the law-to-deliberation methodological camp tend to identify two broad classes of deliberation-enhancing effects of constitutions in a democracy. We may call the first of these 'deliberative filtering'. According to this view, suggested by Habermas and others, deliberative democratic decision-making begins in the social periphery, among civil society groups, media (old and new) and myriad small-scale conversations. There, raw citizen preferences form, usually as vague aspirations and values. These later filter through the formal constitutional apparatus, especially courts and legislatures. Such bodies call upon legal and other expertise to help process raw preferences into coherent and concrete law. Thus, according to Habermas, 'binding decisions, to be legitimate, must be steered by communication flows that start at the periphery and pass through the sluices of democratic and constitutional procedures situated at the entrance to the parliamentary complex or the courts'.[8]

However, Habermas does not always tell us about the detail of such processes. Others have begun to, including in this volume. Most clearly, the substance of constitutional norms, such as human rights guarantees, can have an effect on deliberation, for instance by widening the range of concerns bearing upon democratic decision-making. Constitutions also help to establish substantive normative hierarchies according to which policy matters ought to be considered – especially if we adopt a description of rights as human interests set apart from other interests due to their higher gravity and universality.[9] In other ways constitutions also impose processes that might enhance deliberative filtering by deepening and expanding the course of decision-making. Examples include the ubiquitous proportionality test, which subjects laws to forms of structured scrutiny, generally – but not only – in the courts.[10] In addition, 'constitutional reasoning often relies on comparative perspectives [and] impels the development of binding norms in line with evolving social attitudes'.[11]

[8] Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (William Rehg (trans), MIT Press, 1996, first published 1992) 354–6.
[9] Louis Henkin, *The Age of Rights* (Columbia University Press, 1990) 3.
[10] Ron Levy and Graeme Orr, *The Law of Deliberative Democracy* (Routledge, 2016) ch 3.
[11] See Ron Levy, 'The "Elite Problem" in Deliberative Constitutionalism' in this volume.

A second view of law-to-deliberation, associated with Rawls and others, can be labelled 'deliberative telescoping'. Here the deliberative effects of constitutional practice come not at the end of a law-making process, *after* preference formation in the public arena, but rather *before* or *during* preference formation. That is, the reasons and methods of constitutional decision-making can inform and discipline public debate according to salient points of logic or principle,[12] and 'educate citizens in how to reason with one another on contested issues'.[13] Courts apply an established set of tools of legal deliberation. For instance, they rely on the logic of analogy, invoke rules of evidence to test empirical assumptions, and issue carefully articulated public reasons.[14] These legal modes of reasoning aim to subject collective choices to rational scrutiny, modelling forms of rationalism that public discourse can emulate or incorporate.

Whether these aspirations and ideals are borne out in actual practice remains a live question. Examples in many cases would suggest they are not. But controversies over the legal recognition of same-sex marriage seem to offer prime examples confirming the law-to-deliberation models. In several countries, constitutional equality guarantees have provided a framework to prompt public deliberation about the scope of marriage, and thus directly touch the lives of citizens in same-sex relationships. For instance, in the United States, weak or unsupported arguments frequently collapsed when exposed to judicial scrutiny that can be appropriately characterised as deliberative telescoping. The rationalist perspective of the courts arguably helped wear down entrenched but outdated social assumptions, which could no longer be sustained in the light of logic. For example, using publicly relatable rhetoric, appellate Judge Posner said that: 'Tradition per se … cannot be a lawful ground for discrimination – regardless of the age of the tradition.'[15] Also importantly, legal decision-making has helped to clarify the social interests at stake on all sides of a debate. Legal decisions can do this by being emotive and setting off waves of discussion in the social periphery. At the Supreme Court, the concluding words of Justice Kennedy's majority opinion spoke lyrically of the needs of same-sex couples to be loved.[16] These words inspired numberless opinion pieces and internet memes, and these in turn have influenced the decision-making of office holders.

2. *First- and Second-Order Norms*

A second important distinction within deliberative constitutionalism theory, and the one around which we organise this book, identifies two possible orders of constitutional deliberation. This refers to the distinct norm types that constitutional deliberation might address:

- *First-order deliberation.* First-order norms (e.g., laws and settled policies) directly affect the interests of citizens (e.g., laws regulating marriage, healthcare and the environment). A main question for deliberative constitutionalism is whether decision-making practices associated with constitutions can enhance deliberation amid the making of first-order norms.

[12] John Rawls, *Political Liberalism*, expanded edn (Columbia University Press, 2005) 137.
[13] Zurn, above n 4, 192 (describing other authors' views), citing Ronald Dworkin, *Freedom's Law* (Harvard University Press, 1997) 345–6; *contra* Jeremy Waldron, 'Judicial Review and the Conditions of Democracy' (1998) 4 *Journal of Political Philosophy* 6.
[14] Levy and Orr, above n 10, 42–5.
[15] *Baskin* v. *Bogan*, 766 F 3d 648, 661–3; 666–8 (Posner J) (7th Cir, 2014).
[16] *Obergefell* v. *Hodges* 576 US _ (2015).

Note the straightforward relationship between first-order deliberation and the previous dichotomy: from the perspective of deliberative constitutionalism, first-order deliberation involves law-to-deliberation effects. Constitutional law and associated practices shape how deliberation is conducted during the creation or amendment of first-order norms.

- *Second-order deliberation*. Some norms deal not directly with citizen interests, but with the political and legal institutions within which those interests are deliberated. Second-order deliberation is thus deliberation about the conditions and processes of political deliberation itself, whether this occurs within or outside of public institutions.

Second-order deliberation is more complex than first-order deliberation because second-order norms implicate both law-to-deliberation and deliberation-to-law. As Ron Levy notes in his chapter for this volume,

> many second-order norms are constitutional in status, which raises the complication that, according to some constitutional theorists, any constitutional amendment must involve specially deliberative procedures. Among members of the broader public, too, whether a formal process of constitutional amendment is appreciably deliberative – as opposed to being, for instance, abjectly partisan – influences trust in the process. Hence a full picture of second-order deliberation accounts not only for whether new second-order norms help to improve democratic deliberation, but also whether robust deliberative democratic procedures created the new norms.[17]

With this complication in mind, we see that the relationship between deliberation and constitutional practice is dialectical: a full account of a deliberative democratic constitutional order should examine the reciprocal influence of, on the one hand, deliberation that generates legitimate constitutional law and, on the other hand, constitutional practice and norms that enhance democratic deliberation.

A more practical problem raised by second-order deliberation is that when various kinds of 'constitutional elites' (e.g., judges, legislators and civil servants) conduct such deliberation, they exercise a power to either institute or reject deliberative democratic values. Thus, the reform schemes that institutionalist deliberative democrats persistently propose may have limited impact so long as the forms and substance of constitutional law, as interpreted and applied by constitutional elites, fail to align with them. Second-order deliberation therefore raises a set of issues that are of unique concern to deliberative constitutionalists. Deliberative schemes must contend with judges and policy-makers who may, or may not, endorse deliberation as a political value. A recent volume considering this problem concluded that liberty, equality and integrity generally trump deliberative values in judicial decision-making about the law of the political process.[18] Several chapters in the present volume also examine the nature, scope and effects of implicit constitutional limits on deliberative democratic institutional reform.

3. *Legitimacy Problems*

Finally we introduce the most common theoretical problem addressed in this book. Constitutional theory and deliberative democracy theory share a common fixation on problems of legitimacy. In constitutional theory, a central dilemma is how to use laws to establish and enforce a polity's foundational commitments – as these are reflected in its institutions, values

[17] Levy, above n 10.
[18] Levy and Orr, above n 10.

and collective mission – without wholly ceding power over those commitments to the closed band of elites – judges, lawyers, administrators and legislators – who tend to be a constitution's day-to-day stewards. As we put this problem previously, these elite decision-makers are:

> often insulated from the broader public sphere, and are accustomed to deploying distinctively legal norms and language. The fundamental question for constitutional theory is: are these elite decision-making methods sufficiently alive to the preferences and interests of the citizens who notionally authorize the constitution in the first place?[19]

Similarly, deliberative democratic theory premises legitimacy on decision-making that occurs under conditions of equal inclusion, reflection, adequate information, and flexible/open-minded and reciprocal discussion (among others). But, in a seeming conflict, deliberative democratic theory also pins legitimacy on whether decisions reflect the preferences and interests of citizens.

A concern with the legitimacy of law or of law-making processes thus runs through much of this volume. The challenge we attempt to meet with this volume is to combine theories of deliberative democracy and of constitutionalism in order to construct a more complete picture of constitutional legitimacy. Beyond merely pointing out the overlap between the central conundrums of constitutional and deliberative theory, many contributors examine how the cumulative drift of deliberative and constitutional theory into each other's territories may actually help to resolve certain questions that in the past may have appeared limited to each. The deliberative constitutionalist framework suggests that a constitution ought to be principally a vehicle for deliberation, and envisages various institutions and modalities through which this can occur. It thus 'accounts for the roles of a set of actors in democracy and governance ranging well beyond the traditional courts-legislatures axis of constitutional theory'.[20] Arguably, a constitution's ultimate task should be to inject a distinctive, rationalist and flexible methodology into the collective decision-making system of a democracy. Such a task can take years, decades and even generations.[21] In the chapters that follow, we will see authors wrestling with legitimacy problems on a sustained basis – many elaborating on the broad problems and potential solutions introduced here.

B. THE PLAN OF THIS COLLECTION

As noted, the contributors to this collection examine the different modes by which constitutional practice can influence deliberation within a society – and vice versa. Many authors address issues of either first- or second-order deliberation. Some do this by tackling overarching questions of constitutional law and practice. But most seek to show how deliberative constitutionalism responds, from within the distinct categories developed above, to more circumscribed problems. Most therefore examine particular domains of deliberative constitutionalism, focusing their work for instance on constitutional judicial review of administrative action, the separation of powers or rights claims. A number of authors also profitably pursue their subjects through varied historical, comparative and theoretical lenses.

As noted, we have organised this book according to a basic divide within studies of deliberative constitutionalism between first- and second-order deliberation. Two parts of the book – the first and the last – probe first- and second-order questions respectively; to adapt a phrase

[19] Kong and Levy, above n 5.
[20] Ibid (citing from Les Green's address to one of the noted workshops).
[21] Jürgen Habermas, 'Constitutional Democracy: A Paradoxical Union of Contradictory Principles' (2001) 29 *Political Theory* 766, 768, 774.

from Dennis Thompson,[22] these parts address deliberation *under* and *about* a constitution. In the middle part of the book, by contrast, authors focus on both these aspects of deliberation at once – addressing cases where judges or others apply, but also simultaneously review and modify, constitutions.

Part I: *Deliberating* under *Constitutions*

Executive constitutional deliberations: how, and to what extent, do actors in non-elective executive offices deliberate in line with constitutional norms and principles while conducting their work?

- Jerry Mashaw argues in his chapter that constitutional and other requirements for reasoned administration in administrative law resonate with deliberative democratic ideals. His focus is on the concept of public reason and particularly on how features of administrative decision-making may help to answer certain critiques levelled against the concept.
- Mary B DeRosa and Mitt Regan outline some of the distinctive deliberative constraints that arise in the national security setting. These constraints often result in reason-giving that falls short of the deliberative ideal of full transparency, creating risks to both the quality of decisions and their perceived legitimacy. The authors suggest that robust internal deliberative processes within government can help compensate to some extent for this shortcoming. They cite as an example the operation of a 'Lawyers Group' composed of officials from US national security agencies.
- David Dyzenhaus uses the example of constitutional interpretation by administrative tribunals to sound a note of caution for the deliberative constitutionalist project. He argues that deliberative democrats hold to a dualist theory of democracy that understands there to be a qualitative difference between 'deliberating about constitutional fundamentals and ordinary legal reasoning'. Dyzenhaus draws on Hans Kelsen's writing to argue instead for a 'multi-level monism', wherein citizens are owed reasoned justifications in all instances of legal decision-making.
- Geneviève Cartier explores the terrain of administrative law theory. She argues that a close connection can be made between the ideals of deliberative democracy and the important administrative law notions of discretion and 'deference as respect', which illustrate a form of mutual exchange of reasons as to what are, or should be, the limits of state power. As such, these notions represent particular instantiations of deliberative ideals of reciprocity, accountability and justification.

Legislative constitutional deliberations: can legislatures deliberate carefully about constitutional norms or are they chiefly and inevitably arenas for partisan contestation?

- George Williams and Daniel Reynolds review the controversial innovation of relying on legislative committees to review bills for consistency with human rights. Some observers see this 'parliamentary scrutiny model' as an adequate alternative in jurisdictions that lack a binding rights charter. A chief aim of the model is to prompt richer legislative deliberation about human rights. However, assessing empirical data from the first years of operation of the federal Australian parliamentary scrutiny body, Williams and Reynolds cast doubt on the scrutiny model's effectiveness.

[22] Dennis F Thompson, 'Deliberate about, Not in, Elections' (2013) 12(4) *Election Law Journal* 372.

- Gabrielle Appleby and Anna Olijnyk consider how constitutional norms structure legislative deliberation. They argue that the fact that legislators are '"responsible constitutional actors" places them under an obligation … to deliberate about … constitutional rules when deciding whether to pass legislation'. However, a complication is that some such rules are not judicially enforceable and may also be vague or unsettled. Considering Australian examples of legislative responses to organised crime and terrorism, Appleby and Olijnyk outline how an improved, 'broader deliberative process' that legislatively takes account of constitutional perspectives might look.

Divided powers and dialogue: how do ideas about the benefits and drawbacks of dividing governmental powers – for instance, via federalism or the separation of powers – square with concerns over the quality of deliberation? How also might deliberative democratic theory engage with theories of 'dialogic' interaction between judges and the elected branches?

- Robyn Hollander and Haig Patapan examine a theory of 'deliberative federalism' that claims 'federalism, in giving political and legal authority to disparate voices within the federal state, can make institutional room for deliberation', which in turn might have salutary effects on the protection of rights in federal societies. Considering evidence from the United States, they reach the conclusion that any pro-deliberative effects of federalism are uneven, as 'federalism will in some cases permit what appear to be unjust institutions and practices to persist, and indeed thrive'.
- Danny Gittings examines an under-explored aspect of the separation of powers doctrine. While previous theories have defined the doctrine narrowly and have focused on how the doctrine facilitates deliberation *within* the branches of government, few have adopted a broad definition and inquired into the quality and nature of inter-branch deliberations. Gittings undertakes this analysis and highlights the importance of political parties to the practices of democratic deliberation within systems that separate governmental powers.
- Alison Young's chapter examines whether deliberative democratic theory can enrich theoretical accounts of judicial-legislative dialogue. 'Deliberative democracy may be facilitated by dialogue' and 'can help evaluate the effectiveness of different mechanisms of inter-institutional interaction', she argues. However, she ultimately cautions that '[d]ialogue is best understood as an account of the constitution which focuses on inter-institutional interactions', about which deliberative democratic theory cannot 'provide a precise, stable account'. Young's chapter provides a segue to the next part of this book, which focuses largely on judges in relation to democratic actors (e.g., legislatures, the people themselves).

Part II: *Comprehensive Views: Deliberating* under and about *Constitutions*

This set of chapters addresses processes and problems that often transcend any single category or order of deliberative constitutional practice, offering perspectives addressing the field as a whole. Most thus touch at once on both first- and second-order deliberation by judges or other actors.

Curial deliberations: what is the relationship of courts to democratic actors? For instance, do judges who interpret and/or enunciate fundamental constitutional norms do so in ways that are adequately adapted to the requirements of deliberative democracy?

- TRS Allan argues that rights based in common law are the product both of natural and positive law: they represent the best interpretation of a legal tradition, applying principles of justice within a specific historical jurisdiction. When we acknowledge the constitutional status of fundamental rights, he argues, we must interpret enactments and judicial precedents in their light. Such enactments and precedents provide a shared focus for deliberation, but each lawyer's interpretation of law is rooted in a broader understanding of political morality. Each case, accordingly, is in the final analysis a test of the interpreter's allegiance to law: its correct solution affirms, by reference to constitutional principle, the legitimacy of the legal order'.
- Jonathan Crowe draws on recent research in moral psychology to argue that intuitive or snap judgements often play a pivotal role in guiding constitutional decisions by judges. He argues that a model of constitutional deliberation as a form of dialectical equilibrium between judgments, rules and principles holds potential advantages in explaining how these decisions occur.
- Mark Walters offers a critique of deliberative constitutionalism, as it is applied to the practice of constitutional interpretation. He argues that although agreement may be the objective when a polity *designs* a constitutional order, when its members *interpret* a constitution, they aim to arrive at truth. He draws on Ronald Dworkin's interpretivist theory, illustrates his arguments with an allegory inspired by Lon Fuller, and concludes that deliberative democratic theory cannot adequately account for the aims and practices of constitutional interpretation.
- Daniel Weinstock issues a theoretical challenge to deliberative constitutionalism. He argues that deliberative democracy's goal of rational consensus cannot be achieved in societies where value pluralism is pervasive. However, according to Weinstock, even parties divided by deep-value disagreements over matters such as rights can identify the cores and peripheries of their positions. Once these are identified, concrete legal disputes over controversial matters can be resolved as parties agree to compromise with respect to issues that reside on the periphery of their political and moral commitments.
- Pavlos Eleftheriadis contrasts deliberative theory with positivist legal theory and closely examines how the two alternatives deal with the example of the British constitution. In his view, positivist theory cannot accommodate the idea of the constitution as higher law. He argues instead for the deliberative view, which he concludes is the 'only theory capable of explaining fully the ordinary practice of constitutional law'.
- Theunis Roux addresses Jeremy Waldron's critique of the moral justifiability of judicial review. He challenges the scholarly consensus that this critique can be presented in abstract normative terms, once certain assumptions about a society's governing institutions and political traditions hold. Changing the terms of the debate, he contends that the moral justifiability of judicial review is a mixed normative/empirical question. His examples centre on 'immature democracies', where there is often a wide array of pathologies in the functioning of representative institutions, including the poor quality of deliberation in such institutions. But Roux's argument also has relevance to Western liberal democracies, where he claims the satisfaction of Waldron's assumptions depends on historically aware, context-sensitive methods.
- Eric Ghosh, in a similar vein to Roux, addresses key questions of judicial and constitutional legitimacy by revisiting seminal works by Waldron, Alexander Bickel and others. Also like Roux, Ghosh shines a light particularly upon the empirical assumptions within these works – in Ghosh's case, by examining recent empirical scholarship applying the