Pushing the boundaries of deliberative constitutionalism

From judicial dialogue to inclusive dialogue

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Abstract

Deliberative constitutionalism is a theory that has arrived at the centre of the academic debate in recent decades. Its novelty and interest lie in the fact that it offers a way to escape the objections to judicial review through a commitment to the premises of deliberative democracy. In this context, however, a question needs to be clarified: who can legitimately participate in this constitutional dialogue, in order for the objections to judicial review to be avoided? The argument of this article is that, while deliberative constitutionalism is a promising alternative that takes note of the objections to judicial review as well as the deliberative turn in democratic theory, not all of its variants take both of these aspects seriously. To assuage the objections to judicial review, we need a variant of deliberative constitutionalism that is oriented towards inclusive dialogue, and which addresses the whole constitutional system, rather than only intrajudicial, transjudicial and interinstitutional dialogue.

Index terms

Keywords: deliberative constitutionalism, deliberative democracy, judicial review, countermajoritarian difficulty

Full text
1 Introduction

The present article coincides with the emergence and expansion of deliberative constitutionalism. Possibly, this theory is one of the most innovative contributions offered by constitutional theory in recent decades. According to the common core of deliberative constitutionalism, the premises of deliberative democracy—mainly reasoned dialogue as a condition for the legitimacy of political decisions—assuage the objections to judicial review. In this way, deliberative constitutionalism does not conflict with judicial review, but is rather directed at justifying its legitimacy through democratic deliberation. Judicial review, despite allowing the invalidation of the democratic will by judges who are not elected by the people, does not entail a lack of legitimacy when it is the result of, and when it promotes, dialogue on constitutional issues.

In this context, a question arises that requires more attention: which actors can legitimately participate in this constitutional dialogue, so that it offers an effective solution to the objections to judicial review? Faced with this question, the common core of deliberative constitutionalism divides into at least four variants that offer very different answers. According to these variants, the legitimacy of judicial decisions depends on, in turn, an *intrajudicial dialogue* among the judges of a court, a *transjudicial dialogue* among the courts, an *interinstitutional dialogue* among the political institutions, or an *inclusive dialogue* among the institutions and society.

Within the framework of this controversy, this article will argue that, although deliberative constitutionalism is a promising theory that takes note of the objections to judicial review and the deliberative turn in democratic theory, not all of its variants really take both of these aspects seriously. Only a deliberative constitutionalism whose deliberative network does not reduce to the judges of a court, the courts, or the institutions, but rather includes all the institutions and people that are potentially affected, will have the potential to legitimize judicial review in particular and political decisions in general. Additionally, this systemic view, far from focusing on any single source of legitimation, attends to the multiple interactions within the constitutional system, understood as an interrelated set of diverse sources of legitimation that contribute to the political decision-making process.

To support this argument, the present article has the following structure. In the next three sections, it presents and criticizes theories of *intrajudicial dialogue* (section 2), *transjudicial dialogue* (section 3), and *interinstitutional dialogue* (section 4). Then it presents and defends the theory of *inclusive dialogue* (section 5), before concluding (section 6).

This work is justified for at least two reasons. First, something is provided here that does not exist elsewhere in the literature: a clear and comprehensive map of deliberative constitutionalism, which distinguishes and analyses in detail the various theories held by the most prominent scholars of constitutional dialogue. This is necessary because constitutional dialogue has now become ubiquitous, and yet it is unclear to what extent reference is made to such dialogue. Second, a more auspicious theory of constitutional dialogue is further developed here, one that makes sense of the objections to judicial review as well as deliberative democracy. This is important because standard constitutional theory has displayed a systematic lack of interest in both of these aspects.

Before starting, two clarifications are necessary. On the one hand, my aim is not to deny the potential of other theories of dialogue. Rather, I intend to show that, despite this potential, their scope of inclusion does not go far enough, thus their responses to the objections to judicial review are insufficient. Moreover, I do not wish to insinuate that the three theories criticized here omit other venues or forms of dialogue. Instead I
will try to highlight that, rather than attending to the entire constitutional system, they pay greater attention to dialogue among the judges of a court, among different courts, and among different institutions, respectively.

## 2 Intrajudicial dialogue

According to the theory of intrajudicial dialogue, deliberation among the judges of the same court, or between them and their clerks, legitimizes judicial decisions. This theory, according to Gutmann & Thompson, focuses “on the importance of extensive moral deliberation within one of our democratic institutions—the Supreme Court”. From this perspective, “judges cannot interpret constitutional principles without engaging in deliberation, not least for the purpose of constructing a coherent view out of the many moral values that our constitutional tradition expresses”.

The main exponent of this theory is Rawls. In his opinion, the court is not “antimajoritarian”, because its internal dynamics are those of an “exemplar” of a deliberative forum. Unlike other branches of government, it functions as a venue in which judges must deliberate and justify their positions on the basis of “public reasons”. Under the Rawlsian “ideal of public reason”, “citizens are to conduct their fundamental discussions within the framework of what each regards as a political conception of justice based on values that the others can reasonably be expected to endorse and each is, in good faith, prepared to defend that conception so understood”. In a framework of “pluralism”, then, the requirement of “reciprocity” is only respected if, when making political decisions in the public forum, instead of appealing to particular points of view or the reasons of “comprehensive conceptions”, “public reasons” are appealed to. Based on this kind of dialogue, Rawls offers a way to overcome the objections to judicial review.

Ferejohn & Pasquino, in similar terms, takes up the “exemplary” deliberative character of courts suggested by Rawls to justify the judicial review. According to these authors, public reason, as a characteristic of good deliberation, resides in the courts, while there is a decreasing scale of deliberative demands depending on the degree of distance from society: courts, public bodies, parliament, and the suffrage of society. Thus at one extreme lies suffrage, which is a reason-free zone, in which only the number of votes counts; while at the other extreme are the courts with their demanding deliberative burden, whose obligation to receive and give reasons resides in their lack of institutional ties with society.

Zagrebelsky is another exponent of this theory. For him, the court “has a centre” in the “chamber where deliberations take place”. “More than a physical place”, this is “a spiritual space” in which “heated discussions” take place, and where “a renewed openness to dialogue and availability to cooperation” unfolds. “This shutting away”, as he puts it, “implies a common effort to reject external pressure”, as “it breaks all contact with the outside world” and the “judges find themselves alone among themselves”, so that “what is outside, the world due to which they meet, only continues its existence in the representations of those who are inside”. Zagrebelsky adds: “No outsider is admitted into this work. Voices from outside should no longer resonate, because the deliberation room is a place of autonomous interpretation [...]. Conversely, voices from within must remain inside. Nothing that is said should leave a trace, only the little that is reserved for the resolution that is intended to be public. The closed circle of judges, beyond the four walls of the deliberation room, defines a boundary that configures its own space. The words spoken and the positions assumed must remain rigorously reserved”.

Despite the merits of this theory, Gutmann & Thompson criticize “the tendency to
designate some institutions as forums for reason and others as arenas of power”. Indeed, “courts are not the only or necessarily the primary province of deliberation”, so this theory “neglects the way in which other institutions can contribute to a more deliberative public policy as well as a better understanding of rights”. Thus, it “leave[s] little or no room for deliberation in everyday politics”, since “the tasks of moral deliberation and the defense of rights are assigned to an institution that is supposed to be above politics—the Supreme Court”. While they do not deny that Rawls’s theory “leaves room for such discussion”, they find it “puzzling” that he “stops short of arguing that a well-ordered democracy requires extensive deliberation to resolve moral disagreements”, inasmuch as “he does not propose that citizens or their representatives discuss moral disagreements about these principles in public forums”, but makes do with “a solitary process of reflection, a kind of private deliberation […] in which a veil of ignorance obscures our own personal interests, including our conception of the good life, and compels us to judge on a more impersonal basis”.

Dryzek also objects that “Rawls downplays the social or interactive aspect of deliberation, meaning that public reason can be undertaken by the solitary thinker”. Thus Dryzek considers courts to be deliberative institutions only in a limited sense. In the same vein, Benhabib points out that the scope of the public sphere is limited in Rawls’s theory, as it does not pay the same attention to society. Lafont likewise notes the “narrow juricentric perspective” of this theory, which “focuses on the internal workings of courts without paying sufficient attention to the political system within which the courts operate”, while omitting “the perspective of the citizenry”. Meanwhile, Gargarella points out that defenders of this theory of dialogue must explain how its commitment to the equal status of all people is compatible with this privileged role of the courts and with its mistrust of society. They have to explain, in turn, why the deficits of legislative and social deliberation need not be reproduced in the courts. This objection is relevant insofar as judicial deliberations, in most countries, are closed. The secret system of deliberation implies that only judges—and in some courts also their clerks—are empowered to enter and intervene in the plenary sessions where the resolutions of judicial cases are addressed. So only the final text of the judgement, with its foundations and operative part, is made public. Although the judgement is public, the previous dialogue that takes place within the court remains closed to other institutions and citizens. Neither one nor the other can follow the intrajudicial dialogue or participate in it openly, nor can they access the various draft judgements or discuss them.

Under these conditions, Kramer has objected to the “myth” of the conversation inside the constitutional court, since today most of the judges seldom read more than a “bench memo” or “the parties' submissions”. Judges “almost never meet to discuss a drafted opinion and they never work out their reasoning as a group”, that is to say, they only have meetings that are “as short as possible”, “with little or no actual debate or discussion”. The role of judges “consists mainly of dictating the outcome, instructing the clerks on how an opinion should look”, since they “rely on law clerks to prepare a case for them”. Concerning this point, Bello Hutt has argued that “idealizations of the courtroom as the forum in which ideal aspects of deliberative democracy are instantiated, are misguided”. In particular, he has criticized Mendes’s proposal, which, like Rawls, seeks to overcome the objections to judicial review by arguing that courts are optimal forums for deliberation: “special deliberators”. Furthermore, Mendes does not explicitly state that the court’s deliberative sessions should be public, since “a degree of secrecy” seems appropriate for deliberation, which can be jeopardized if it is public. Therefore, according to Bello Hutt, given that “access to the courtroom is limited by the
very structure of judicial procedures”, “we are in no position to know whether judges are deliberative during the parts of the procedure in which they gather to decide”. In the same vein, Atienza argues: “It certainly seems important that we know in some detail which are the real processes of deliberation and decision-making in these institutions, and that we consider what could be done and what changes could be introduced”. However, there is currently a lack of mechanisms for assessing intrajudicial deliberation.

In short, the potential of intrajudicial dialogue to justify judicial review is the most restricted compared to the other theories that will be discussed below. However, these criticisms by no means ignore the importance of developing courts whose internal functioning operates more deliberatively, publicly and accessibly. However, a dialogue focused mainly on the internal dynamics of the courts omits other instances of dialogue that are equally or more important, such as those that take place with parliament, social movements and authorities. As a correlate, this theory does not succeed in assuaging the objections to judicial review, nor in adequately considering the deliberative turn in democratic theory. Since judges are given a privileged voice, if not the last word, this type of dialogue is linked to strong judicial review.

### 3 Transjudicial dialogue

According to the theory of transjudicial dialogue, deliberation among courts of one country, among courts of different countries, between them and international courts, or among the international courts themselves, legitimizes judicial decisions. This theory, in Ferreres Comella’s words, suggests that “courts should consult each other when interpreting jusfundamental texts”, since “dialogue among judges appears to be the most reasonable method for channelling possible conflicts”. Or in the words of Bustos Gisbert: “Judicial dialogue is the communication among courts that is derived [...] from taking into account the jurisprudence of another court (foreign or alien to one’s own legal system) in order to apply one’s own law”.

Within this theory, Slaughter offers a typology: horizontal dialogue, when the interaction is between courts with the same status, be they national or supranational; vertical dialogue, when the interaction is between courts of different statuses, national and supranational; and finally mixed dialogue, when the two previous interactions are combined. In this context, Slaughter argues that constitutional and international courts from “all over the world”—e.g. the International Court of Justice, the International Criminal Court, the European Court of Human Rights, the Inter-American Court of Human Rights, the Court of the European Union—resolve the cases before them through a “transjudicial” “colloquy”. This dialogue is characterized by “persuasion” rather than “coercion”. Similarly, L’Heureux-Dubé does not conceive of this interaction between “courts all over the world” in terms of “reception” or a “one-way transmission”, but rather as a “dialogue”. Thus, “[n]o longer is it appropriate to speak of the impact or influence of certain courts on other countries, but rather of the place of all courts in the global dialogue on human rights”.

Along the same lines, Moreso “privileges judicial dialogue”. In his opinion, courts “will adopt more perspicuous decisions [...] if they take into account in their reasoning the justifications offered by courts of other jurisdictions, nationals of other constitutional or international democracies”. Although Moreso affirms that he “could also try to base this practice on ideas about the Habermasian community of dialogue”, he prefers to base it on a Rawlsian idea of “reflective equilibrium”, albeit “broader”. In his opinion, interpretations of the constitution and precedents are not conclusive;
rather there are various ways of deciding that are consistent with them. On the basis of Dworkin's distinction, he suggests that if judges do not find conclusive arguments in favour of a decision in the “dimension of adequacy”, then they must turn to the “dimension of justification”, and here reflective equilibrium is crucial. They must establish what is the most coherent way to harmonize the legal materials with the principles that best reconstruct their constitutional practice. If they limit themselves to their domestic practice, then the reflective equilibrium they will reach will be narrow, but they will broaden their vision if they turn to what other courts have done. In short, this theory focuses on “a global and cosmopolitan conversation among all the high courts”.  

Also, the so-called “Ius Constitutionale Commune in Latin America” (Ius Constitutionale Commune en América Latina, ICCAL) addresses inter-American dialogue from a primarily juricentric perspective. In this sense, Von Bogdandy, despite admitting that “dialogue is used to qualify various phenomena of the new public law”, prefers to limit himself to “dialogue among courts”. In this framework, he conceives inter-American judicial dialogue as a setting where the decisions of the national courts can be controlled by the Inter-American Court of Human Rights, while the latter’s decisions can be rejected by them. This, in his opinion, “encourages the jurisdictional bodies to rationally justify their rulings, because such argumentation is essential to demonstrating that a decision is not arbitrary”. Similarly, Morales Antoniazzi affirms that “jurisdictional dialogue and conventionality control” constitute “key tools for consolidating the protection of democracy and human rights”, and that through them “the ius constitutionale commune is being developed”. 

The paradigm of this theory is Dworkin’s. “Law as integrity” requires that the courts, when deciding cases, conceive of themselves as authors of a “chain novel”. From this point of view, judicial activity is conceived as a text written by various co-authors, who successively delegate it over time and must respect the argumentative thread of the past, while adding something else to it. Unlike the positivist thesis that courts have discretion when a lawsuit cannot be resolved by a predetermined solution, Dworkin holds that courts must work to reach the correct answer through moral reasoning, in accordance with “law as integrity”. 

However, the “novel” that is the law is primarily written by judges, since it is not open to conversation among equals. In other words, the problem is the dominant place that it grants to jurisprudence over the interpretations and constitutional narratives that derive from interactions among other actors, such as governmental bodies and society. Yet, as Habermas warns, “the administration of justice” is only one “part of a more encompassing process” of rationalization. In Waldron’s words, “the right of rights”, that is, social participation in common affairs, “is called seriously into question” when basic affairs are transferred from the people and their representative institutions “to a handful of men and women, supposedly of wisdom, learning, virtue, and high principle who, it is thought, can alone be trusted to take seriously the great issues”. Dworkin’s approach, as Gargarella affirms, is “devoid of what makes the very idea of dialogue attractive, that is, the assumption of parity”. In other words, this dialogue is distorted “by the privileged position of judges, which gives their voice a special authority”, because when they express their position “it gains strength and solidifies, making it extremely difficult for citizens and their political representatives to make changes to it, even after many years of discussion and political mobilization”. 

In conclusion, although the theory of transjudicial dialogue offers a broader deliberative network than intrajudicial dialogue to justify the judicial review, its scope of inclusion is also limited, since it still concerns a dialogue between judges; hence the “juricentric” character of both the theory of intrajudicial dialogue and the theory of
transjudicial dialogue. These criticisms, to repeat, do not deny the importance of judicial dialogue, but rather insist that this dialogue is insufficient, since it excludes or omits dialogue among other actors. As a result, it also fails to assuage the objections to judicial review in light of the deliberative turn in democratic theory. So, like the previous theory, this type of dialogue grants a privileged voice to judges, and continues to be linked to strong judicial review.

4 Interinstitutional dialogue

According to the theory of interinstitutional dialogue, deliberation between courts and other institutions legitimizes judicial decisions. What is distinctive about this theory, according to Tremblay, is that “courts and the legislatures participate in a dialogue regarding the determination of the proper balance between constitutional principles and public policies”. In other words, “an institutional dialogue may occur anywhere legislatures are able to reverse, modify, avoid, or otherwise reply to judicial decisions nullifying legislation”. According to Bateup, this theory focuses on the “interactions between courts and the political branches of government in the area of constitutional decision-making”. Thus it emphasizes that “the judiciary does not (as an empirical matter) nor should not (as a normative matter) have a monopoly on constitutional interpretation”.

One of the first figures of interinstitutional dialogue was Fisher, who shows that constitutional practice does not reduce to a judicial monologue, and that the court does not have the last word; rather, in Bickel’s terms, there is a continuous “colloquy”. Fisher refers to a “coordinated construction”, in which the executive and the legislature share a role with the judiciary in interpreting the constitution. A further paradigm of this theory is Hogg & Bushell’s famous article on weak judicial review in Canada, according to which, “[w]here 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”. In short, works such as these have stimulated a debate that has contributed to rethinking judicial review so that it is not seen as being exclusively in the hands of the court, but rather a “dialogue” between the courts and the other branches of government.

From a similar angle, according to Young, “dialogue describes a practice in which reason-giving courts are able to adjudicate rights, but elected and accountable legislatures are given the final word on the shape of the obligations that flow from them. At base is the expectation that both branches attempt to provide reasonable interpretations of constitutional provisions”. Meanwhile, Dixon, while suggesting that legitimacy requires abandoning strong judicial review, underlines that courts have the conditions, capacity and responsibility to assume an active and dialogic role to counteract the “blind spots” and “burdens of inertia” in the process of rule-making and enforcement. This dialogue, according to her, is “the most desirable model of cooperation between courts and legislatures”.

One difficulty of the theories of intrajudicial and transjudicial dialogue lies in the fact that, during the course of “ordinary politics”, they defend the privileged voice of the courts against the other branches of government, although in “extraordinary politics” some do admit the possibility of reversing jurisprudence through constitutional amendments. Another problem, as mentioned above, is that the deliberative network appears to be restricted to an exchange among judges and courts. In contrast, the potential of the theory of interinstitutional dialogue consists in its broadening the network of agents who participate in deliberation, in such a way that it focuses on the
interaction between the courts, the executive branch and parliament.

To conclude, the theory of interinstitutional dialogue incorporates dialogue between courts and parliaments. In addition, this theory is characterized by its thinking of links of collaborative dialogue among the branches of government, rather than veto mechanisms that are not very susceptible to dialogue. Here, then, lies its potential to assuage the countermajoritarian objection to judicial review. However, despite the theory of interinstitutional dialogue’s greater potential, its focus often reduces to a binary dialogue: one between parliament and the courts. Hence the importance of taking a step towards a theory in which the last word is not reduced to a binary issue between parliament and the courts—that is, to strong or weak judicial review.

5 Inclusive dialogue

According to the theory of inclusive dialogue, deliberation among judges, courts, political branches and society legitimizes judicial decisions. This theory, according to Bateup, seeks to “foster the legitimacy” through “systems of constitutional dialogue in a way that recognizes the central place of the people in ongoing discussion about fundamental values”. In the same vein, Kong & Levy note that this theory focuses on “democratic deliberation, both within institutions of public power (including the courts) and within wider society”. As Bakker states, the theory of inclusive dialogue treats the “people as a constitutional actor”, which “encompasses the idea that different governmental branches and the people interact in ways that shape the dominant views of constitutional interpretation”. Under these conditions, “the normative appeal” of the theory of inclusive dialogue “is the society-wide nature of dialogue, which is rather different than the strictly institutional accounts”.

The theory of inclusive dialogue takes a “systemic approach”, in the sense that it shifts attention from “individual sites” and their unique manifestations, traditionally understood as “the best possible single deliberative forum”, with “capacity sufficient to legitimate most of the decisions”—e.g. society, parliament or the courts—to “the interdependence of sites within a larger system”. Hence, despite the similarities between the theories of interinstitutional dialogue and inclusive dialogue, the former is concerned with how “legislatures and courts negotiate over the content of a law and its impact on rights”, while the latter is concerned with “broad systemic deliberation—among ordinary citizens, media, civil society groups, and branches or departments of government”.

In this framework, the theory of inclusive dialogue’s response to the question of who should deliberate takes Habermas as its reference. According to the “discourse principle”, “just those norms deserve to be valid that could meet with the approval of those potentially affected, insofar as the latter participate in rational discourses”. From this perspective, dialogue does not reduce to the institutional sphere; rather there must be, rather than isolation, a “two-track” connection with sensitivity between the institutional and social spheres in the formation of opinion and political will. Under these conditions, the question of who should make the decisions does not reduce to defining a venue with a privileged voice—whether this be parliament, the courts, or society—but rather depends on reciprocal deference to the “force of the better argument”.

On this last point, Fredman notes that the theory of inclusive dialogue “goes beyond” interinstitutional dialogue, “by focusing not simply on the final decision, whether legislative or judicial, but also on the quality of the deliberation in both arenas (and potential in relation to civil society too)”. She also agrees that the “conversation” about
law and justice is not just a “professional matter” of professors, litigants, judges and political representatives, but also includes different social groups—politicians, activists, the socially excluded. This conversation highlights the importance of “cooperation” and gives greater legitimacy to political decisions.\(^{54}\)

Within the Habermasian tradition, Forst also warns of the error of according “priority to teleological values which are supposed to ground a just or good social order, where those who are subjected to this order do not feature in it as authors”.\(^{55}\) Similarly to Waldron—who also highlights the centrality of the institutional question\(^{56}\)—Forst notes that it tends to be forgotten that “the first question of justice is the question of power”,\(^{57}\) which perpetuates “alienation” insofar as these values are not submitted to the justificatory authority of those involved.\(^{58}\) For this reason, Forst argues that the principles of autonomy and dignity demand that those who are subjected “should be the subjects” and “not merely the objects” of justification.\(^{59}\) This entails an “obligation” and a “right” “to justification”, that is, to give, receive and challenge reasons.\(^{60}\) Hence the “content of human rights is to be justified discursively”,\(^{61}\) that is, through an inclusive dialogue.

In the same vein, Gutmann & Thompson claim that “deliberative labor should not be divided so that representatives give reasons while citizens merely receive them”, but rather “all institutions of government have a responsibility for deliberation”,\(^{62}\) which should be extended “throughout the political process” to “any setting in which citizens come together on a regular basis to reach collective decisions about public issues—governmental as well as nongovernmental institutions”.\(^{63}\) Lafont, writing in the same tradition, endorses a “holistic” theory, which is not limited to the courts or parliament. According to this theory of inclusive dialogue, judicial review is understood as a participatory mechanism of society for triggering public deliberation. Thus judicial review empowers citizens with equal communicative power “to call the rest of the citizenry to put on their robes”.\(^{64}\) The same goes for Gargarella, who advocates “an open and persistent collective dialogue”, which includes “dialogue between authorities, but extends far beyond it” and “reserve[s] a central, rather than marginal, role for the citizenry”.\(^{65}\) Similarly, Post & Siegel call for “an ongoing and continuous communication” between representative government, the courts, and a mobilized citizenry.\(^{66}\)

Valentini likewise starts with a systemic conception of deliberative democracy and defends a dialogue that, far from being limited to courts or institutions, “attends to the whole set of actors, processes, and sites, that perform institutional and non-institutional activities of deliberation”.\(^{67}\) Bello Hutt, also arguing from a systemic conception, rejects the premise that “interpreting the constitution is exclusively a judicial endeavour”, while defending constitutional deliberation in multiple institutional and popular forums as a condition of legitimacy.\(^{68}\)

Here it is also worth keeping in mind those works that have proposed democratic and deliberative mechanisms for the formation, transformation and understanding of society’s political opinion. In this sense, Fishkin has defended the so-called “deliberative polls”, whose objective is to conduct a consultative vote at the end of a meeting between citizens chosen by lottery to deliberate on controversial issues in a guided, publicly broadcast, and technically informed manner.\(^{69}\)

Ackerman also argues that the constitution “is the subject of an ongoing dialogue” that includes the “people”,\(^{70}\) and he emphasizes the importance of “legitimation through a deepening institutional dialogue between political elites and ordinary citizens”.\(^{71}\) More recently, Fishkin and Ackerman have proposed the so-called “deliberation day”. Its objective is to establish an annual holiday during which the interested citizens meet in their neighbourhoods to consultative vote after publicly
deliberating on controversial issues, drafting proposals, and electing a representative. In a larger assembly, all the representatives from the smaller assemblies then deliberate on the proposals, make decisions, and subsequently return to their smaller assemblies to explain the outcomes.\textsuperscript{72}

Several works have enriched Fishkin and Ackerman’s proposals, as they have conferred upon society a significant role not only in the process of formation, transformation and understanding of political opinion, but also in the decision-making in the creation of ordinary norms, the adjudication of specific cases, and the constitutional reform. Regarding the first aspect, Leib has proposed, along with the classic triad of powers, a “popular branch of government” that reserves a more important place for society in deliberation and decision-making on the creation of ordinary norms.\textsuperscript{73}

Regarding the second aspect, Spector has justified a “bimodal” system that maintains existing constitutional review while adding a democratic mechanism of constitutional review through “constitutional juries” selected by lottery and as an “optional right” for plaintiffs in cases where they do not trust the constitutional court and prefer to evade it.\textsuperscript{74} Ghosh also has gone further by suggesting the replacement of strong constitutional review for what he has considered a more representative, deliberative, democratic and freedom-respecting alternative, that is, a “citizens’ court” formed through sortition.\textsuperscript{75}

Regarding the third aspect, Zurn has suggested that the arbitration of constitutional procedures that guarantee the legitimacy of the production of law should be in charge of a constitutional court—as the one in the European model—along with a flexible three-stage constitutional amendment processes: in the first stage, proposals can originate from a government decision or popular initiative; then, these proposals must be debated and approved by “civic constitutional fora” organized as deliberative democratic assemblies; and finally, such proposals must be debated in citizens “deliberation day” and ratified by the vote of the society at large.\textsuperscript{76}

In similar terms, with the aim of dissolving the counter-majoritarian objection through constitutional dialogue between the branches of government and society, Colón-Ríos has advocated for the democratization of the constitutional amendment procedure. This would be achieved through a “non-constituent assembly”—without the power to create a new constitution—that can be activated in response to a controversial judicial decision, by popular initiative or by the legislature’s call to the electorate. This assembly would then elaborate and present an alternative constitutional interpretation or constitutional amendment for the majority decision of the electorate. The goal would be to validate the challenged law and nullify the judicial ruling.\textsuperscript{77}

In conclusion, the theory of inclusive dialogue goes a step beyond previous theories. In effect, it encompasses intrajudicial, transjudicial and interinstitutional dialogue, while adding a further dialogue: that of society, among itself, and with its institutions. This theory does not conceive of the social groups or people affected as passive objects—on whose interests, needs and demands institutions must deliberate and decide—but rather as autonomous participants. In this way, it offers the most inclusive answer to the question of who should deliberate on constitutional matters. In other words, it takes seriously the democratic or inclusive aspect of deliberative democracy.

Notwithstanding this potential, many works that advocate the theory of inclusive dialogue, at the end of the day and with some independence from that process, assign a privileged voice to a political authority that has been determined in advance. In contrast, some other works discussed here not only argue for an inclusive dialogue, but also call for a continuous and systemic dialogue that does not endorse the idea of a privileged voice or a last word had by a particular venue, but rather holds that a decision must depend on the strength of the arguments.
6 Conclusion

While deliberative constitutionalism seeks to overcome the objections to judicial review by engaging with the premises of deliberative democracy, the argument of this article has been that, while the four theories discussed seek to amend judicial review’s lack of legitimacy through constitutional dialogue, only the theory of inclusive dialogue has the normative potential to achieve this. Indeed, this constitutional variant is oriented towards inclusive dialogue. At the same time, it does not focus on any single source of legitimation, but instead incorporates a broader variety of dialogue within the constitutional system.

Yet neither a sceptical nor a naive stance should be adopted towards the inclusive dialogue proposed in this article. On the one hand, one should not be sceptical because of the empirical impediments, obstacles and difficulties that make a more deliberative constitutionalism unlikely. Indeed, the causes of problems in adverse contexts are often external and prior to democratic deliberation, and such contexts do not necessarily imply that this theory is impractical or useless, but rather constitute challenges that reaffirm the importance of deliberative constitutionalism. These contexts, then, do not inevitably require an alternative model, but rather call for deliberative constitutionalism’s consistent implementation. On the other hand, one should not succumb to the wishful thinking that institutions will necessarily behave according to this theory, mainly because existing constitutional systems often provide few, if any, institutional incentives for political decisions to follow the ideal of deliberative constitutionalism. In this sense, although including society in the dialogue is “a significant theoretical contribution”, we should not ignore the fact that “society-wide dialogue is unlikely to take place”; and we should not “[underplay] the institutional aspects of constitutional dialogue” but rather explore the institutional possibilities by means of which this dialogue could take place.78

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**Notes**

1 Bateup 2006: 1109; Dixon 2007: 393; Fredman 2015: 448; Kong & Levy 2018: 626; Valentini 2022: 1-2; *inter alia*.

2 On deliberative democracy, see Habermas 1996.

3 On the countermajoritarian objection, see Bickel 1962.

4 Kong & Levy 2018: 634.

5 Gutmann & Thompson 1996: 45.


8 Zagrebelsky 2008: 15, 17, 19, 20 (my translation).

42 This distinction between two expressions of democracy, extraordinary law-making and ordinary law-making, is due to Ackerman 1991: 290.
Despite how enriching his proposal is, Leib does not resolve objections to constitutional court. On the one hand, the decisions of the fourth popular branch require a supermajority (2004: 83), so the possibilities of discussing and reversing judicial decisions become difficult and unlikely, as happens in the framework of rigid and counter-majoritarian mechanisms of constitutional reform. On the other hand, the constitutional court retains the final authority over the decision of the popular branch of government (2004: 12, 22, 72).

Spector 2009: 111-124. Despite the appeal of this proposal, it is limited to a small group of rights, those involving claims of citizenship against political representatives. Spector is sceptical about the effectiveness of juries when the rights of minorities against majorities are at stake and, in such cases, he leans towards a counter-majoritarian institution as a more effective alternative.

Ghosh 2010: 345-352. Ghosh’s “citizens’ court” must make decisions by a supermajority, these decisions can be vetoed by a supermajority in congress, its scope is limited to cases of rights violations, and these cases are selected based on an advisory opinion from a council of judges formed by lottery. As can be seen, this jury, at the end of the day, is left in a situation like that of the constitutional court of the strong model, since its decisions can only be reversed by a supermajority. But with an addition, unlike almost all constitutional courts that can invalidate norms by a simple majority, the jury can only do so by a qualified vote.

Zurn 2007: 274-341. Zurn considers that a democratic and deliberative constitutional amendment mechanism allows responding to the rulings of the constitutional court. In addition, Zurn goes further than the previous theories because it places the final authority in the hands of the society. Also, Zurn’s civic constitutional fora, unlike Spector and Ghosh, does not have to resolve specific cases, but must issue general and clear norms useful for resolving a series of specific cases in a consistent manner.

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