

## **Canadian PSA Conference June 2006**

### **Deliberative democracy and the countermajoritarian problem**

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#### **1. INTRODUCTION**

Theories of deliberative democracy generally endorse judicial review.<sup>1</sup> “Judicial review” refers in this paper to the practice where judges can invalidate legislation and executive action based on interpretation of a bill of rights. This paper argues, however, that insights from the literature on deliberative democracy, in particular its empirical dimension, can in fact be employed to cast critical light upon the legitimacy of judicial review. More particularly, the focus will be on experience with deliberative polling.

The next section discusses the practice of deliberative polling, some existing proposals for institutionalising them, and the rationale for the practice and those proposals. Section 3 discusses implications for judicial review that arise from experience with deliberative polls. These implications support a check upon parliament and the executive. However, they also raise the question of whether something like a deliberative poll could be institutionalised as a substitute for a conventional judiciary. Section 4 sketches a Citizens’ Court, while section 5 briefly evaluates it. The unrepresentative quality of the judiciary is a manifest weakness that tells in favour of the Citizens’ Court proposal. However, an alternative approach to selecting judges that would make them more representative is also mentioned.

#### **2. DELIBERATIVE POLLS**

##### **A. The practice of deliberative polls**

Theories of deliberative democracy are often philosophical in orientation. They reject the preference-aggregation model of democracy in favour of a model of political decision-making involving deliberation between citizens conscientiously seeking morally justifiable outcomes.

However, an empirical dimension in the literature involves experimentation with deliberative forums. James Fishkin’s deliberative polls are the most prominent instance of this.<sup>2</sup> These polls commence with a pre-deliberation survey of a statistically representative sample. This involves a face-to-face interview sandwiched around a self-administered questionnaire.<sup>3</sup> The sample is then invited to participate in a weekend discussion a few weeks later concerned with the same issues as those targeted in the survey and questionnaire. Various inducements are offered, such as free accommodation, meals and travel, and a small honorarium.

Typically, 35 to 60 percent of those interviewed are interested in further participation.<sup>4</sup> On the weekend, there is discussion in small groups assisted by a moderator, and

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1 This is noted in David Estlund, “Introduction”, *Democracy* (Malden, Ma.: Blackwell, 2002), pp. 1-28 at p. 5 and John Dryzek, *Deliberative Democracy and Beyond: Liberals, Critics, Contestations* (Oxford: Oxford University Press, 2000) ch 1.

2 Robert Luskin, James Fishkin, and Roger Jowell, “Considered Opinions: Deliberative Polling in Britain”, *British Journal of Political Science*, 32 (2002), 455–87.

3 *Ibid.*, p. 463.

4 James Fishkin, “Experimenting with a Democratic Ideal: Deliberative Polling and Public Opinion” (paper presented at the Swiss Chair’s Conference on Deliberation, European Univer-

also plenary sessions in which question can be put to experts and politicians. At the end of the weekend, the participants are surveyed again, so it is possible to track shifts in opinion on normative questions as well as levels of political knowledge that occurred through the process.

There have been at least 20 polls conducted so far, mostly in America, Britain and Australia. The first deliberative poll was in Britain in 1994, and it was concerned with crime. This poll led to an increased sense of the limitations of prison as a tool for fighting crime. For example, agreement that sending more offenders to prison is an effective way of preventing crime decreased from 57 to 38 percent.<sup>5</sup> There was also a significant improvement in responses to questions testing knowledge of the British legal system.

To mention another example, in a deliberative poll before the 1997 British election, concerned with which party to vote for, support for the Conservative Party and the Labor Party decreased by 7 and 8 percent respectively, while support for the Liberal Democrats increased by 22 percent.<sup>6</sup>

Typically, significant shifts in opinion and gains in knowledge occur between the two surveys. Nevertheless, Fishkin only claims that opinions become more thoughtful and informed. In relation to the 1994 British poll, Fishkin says that “the post-event distribution of opinion is almost certainly not what might be expected of an *ideally* informed and thoughtful citizenry”.<sup>7</sup> Indeed, it would have been incredible if it were, given the range of policy issues relating to crime that were considered.

Also typical is that the group which participates in the deliberative poll has attitudes to the particular issues in question and sociodemographic attributes which are similar to the larger group initially polled.<sup>8</sup> In that sense, the participants are representative of the larger group.

## B. Institutional proposals

Fishkin has also argued that this model of deliberation could be institutionalised. It could become part of the process of selecting a president. Citizens could be asked whether they are Democrats or Republicans and then a representative sample of each group could be selected to go to the respective convention to choose a presidential candidate for each party. If this were institutionalised, serving on this National Caucus would be an obligation of citizenship.<sup>9</sup> More recently, he and Bruce Ackerman have

sity Institute, 21 February 2004) accessed 19 April 2006 from <cdd.stanford.edu/research/papers/2004/democraticideal.pdf>.

5 Luskin, Fishkin, and Jowell, “Considered Opinions”.

6 Stanford University Center for Deliberative Democracy, *Deliberative Polling* 2 March, 2006 from <<http://cdd.stanford.edu/polls/docs/summary/>>.

7 Luskin, Fishkin, and Jowell, “Considered Opinions”, p. 484. Some scepticism about the rationality achieved through deliberative polls has been expressed elsewhere. See Patrick Sturgis, Caroline Roberts, and Nick Allum, “A Different Take on the Deliberative Poll: Information, deliberation, and attitude constraint”, *Public Opinion Quarterly*, 69 (2005), 30–65, Rachel Gibson and Sarah Mishkin, “Australia Deliberates? The Role of the Media in Deliberative Polling”, *Constitutional Politics: The Republic Referendum and the Future*, ed. J. Warhurst and M. Mackerras (St Lucia, Qld.: University of Queensland Press, 2002), pp. 163–175. For some different criticisms, see Daniel Merkle, “The Polls – Review: The National Issues Convention Deliberative Poll”, *Public Opinion Quarterly*, 60 (1996), 588–619.

8 Luskin, Fishkin, and Jowell, “Considered Opinions”, pp. 466, 485.

9 James Fishkin, *Democracy and Deliberation: New Directions for Democratic Reform* (New Haven: Yale University Press, 1991) ch 1.

suggested that all citizens could be involved in a deliberation day before elections take place.<sup>10</sup>

Ethan Leib, on the other hand, has devised more radical proposals, with decision-making on issues vested in representative groups of citizens. Such groups could replace the citizenry in relation to referendum questions initiated by parliament or by citizens.<sup>11</sup> To mention the latter possibility, once the required number of signatures has been gained, instead of the question going to a referendum, it would be decided by a representative group of citizens. He also suggests that judges could be empowered to commission a deliberative poll when they think this would be helpful in deciding a case.

The next section considers the values that underlie the current practice of deliberative polling and the above proposals.

### C. Values underlying deliberative polls

#### i. *The aim and value of deliberation*

The deliberative polls have two main features: deliberation and representativeness. In relation to deliberation, Fishkin hopes that this leads to more informed opinions. The opinions should represent a better understanding of relevant facts and also relevant values and perspectives.

Why is this valuable? Fishkin does not discuss this directly, but instead notes that important thinkers, including Madison, Hamilton, Dahl and Habermas, valued deliberation.<sup>12</sup> Fishkin also states that deliberation is one of three conditions necessary to legitimise democracy, the others being political equality and nontyranny.<sup>13</sup> He appears to be hoping that better informed decisions are likely to be normatively better. Thus, when they feed into the political system, they will have a positive influence upon the quality of decisions made.

Why are more informed opinions likely to be normatively better? The existence and nature of moral truth are controversial. However, the expectation that more informed opinions are likely to be normatively better rests on fairly modest assumptions. First, that a morally sound decision is one that takes into account relevant facts and values and appropriately weighs the competing values. Secondly, that participants are more likely to reach the truth about facts when they are better informed about the state of available evidence. Thirdly, that a better understanding of the facts and the values at stake is likely to lead to a better balancing of competing values.

The second assumption rests on available evidence enjoying some positive probative value. The third assumption is more controversial. It relies on the likelihood that as people learn more about an issue, the greatest learning occurs in relation to the interests of others. The expectation is that with this learning, people are more likely to adopt moral positions that better accommodate the legitimate interests of others. A deliberative poll on reconciliation between indigenous and non-indigenous Australians in 2001

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10 Bruce Ackerman and James Fishkin, *Deliberation Day* (New Haven: Yale University Press, 2004).

11 Ethan Leib, "Towards a Practice of Deliberative Democracy: A Proposal for a Popular Branch", *Rutgers Law Journal*, 33 (2002), 359–456. See also Ethan Leib, *Deliberative Democracy in America: A proposal for a popular branch of government* (University Park, Pa: Pennsylvania State University Press, 2004).

12 Fishkin, *Democracy and Deliberation*, pp. 35–6. David Estlund has pointed out, in relation to another work by Fishkin, some evasiveness as to why deliberation is valuable; Fishkin teeters unstably between various options: David Estlund, Book review of *The Dialogue of Justice: Towards a Self-Reflective Society* by James Fishkin, *Ethics*, 105 (1994), 186–8.

13 Fishkin, *Democracy and Deliberation* ch 4.

perhaps illustrated this, with support for certain positions sympathetic to indigenous Australians increasing by over 20 percent.<sup>14</sup>

## ii. *The deliberative nature of the polls*

The deliberative polls prompt two types of deliberation: solitary and social. The former occurs when individuals read the material they are furnished with several weeks before the weekend discussion. The latter consists in discussion with others before the weekend, and on-site discussion during the weekend. The on-site discussion is structured to ensure interaction with diverse others, something which may or may not happen in informal conversation with friends, family and other acquaintances. It is structured social deliberation that theorists of deliberative democracy are principally interested in.<sup>15</sup> Indeed, the importance of discussion with diverse others, rather than merely being presented with diverse views through reading material or formal presentations, was brought out in the last-mentioned poll. Small groups in which indigenous Australians were present shifted in favour of positions sympathetic to that group to a greater extent than groups where they were not present.<sup>16</sup>

A difficulty in evaluating the helpfulness of structured social deliberation in improving opinions on normative questions is that reasonable people disagree on what is normatively right. While my example of the poll on reconciliation assumed that certain positions that prominent Aborigines supported were better positions, this is a controversial assumption. However, there has been experimental work examining deliberation on factual questions, and this throws light upon deliberation on normative questions.<sup>17</sup> Normative issues often depend to some extent on the resolution of factual matters. Furthermore, deliberation on facts, like deliberation on norms, often involves consideration of diverse information.

Cass Sunstein points to experimental studies that demonstrate how deliberation in its social structured aspect can lead to worse decisions on factual questions than relying upon the predeliberative statistical mean opinion of a group. Both information and social influences can work negatively. In relation to information influences, people, before expressing their own views, will be influenced by the views of others simply because they attribute authority to those views. They may, for instance, assume that others are as likely to be correct as they are. Social influences, on the other hand, are due to concern with reputation. People with dissenting views may be concerned that they will be viewed as foolish or disagreeable if they express or press those views.

Information and social influences can lead to two major consequences. First, individuals may suppress private information they hold, thereby denying the group the benefit of their knowledge. Secondly, these influences can produce polarization. Polarization is where the predeliberative majority opinion ends up prevailing, after deliberation, but in a more extreme form. This is due to individuals with dissenting predeliberative opinions adopting opinions consistent with predeliberative majority opinions that are expressed in the course of deliberation. Furthermore, those with

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14 Center for Deliberative Democracy, *Deliberative Polling*. This included support for an apology to the “stolen generation” and formal acknowledgment that Australia was occupied without the consent of indigenous Australians.

15 Indeed, John Dyzek prefers the term “discursive” to “deliberative” to indicate this focus: *Deliberative Democracy and Beyond*, pp. v–vi. For discussion of solitary deliberation, see Robert Goodin, *Reflective Democracy* (Oxford: Oxford University Press, 2003).

16 Center for Deliberative Democracy, *Deliberative Polling*, Gillian Cynthrie and Rob Simms, *Without Prejudice: A story about Australians confronting reconciliation* (ITE Media, 2001), documentary.

17 Cass Sunstein, “Group judgments: statistical means, deliberation, and information markets”, *New York University Law Review*, 80 (2005), 962–1049 at p. 967.

predeliberative majority views will feel more confident of their views, given the concurrence of others, and one consequence of confidence is taking a more extreme position. The danger is that errors arising from the suppression of private information can become accentuated.

Fishkin, though, has not found in the deliberative polls a systematic tendency to group polarization. Sunstein suggests that this may be due to the provision of balanced written material beforehand, so there is not pure reliance upon the deliberative process to reveal information.<sup>18</sup> Secondly, the participants did not vote as a group, so the social influence was reduced. Instead, they completed a questionnaire at the end of the process. Thirdly, the moderators sought to achieve a level of openness and balance that may not have otherwise occurred.

There seem strong grounds for believing that the deliberative polls are likely to lead to opinions that are better informed both on factual and normative matters. As argued in the previous sub-section, it seems reasonable to assume that such opinions are also more likely to be closer to the truth on factual questions, and be more sound on moral questions.

### *iii. The value in representativeness*

The polls aspire not only to be deliberative. The groups polled are also statistically representative of the communities from which they are drawn. Part of the point of representativeness is to ensure diversity, which should assist deliberation. However, this does not require, and may on occasions be in tension with, strict statistical representativeness.

What justification exists for statistical representation? Fishkin suggests that democratic reform has long striven to realise the contrary values of political equality and deliberation.<sup>19</sup> Fishkin defines political equality as requiring the equal consideration of everyone's preferences, as this is achieved through everyone having the same voting power. Fishkin does not seek to defend this value, but simply notes that it is regarded as an important value, and that the American system has been moving in this direction, with primaries, recalls, the direct election of the Senate, and citizen-initiated referendums.

A defence of political equality is not in fact necessary to justify deliberative polls, as they have been practised, or as they would be practised if Fishkin's institutional proposals were adopted. A major justification for such polls is to improve the working of representative democracy. First, the polls, as they are currently implemented, can have an educative role for the public at large, who are not participants. They can read about the opinions and may be influenced by them, partly because those opinions do not represent the views of possibly an elite with its own narrow interests and perspectives, but instead represent community views that have had the benefit of deliberation. Secondly, the polls can have an educative role by involving the public directly in the process. Such direct involvement occurs, for instance, with Ackerman and Fishkin's proposal of a deliberation day. Thirdly, it can have a role in replacing voting by the general public in aspects of the political system. This is evidenced in Fishkin's proposal for a deliberative poll to be used in selecting presidential candidates. Leib's proposals seem to largely fall within this.

These possibilities are aimed at rendering more deliberative aspects of the democratic system that involve the public voting, say for candidates and political parties. Support for deliberative polls does not require support for this public involvement. Instead, it need only rely on the following:

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18 See *Ibid.*, pp. 1010–11.

19 Fishkin, "Experimenting with a Democratic Ideal", *Democracy and Deliberation*.

1. aspects of our political system involving direct citizen participation, such as voting, are deeply entrenched;
2. the rationality of those aspects can be enhanced through the use of deliberative polls.

### 3. IMPLICATIONS OF DELIBERATIVE POLLS FOR JUDICIAL REVIEW

This discussion of experience with deliberative polls and their underlying values may not appear relevant to judicial review. However, deliberative polls cast negative light upon the degree of autonomy that citizens exercise in politics. This undercuts the strength of the countermajoritarian difficulty with judicial review, ie, the concern that judicial review compromises democratic values.

#### A. Implications of the assumption of strong autonomy

Assume that citizens exercise strong autonomy on political matters, ie, their political behaviour is based on well-informed deliberation on what the public good requires. With this assumption, there is what I will describe as a substantive-instrumental justification for leaving issues of justice to parliament unconstrained by judicial review. If citizens' political behaviour reflects a deep and informed commitment to justice, this will significantly motivate parliamentarians to reflect the same commitment in their decisions. While parliamentarians would still be able to act on specific issues in a manner contrary to public opinion, public opinion informed by deliberation would significantly constrain unreasonable violations of rights.

In this context, it would seem odd to entrust decision-making on rights to a select group of legal professionals. It is not surprising that judicial review is generally defended based on the assumption that citizens do not exercise strong autonomy. Thus, Jeremy Waldron, in his attack upon judicial review, is centrally concerned with undermining this assumption.<sup>20</sup> He urges us to assume that citizens exercise strong autonomy.

It is reasonable, then, to interpret judicial review as conveying the message that citizens do not exercise strong autonomy in their political behaviour. It might be argued that the possibility of parliamentary override of judicial review decisions means that this message is not conveyed.<sup>21</sup> However, judicial review still expresses some lack of confidence in citizens' autonomy, though it does express confidence that with the moral tutoring of judges, citizens and their representatives can exercise greater autonomy.<sup>22</sup>

The message that citizens do not exercise strong autonomy on political matters is problematic if citizens actually exercise such autonomy, for the system of judicial review then demonstrates unwarranted disrespect towards citizens. The evil of this can be understood in instrumental terms, if this negatively impacts upon citizens' self-confidence, their behaviour and how they are treated by others. It can also be understood in intrinsic terms if it is accepted that it is simply unjust to demonstrate an undeserved lack of respect for citizens. The injustice involved may be regarded as particularly significant if strong autonomy is a quality that adds significant dignity to human beings.

Finally, judicial review, with the finality found with the US system, diminishes citizens' capacity to participate in decision-making on important matters of justice. Strongly

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20 Jeremy Waldron, *Law and Disagreement* (Oxford: Clarendon Press, 1999).

21 Jeffrey Goldsworthy, "Judicial Review, Legislative Override, and Democracy", *Protecting human rights: instruments and institutions*, ed. T. Campbell, J. Goldsworthy, and A. Stone (Oxford: Oxford University Press, 2003), p. 263.

22 This contrasts with the greater faith in citizens' autonomy expressed by the UK approach, where courts can declare legislation incompatible with rights, but cannot invalidate such legislation. This approach is approved of in Jeremy Waldron, "On judicial review" (Summer, 2005) *Dissent* accessed from <<http://www.dissentmagazine.org/>>.

autonomous citizens may value highly the participatory opportunities that democracy affords. Where such opportunities exist, citizens are motivated to exercise and develop further their moral capacities. This adds an additional moral dimension to their lives. Participation may also be pleasurable. The curtailment of participatory opportunities is significantly less, though, where there is the possibility of parliamentary override.

I have mentioned the above arguments in order to indicate that the assumption of strong autonomy is helpful in arguing against judicial review. Once the assumption of strong autonomy is relaxed in favour of weak autonomy, these arguments collapse. Citizens with weak autonomy are only assumed to have a reliable grasp of their own interests and a capacity to determine which political party is most likely to promote those interests. With weak autonomy, there can be no assumption that just outcomes will arise from the democratic process in relation to minority rights. Furthermore, there is little reason to believe that citizens will in fact feel degraded or insulted by judicial review, that they will miss a decrement in the power attached to their participatory opportunities, or that there is any violation of justice in terms of judicial review showing unwarranted disrespect for people's autonomy.

Indeed, the situation becomes worse when the assumption of weak autonomy is relaxed. Weak autonomy assumes that citizens are vigilant at least in protecting their own interests. If they are not, the constraints that citizens impose upon their representatives look particularly loose.<sup>23</sup> In that case, a shift of power from parliament to the courts looks more like a shift of power from one elite to another.

## **B. Problems with the assumption**

Thus, the assumption of what degree of autonomy citizens exercise clearly impacts upon the debate about judicial review. It is here that experience with deliberative polls become relevant. That citizens have too little knowledge on political matters to exercise strong autonomy (or perhaps sometimes even weak autonomy) when voting etc, was well established before deliberative polling. For instance, in American polls, generally half the people admit either to having no idea where the Republican and Democratic parties stand on the issues of the day, or they get it wrong, placing the Republican Party to the left of the Democrats.<sup>24</sup>

However, perhaps some hope remains that citizens, while not exercising strong autonomy, could rely upon heuristic devices. Or alternatively, that errors of voters are likely to cancel each other out.<sup>25</sup> Parliamentarians would then be under the same electoral constraints as those that would exist if citizens as a whole were deliberative. The 1997 deliberative poll in Britain mentioned above suggests that such hope is misplaced.<sup>26</sup> There was a significant shift in political support between different political parties.

The deliberative polls suggest a lack of deliberation by people in general on political issues. Otherwise, the dramatic shifts in opinion should not occur. The polls also render more palatable the view that citizens in general exercise a fairly low level of autonomy on political issues. The assumption of strong autonomy is attractive partly because any other attitude can appear arrogant. However, the results of deliberative polls make it clear that it is possible to accept the results of the empirical evidence of voter knowledge without suggesting that somehow the average voter is unintelligent or indifferent to moral issues. The average citizen is interested in deliberating on political issues in a conscientious way

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23 Ilya Somin, "Political Ignorance and the Countermajoritarian Difficulty: A New Perspective on the Central Obsession of Constitutional Theory", *Iowa Law Review*, 89 (2004), 1287–1371.

24 Referred to in Luskin, Fishkin, and Jowell, "Considered Opinions", pp. 456–8. See also Somin, "Political Ignorance and the Countermajoritarian Difficulty", p. 1315ff.

25 See Luskin, Fishkin, and Jowell, "Considered Opinions", p. 458.

26 Above at 2.

if given a proper opportunity and incentive to do so. Our system gives each individual so little influence that ignorance about politics is quite rational. Thus, the deliberative poll, both directly and indirectly, is supportive of the view that the general voter casts an undeliberative vote. It thereby weakens the countermajoritarian concern, and supports concern about majoritarian tyranny. Policies involving indifference or hostility towards the rights of minorities may appeal to a sufficient section of an undeliberative public to be electorally rewarding.

### C. A different countermajoritarian difficulty

It would seem, then, that deliberative polls have positive implications for judicial review. The values underlying deliberative polls do not involve any tension with judicial review. Section 2 argued that deliberative polls involve a commitment to deliberation, but not necessarily to political equality.

However, perhaps there is a hint of a query about judicial review in Leib's suggestion that judges might find it helpful to consult deliberative polls. He suggests that in deciding whether to reverse *Bowers v Hardwick* (1986), the US Supreme Court case which refused to strike down anti-sodomy laws, the Supreme Court might find a deliberative poll helpful in understanding the nation's traditions.<sup>27</sup> This is perhaps a limited acknowledgment that correct decisions on matters of constitutional adjudication could benefit from representative, deliberative opinion. However, it would of course lie within the judges' discretion when such opinion would be helpful. Judicial references to community values, etc, do not always represent a genuine attempt to understand public opinion, deliberative or not, but are often rhetorical, aimed at shoring up the democratic credentials of the decision.<sup>28</sup>

The literature about or drawing upon deliberative polls does not seriously challenge judicial review. Indeed, Fishkin and Leib rely upon judicial review to legitimatise institutionalising deliberative polling: judicial review will remain as a check upon decisions made by representative groups of citizens. Despite this, it will be argued that experience with deliberative polls has negative implications for judicial review. Quite simply, it raises the question of whether a representative sample of citizens could deliberate on questions of justice instead of judges. The polls suggest that citizens are willing and able to deliberate on public issues.

If this possibility is attractive, it would provide strong support for the countermajoritarian concern. While the concern can be presently undercut by pointing to the lack of autonomy citizens exercise in politics, there would be a powerful rejoinder: judicial review forecloses the possibility of a genuinely democratic body being involved in decision-making on justice. Indeed, it is not possible to appreciate the strength of the countermajoritarian concern unless we consider whether there are less elitist approaches to addressing concern about majoritarian tyranny. Some hope to increase the level of autonomy that citizens in general exercise in voting, etc, by improving the quality of political education,<sup>29</sup> by democratising institutions that people are intimately involved

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27 Leib, "Towards a Practice of Deliberative Democracy", p. 409. This decision was overturned in *Lawrence v Texas* (2003).

28 Eric Ghosh, "Republicanism, community values and social psychology: a response to Braithwaite's model of judicial deliberation", *Sydney Law Review*, 20 (1998), 5–41.

29 This can occur within existing structures, such as schools (see, eg, James Tarrant, *Democracy and Education* (Aldershot, Hants: Avebury, 1989), Amy Gutmann, "Civic Education and Social Diversity", *Ethics*, 105 (1995), 557–79), or through new activities, such as civil conscription: Benjamin Barber, *Strong democracy: participatory politics for a new age* (Berkeley: University of California Press, 1984), p. 298ff.



with, or creating additional democratic institutions.<sup>30</sup> It seems unlikely, though, that such measures will lead to citizens exercising strong autonomy on issues of national politics. Problems of scale and complexity will remain.

It is also true that if deliberative polls are institutionalised, they could be inserted elsewhere. They could, for instance, replace or supplement one or more houses of parliament. Or they could be involved in a body acting like the French Constitutional Council, with referrals from politicians concerning the constitutionality of bills. My proposal does not exclude such possibilities. However, there will remain a need for an institution that is responsive to complaints once legislation is in place. It is not possible to foresee in advance how legislation will apply or impact upon people, so some later possibility of review seems important.

#### 4. A CITIZENS' COURT

I place my proposal of a “Citizens’ Court”<sup>31</sup> in the Australian context, partly because it is the one I am most familiar with. Australia has a federal system with no national bill of rights. I can only sketch my proposal here in a suggestive way.

The Citizens’ Court would involve judges. Judges would be randomly selected from willing members of the Federal Court judiciary. However, unlike conventional courts, the main decision-making body would be citizens’ juries, consisting of around 200 members chosen through a combination of random selection and a test.

This court could be charged with interpreting a bill of rights that includes social rights, such as a right to a basic standard of living,<sup>32</sup> and also a catch-all phrase to capture cases of substantial injustice. Such an open-ended bill of rights seems essential to ensure that a representative sample of citizens is empowered to decide what counts as a substantial injustice, rather than having this decision sharply constrained by the wording of particular provisions.

A bench of three judges would decide preliminary matters, subject to appeal to a “mini-jury” of 12 citizens instructed by a judge. Perhaps the 12 citizens could be randomly selected from those who have served on citizens’ juries and are willing to continue their participation with the Citizens’ Court.<sup>33</sup> Preliminary matters include defining clearly the issues in dispute and resolving factual disputes. However, there is one preliminary matter which is too crucial to leave so firmly in the hands of judges. The determination of the cases that most merit a hearing would be a controversial matter and it would be appropriate for a citizens’ jury to be involved in the selection. The jury could be assisted by the opinions of three judges.

That must suffice here with respect to how preliminary matters would be determined. I now turn to citizens’ juries, for authority rests largely with them. To form these juries, citizens would randomly be asked by phone if they wish to participate. If they are interested, some relevant literature on the process could be sent to them, and they could then have a face-to-face discussion with a person to confirm their willingness to

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30 See Frank Cunningham, *Theories of Democracy: A critical introduction* (London: Routledge, 2002) ch 7.

31 The idea of having a statistically representative body making decisions on constitutional matters is endorsed in David Held, *Models of Democracy*, 2nd ed. (Stanford: Stanford University Press, 1996), p. 320 fn 9. There is some brief discussion of the possibility in Horacio Spector, “Judicial review, rights, and democracy”, *Law and Philosophy*, 22 (2003), 285–334 at pp. 311–13.

32 For an argument in favour of constitutionalising these, see Cécile Fabre, *Social Rights under the Constitution: Government and the Decent Life* (Oxford: Clarendon Press, 2000).

33 Appeals could be successful if a majority of, say, nine members of a mini-jury agree with the point of appeal. The jury could provide a short statement of reasons, after consulting with the instructing judge.

participate and to abide by the governing rules. For one case, it would be necessary to find perhaps around 300 willing participants.

They would be given material relevant to the issue to be decided and tested upon that material to ensure they have a reasonable grasp of it. The test should ensure a satisfactory level of competence in jurors without deterring too many candidates. Attrition together with the test are likely to reduce the pool of 300 candidates to around 200.

As Fishkin and Luskin note, a random sample of several hundred is very unlikely to differ radically from the population.<sup>34</sup> The variance in postdeliberative opinion from what the general community's postdeliberative opinion may be larger than the variance that can be expected with respect to predeliberative opinions,<sup>35</sup> but it should nevertheless be broadly representative. A supermajority of perhaps 60 percent would be appropriate for decisions. This partly acknowledges sampling variance as well as helping to confine the Citizens' Court to matters potentially involving serious injustice.

There would be two types of juries: case-selection juries, which determine the final list of cases to be heard, and case-deciding juries. Both would follow a similar model to deliberative polls. Members of the case-deciding juries would need to decide whether there has been a violation of the bill of rights, and would need to endorse a principle and brief statement of reasons that best reflects their position.

If the requisite majority makes a declaration of invalidity, this declaration would have legal force. Such declarations, though, would be subject to disallowance by Parliament, perhaps with a 60 percent majority. The ordinary courts would have two roles in relation to the Bill of Rights. They could use its provisions to assist in interpreting legislation and the common law. Secondly, with respect to invalidating rather than merely interpreting legislation or executive action, the ordinary courts other than the highest court could follow Citizen Court declarations.<sup>36</sup> It would be open to aggrieved parties to appeal to the Citizens' Court against an ordinary court applying or failing to apply a Citizen Court declaration in a specific case. This way, the Citizens' Court would retain control of the body of law it develops, subject to parliamentary disallowance.

## 5. EVALUATING THE PROPOSAL

### A. Process-instrumental and intrinsic considerations

This discussion has to be highly selective, given the myriad issues raised by this proposal. When describing the arguments against judicial review that could be made if we assumed strong autonomy, various criteria were employed. The first was substantive-instrumental: which body is likely to make the best decisions? The second was process-instrumental: what consequences follow from the decision-making process itself? These consequences include symbolic recognition of autonomy and the value of participatory opportunities other than their value in producing good decisions. The third was intrinsic. Is the system just in the sense that it gives due recognition to people's autonomy? These criteria will be employed in comparing my proposal with judicial review. The substantive-instrumental criterion is the most difficult to apply and will be considered in the next section.

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34 James Fishkin and Robert Luskin, "The quest for deliberative democracy", *Democratic Innovation: Deliberation, representation and association*, ed. M. Saward (London: Routledge, 2000), pp. 17–28 at p. 20.

35 Goodin, *Reflective Democracy*, p. 175.

36 The highest court would need to be excluded to prevent the difficulty of it perhaps hearing an application that the Citizens' Court has committed an error of law in relation to a decision which overturns its own application of an earlier Citizens' Court declaration.

I commence with process-instrumental consequences. The first relates to status. It is not clear that citizens generally feel degraded by the existence of judicial review. In fact, they may feel more positively about the judiciary than they do about their parliamentary representatives. They may feel alienated from supposedly representative institutions. Thus, judicial review may be viewed not as an institution constraining the people, but rather an institution constraining the elite in parliament.

Public satisfaction with the judiciary does not, however, preclude the possibility that a Citizens' Court could enhance citizens' sense of empowerment. With a Citizens' Court, the citizens themselves would be involved in deciding challenges to government policy on important questions concerning justice. The open-ended nature of the bill of rights would allow not just negative but also positive rights to be agitated. A Citizens' Court would add a radically different component to the system. Representative democracy need only convey limited faith in people's autonomy. It need only suggest that people have the degree of autonomy necessary to make a selection between different political elites, in terms of which elite is most likely to promote people's preferences. In doing so, people may rely on heuristic devices, thereby reducing even the demands of weak autonomy. People may not always get the choice right, but they will overall do better than in a non-democratic regime. Judicial review also conveys limited faith in people. It is consistent with viewing the people as exercising weak autonomy on political matters. By contrast, a Citizens' Court recognises that citizens are able and willing to exercise stronger autonomy on political matters if presented with appropriate opportunity and incentives. It involves a commitment to enabling citizens to exercise stronger autonomy.

It is perhaps unlikely that this recognition of autonomy will enhance subjective status significantly.<sup>37</sup> However, an intrinsic justification is available: a Citizens' court appropriately recognises citizens' potential capacity to exercise autonomy and thereby confers on citizens the dignity they deserve.

The second process-instrumental advantage mentioned was the benefit of participatory opportunities. The Citizens' Court has here an advantage over judicial review, but in an entire population, the proportion of citizens that would serve on the Citizens' Court would be tiny. There is also participation by groups seeking to organise litigation. While this occurs with judicial review, the more open-ended nature of the bill of rights I am proposing, one which would sit oddly with a judiciary, extends the possibilities for public-interest litigation.

A third process-instrumental advantage, one not referred to earlier, concerns procedural legitimacy. The Citizens' Court may lead people to view the system as more open to challenge and therefore more likely to achieve just decisions. If people view a political system as legitimate, this may lead to greater compliance with laws that are in fact substantively fair, and may make the burdens imposed by government feel less onerous.

A further process-instrumental consequence, also not referred to earlier, concerns the financial cost of the decision-making process. It suffices to note here the Citizens' Court, while expensive, should not be exorbitantly so. The supermajoritarian requirement of the Citizens' Court, the use by ordinary courts of a bill of rights in interpreting statute and the common law, and the preliminary steps before a case comes before a Citizens' Court should ensure that only a limited number of cases are heard.

The intrinsic justification for a Citizens' Court is dependent upon citizens actually having the potential to exercise fairly strong autonomy. However, the other considerations are more independent of how well the Citizens' Court performs in reaching right decisions. They suggest that if it is unclear whether the Citizens' Court is superior to

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37 For some skepticism about the strength of process-instrumental justifications, see Robert Dahl, *Democracy and its Critics* (New Haven: Yale University Press, 1989) ch 6.

judicial review, the Citizens' Court should be preferred: it promotes values other than the substantive-instrumental one. On the other hand, if the Citizens' Court is likely to make decisions that are clearly inferior, it probably should not be favoured. This reflects the view that the substantive-instrumental consideration is the weightiest. It is to this consideration that I now turn.

## **B. The substantive-instrumental consideration**

It should first be noted that the substantive-instrumental consideration is controversial. It has been argued that to prefer a process on the basis that it promotes one's own substantive conception of justice may demonstrate disrespect for others' autonomy.<sup>38</sup> However, the evaluation that follows does not privilege a partisan conception of justice.

### *i. Diversity*

One contrast between the Citizens' Court and a conventional bench is that the former involves statistical representativeness. Judges, on the other hand, share similar sociodemographic attributes. The reason this is important is that diversity should assist deliberation. It should facilitate taking into account diverse perspectives.

However, at least in Australia, the most alarming feature of conventional judiciaries, in terms of their homogeneity, lies in the fact that it is the government that appoints judges, and it does so partly on the basis of ideology. This not only refers to the prospective judges' substantive views on policy questions, but their views on whether they should be deferential towards the elected branches of government. After a long period of rule by one party, for instance, the bench may be largely staffed by judges who share a similar ideology to the dominant party, or they may share a deferential stance towards the elected branches.<sup>39</sup>

Sunstein points to significant polarization occurring on appellate benches of the US Federal Court, when Democrat- or Republican-appointed judges sit together. They make more extreme judgments than when they sit on mixed benches.<sup>40</sup> Judges are not immune from social influences and group dynamics. With a diverse group, judges will take more seriously alternative perspectives, and will be less confident in privileging their own. They will tend to moderate their position.<sup>41</sup> If we view moral decision-making as better to the extent to which it takes into account diverse perspectives, then uniform benches will do less well than diverse benches.

It might be hoped that even if judges in their ideological position represent a bare majority or a minority of the community, and together they make decisions that are somewhat extreme, at least they will be acting upon deliberative understandings of what justice requires. However, there is no guarantee of this either. The judges, as I suggested, may be chosen because they believe in judicial deference. So, even if on their deliberative understanding, the government is curtailing unjustly the rights of a particular group, the judges may not strike such action down.

This suggests serious difficulties with relying upon judicial review to achieve just decisions. The Citizens' Court, on the other hand, is not affected by these difficulties. It is diverse and it is genuinely independent of government. Participants' sense of democratic legitimacy may also encourage them to act on their deliberative sense of justice rather than defer to the other branches.

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38 Waldron, *Law and Disagreement*.

39 This seems to have occurred, for instance, with the Australian High Court in the last ten years.

40 Cass Sunstein, David Schkade, and Lisa Ellmann, "Ideological Voting on Federal Courts of Appeals: A preliminary investigation", *Virginia Law Review*, 90 (2004), 301–54 at 304–6, 314.

41 This does not apply to certain issues of conviction, such as abortion and capital punishment: *ibid.*, p. 306.

## *ii. Intelligence and other considerations*

Of course, diversity is only one factor relevant to sound moral decision-making. It could be argued that judges are likely to be more intelligent, analytical, and conscientious. These qualities can be expected since judges are selected from an elite within the legal profession. Furthermore, there are certain features of judicial decision-making that give them an advantage. There are only a few judges involved in a case, as opposed to, say, 200. Given their larger influence, they have a greater incentive to deliberate on the issue. Their greater exposure means a reputational interest is also at stake. Furthermore, writing a judgment prompts more deliberation than merely voting yes or no and endorsing a short statement of reasons.

The importance of superior intelligence and analytical skills increases with the complexity and volume of material that needs to be considered. What is critical, then, for a Citizens' Court to reach a good standard of reasoning is that the material citizens are given is presented in an accessible form. Legal expertise will be very much relied upon in ensuring this. The cases that come before a Citizens' Court will already have had any factual matters in dispute resolved, so it would come down to the trade-off between competing moral values that constitutional cases generally involve. Here, superior intelligence and analytical skills may not offer a significant advantage.

In terms of the factors suggesting a more conscientious, deliberative approach, these certainly carry some weight, but they should not be overstated. Reputational interest can work for or against correct decisions, depending upon the state of prevailing opinion in the community or section of the community that the judge is concerned about. In writing judgments, much of the effort goes not into reflection upon the fundamental value-conflict at stake, but into painstaking accumulation of previous statements in cases supporting the principle favoured. Indeed, certain prominent styles of legal reasoning, such as formalism, try to mask the underlying moral reasoning involved. Due to their unelected status, judges are reluctant to present their decisions as fundamentally moral as opposed to involving the exercise of minimal discretion. The time constraints that judges face should also be taken into account: many face fearsome workloads.

In determining which body is most likely to reach right decisions, we are in the realm of judgment, dealing with considerations that are suggestive rather than decisive. Only some of the relevant considerations have been discussed here. I would suggest, though, that given the very significant problems of conventionally appointed benches, in terms of representativeness, there are reasonable grounds for believing that a Citizens' Court may do better. There may be no need to rely upon the presumption in favour of a Citizens' Court defended in the previous section.

## *iii. Reconsidering the judicial appointment process*

It could, however, be argued that we should compare the Citizens' Court not with a judiciary constituted through the current highly defective approach to judicial appointments, but with a judiciary selected using the best possible process. If necessary, this could involve setting up a separate Constitutional Court.

A Judicial Appointments Commission, which has the power to select, or recommend for selection, candidates for judicial office, could be established.<sup>42</sup> It is difficult, though, to ensure that the Appointments Commission is independent of the government while, at the same time, not drawn narrowly from professional associations. In achieving this, a deliberative jury might be helpful. Candidates would submit their application, explaining how they conceive their role. A committee consisting of members of the political parties

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42 Rachel Davis and George Williams, "Reform of the Judicial Appointments Process: Gender and the bench of the High Court of Australia", *Melbourne University Law Review*, 27 (2003), 819–63.

represented in the Senate could consider the applications and prepare a statement of follow-up questions for the judges. These could relate to the judges' ideological position and their view on whether judges should be activist or passivist. Their advice could be in the form of a ticket, so each political party has its preferences. This ticket could then be voted on by the Commission. At least 10 judges would be needed to ensure a reasonable reflection of the main ideological positions in the community. Judges would serve for one or two electoral terms.

I cannot consider this proposal in detail here. The arguments for judicial review based on a representative judiciary versus a Citizens' Court are more evenly balanced. This judiciary should involve a significant degree of diversity. Such a body would be genuinely independent from the government. Its members are likely to have, on average, a higher level of analytical skill and are likely to be more deliberative than a Citizens' Court jury, partly due to the requirement to provide reasons for judgment. In this context, my argument for still preferring the Citizens' Court would draw upon its capacity to take up the open-ended quality of the bill of rights I favour in challenging government on matters that are not traditionally within the province of constitutional adjudication, such as social rights. The presumption in favour of the Citizens' court suggested above in section 5A might also be relied upon.

## **6. CONCLUSION**

The countermajoritarian difficulty can only be properly assessed if democratic alternatives to judicial review are explored. While deliberative democrats are largely supportive of judicial review, their findings and arguments can be employed to shed critical light upon judicial review.