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Constitutional Amendment and Political Constitutionalism: A Philosophical and Comparative Reflection

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Constitutional government entails that certain laws have a special fundamental status and the validity of other laws depends on their compliance with constitutional requirements. In many cases constitutions are contained in one, or a few, canonical documents and in such cases, constitutions are usually in some way formally entrenched – that is, they are especially hard to change via existing legal procedures.¹ These features of constitutionalism enable and limit government by providing for stable institutions identifying key constitutional norms that cannot be transgressed. But where constitutions have these features, they also include provisions for amendment. That is, the text of the constitution contains a provision that prescribes a mechanism for constitutional change.

In this chapter we consider the role that amendment plays in democratic constitutionalism generally, and particularly debates over the democratic legitimacy of judicial review by constitutional courts. Amendment procedures, we suggest, serve three broad functions or values: they allow for change of a constitution in line with changing societal needs and circumstances – and thus ensure that a constitution can respond to the changing needs of the polity it governs.² They provide for on-going popular participation in constitution making, and in doing so confer legitimacy on changes to the constitution as well as to the status quo. And they provide a means of overriding judicial interpretations of existing provisions of the constitution, thereby allowing for the reassertion of democratic decision-making in the constitutional process. Amendment procedures thus hold the promise of answering some of the central philosophical difficulties posed by the phenomenon of written constitutionalism: how to justify the imposition of a constitution on later generations, and how to justify the role of courts in determining the meaning of constitutions, and specifically judicial review.

In this chapter, we focus largely on this second aspect of the relationship between amendment and democratic constitutionalism. Political constitutionalists such as Jeremy Waldron have famously objected to judicial review on democratic grounds, or as an undemocratic displacement of the will of the people expressed through legislative majorities.³ Yet political constitutionalists often concede that democratic objections largely do not apply in ‘weak-form’ systems of judicial review in which legislatures can override courts simply by inaction, or by ordinary legislation.⁴ Nonetheless, they generally fail to account for the possibility that constitutional amendment procedures may play a similar role in answering such objections.

¹ There is, of course, always the possibility of constitutional change via formal constitutional replacement, or ‘informal’ constitutional change via procedures not explicitly recognized in the existing constitutional text: see e.g., Bruce Ackerman, *We the People: Foundations* (Harvard UP 1991).

² Rosalind Dixon, ‘Constitutional Amendment Rules: A Comparative Perspective’ in Tom Ginsburg and Rosalind Dixon (eds), *Comparative Constitutional Law* (Edward Elgar 2011).

³ See generally Jeremy Waldron, *Law and Disagreement* (Clarendon Press 1999); Jeremy Waldron, ‘The Core of the Case Against Judicial Review’ (2006) 115 Yale LJ 1346; Adam Tomkins, ‘In Defence of the Political Constitution’ (2002) 22 OJLS 157; Adam Tomkins, ‘The Role of Courts in the Political Constitution’ (2010) 60 UTLJ 1.

⁴ See Bruce Ackerman, *We the People: Foundations* (Harvard UP 1991).

This chapter explores what, if any, arguments or assumptions might support this implicit position that amendment procedures do not mitigate the anti-democratic nature of judicial review. It identifies three possible explanations: first, the practical unavailability of amendment as a means of democratic override; second, the idea that any super-majority requirement for the approval of an amendment is necessarily incompatible with democratic commitments to equality among citizens; and third, the idea that amendment procedures necessarily add too greatly to the overall length, or ‘prolixity’, of a constitutional document.⁵ It then explores the plausibility of each argument, or explanation, in the context of the constitutional experience of two countries, India and Colombia, which otherwise generally meet the requirements, identified by political constitutionalists, of having legislative and judicial institutions in relatively good working order.⁶

In both countries, the chapter suggests, constitutional amendment procedures have played an important role in providing a means of legislative override of court decisions; and in a way that does not obviously contravene commitments to equality among citizens, or the capacity of the constitution to function as a framework for democracy. . In light of these facts, the chapter further suggests, the legitimacy of judicial review should not be treated as an ‘either-or-proposition’ with systems of weak-form judicial review preserving the legitimacy and systems of strong form review departing from it.

Once it is recognised that various forms of judicial review fall along a spectrum from weak to strong, the question of the legitimacy of judicial review will be best approached as both one of degree, and one informed by a variety of factors.⁷ The most important question, in this context, may be the range of formal mechanisms that allow legislators to override court decisions simply by way of inaction, or ordinary majority vote. But it will also be important to consider the practical availability of other mechanisms, such as powers of amendment.

The remainder of this chapter is divided into four parts. Part I considers in general terms the values that amendment procedures serve. In light of that discussion, we then revisit the democratic objections to judicial review of political constitutionalists such as Waldron, and the degree to which they view mechanisms for legislative override as answering those objections. Part II considers whether amendment procedures are necessarily inferior to those other mechanisms based on three criteria: the practical unavailability of amendment procedures, notions of equality in voting, and the tendency of such procedures to add undue length or ‘prolixity’ to a democratic constitutional document; and the degree to which these assumptions have plausibility in constitutional democracies such as Colombia and India, compared to the United States (‘US’) or the United Kingdom (‘UK’). Part III offers a conclusion that reflects on the relationship between constitutional theory and comparative constitutional law in this context, as well as more generally.

⁵ Jeremy Waldron, ‘Some Models of Dialogue Between Judges and Legislators’ (2004) 7 SCLR (2d) 7, 36, reprinted in Ian Ross Brodie and Grant Huscroft (eds), *Constitutionalism in the Charter Era* (LexisNexis Butterworths 2004).

⁶ For India, this assumption holds true largely for the higher judiciary, though not necessarily for lower courts: see, eg, Marc Galanter, *Law and Society in Modern India* (OUP 1993).

⁷ Compare Aileen Kavanagh, ‘What’s So Weak about “Weak-Form Review”’: The Case of the UK Human Rights Act 1998’ (Unpublished manuscript 2014).

I Democratic Objections to Judicial Review: The Relevance of Amendment

A. Amendment Procedures: Philosophical Underpinnings

A starting point for this chapter is to consider the role that amendment procedures play in the project of democratic constitutionalism. First, it should be seen that amendment procedures are a feature of a certain kind of constitutionalism: constitutions consisting of one or more canonical documents. An unwritten, common law constitution of the kind that characterises the UK may change over time. It may even change abruptly – the *Human Rights Act 1998* (UK) ('HRA') might be once such change⁸ – but we would not describe that kind of change as an amendment. When we speak of constitutional 'amendment' rather than constitutional change we are referring to change to those canonical texts.

The association of 'amendment' procedures with canonical texts brings with it an association with entrenchment. Almost all modern constitutions, and especially written constitutions, are entrenched against ordinary revision.⁹ It is this rigidity that allows constitutions to serve the purpose of enabling government by settling basic questions and removing the need to revisit questions as to basic structures.¹⁰ In addition, rigidity serves to limit government and ensure adherence to fundamental moral norms. But entrenchment brings with it practical and philosophical problems.¹¹ The practical problems arise from the inability of an entrenched constitution to respond to changing circumstances. A constitution may contain commitments to which a polity no longer adheres or, more prosaically, may have failed to anticipate social or technological developments. There are related philosophical problems that arise from the imposition of a constitution on future generations. Even if a constitution has a strong claim to legitimacy with respect to its framing generation, the question of legitimacy is complicated by its imposition on later generations. Moreover, as Andrei Marmor points out, this problem persists even where a constitution is not very old, as even a new constitution purports to impose its constraints on later generations.¹² Amendment procedures respond to both problems. As a practical matter, they allow for change though within a framework that protects entrenched norms from ordinary revision. In addition, amendment procedures serve two values associated with legitimacy: popular participation and compliance with rules.

Legitimacy is a contested value in constitutional theory as elsewhere,¹³ but nonetheless some minimal conditions for constitutional legitimacy are relatively uncontroversial. At its most minimal, legitimacy of any law – including a constitution or constitutional amendment – might be (at least partially) a matter of compliance with pre-

⁸ Aileen Kavanagh, *Constitutional Review under the UK Human Rights Act* (CUP 2009) 2.

⁹ Entrenchment of this kind can, of course, be either formal/legal or informal/political in nature: see, e.g., Rosalind Dixon and Eric A Posner, 'The Limit of Constitutional Convergence' (2011) 11 *Chi J Intl L* 399.

¹⁰ See, e.g., Sandy Levinson [paper in this volume] (on the 'constitution of settlement'). See also Stephen Holmes, *Passions and Constraint: On the Theory of Liberal Democracy* (CUP 1995); Christopher L Eisgruber, *Constitutional Self-Government* (Harvard UP 2001); Rosalind Dixon, 'Updating Constitutional Rules' [2009] *Sup Ct Rev* 319.

¹¹ For this reason, judges interpreting written entrenched constitutions commonly take the view that methods for constitutional interpretation should be somewhat flexible to respond to changing circumstances, even in legal cultures, like Australia and the US, where originalism has significant judicial support. See *Australian National Airways Pty Ltd v Commonwealth* (1945) 71 *CLR* 29, 81 (Dixon J); *McCulloch v Maryland* (1818) 7 *US* 316, 407, 415 (Marshall CJ).

¹² Andrei Marmor, 'Are Constitutions Legitimate?' [2007] *CJLJ* 69.

¹³ Richard H Fallon, 'Legitimacy and the Constitution' (2005) 118 *Harv L Rev* 1787.

existing prescribed rules.¹⁴ Therefore amendment procedures, in so far as they provide a set of legal criteria against which the legitimacy of future changes might be judged, offer legitimacy associated with compliance with legal rules.¹⁵

Another condition for legitimacy of a constitution, which is more significant for our purposes and which can be stated with confidence, is popular participation in constitution-making. Although the reality of constitutional politics may not always live up to the ideal, it is almost always assumed that popular participation in constitution making – usually filtered through a representative body – is a pre-condition for constitutional legitimacy.¹⁶ Indeed, in a democracy, some form of popular participation in constitution-making is almost axiomatic following closely from the idea the people hold the ‘constituent power’ in the constitutional order.¹⁷ The close association between legitimacy and popular participation is reflected in the suggestion that popular participation in constitution making has become a norm of international law,¹⁸ or conversely, that there is a constitutional right to ‘amendment’ – or replacement – by plebiscite that exists irrespective of its formal recognition in constitutional text.¹⁹ For similar reasons, amendment procedures, like modern constitution making procedures, frequently reflect a commitment to popular participation.²⁰ In some cases, this will involve procedures for the proposal of amendments by citizens, and in others, a requirement that proposed amendments gain the approval of a democratic majority at a referendum. But in either event, constitutional amendment procedures will frequently involve some element of direct popular participation.

Even amendment processes that lack this element of direct popular participation will also often have important claims to democracy legitimacy. By allowing the people’s elected representatives to debate, and vote on, proposed constitutional changes, such procedures ensure at least some minimal connection between such change and the ‘will of the people’, or the ‘consent’ of the governed. Thus one way to view amendment procedures is that they offer an on-going mechanism for constitution-making, and confer on formal constitutional change the legitimacy that popular participation confers on constitutional making. But, importantly, amendment procedures can also offer legitimacy – perhaps in a weaker form – associated with popular participation to continuing, unamended constitutions as well. In addition to the provision of this positive consent, amendment procedures can provide a weaker form of legitimacy: that which arises from a failure to amend. The failure to use amendment procedures to change the constitution, or more concretely, the rejection of proposals for amendment can also be taken as evidence of a tacit acceptance of the constitution and thus confer legitimacy on the continuance of old constitutional arrangements.

¹⁴ Richard H Fallon, ‘Legitimacy and the Constitution’ (2005) 118 Harv L Rev 1787.

¹⁵ Richard H Fallon, ‘Legitimacy and the Constitution’ (2005) 118 Harv L Rev 1787.

¹⁶ Though an imposed constitution may gain acceptance over time, especially if it succeeds in reducing conflict or promoting prosperity: Claude Klein and Andras Sajó, ‘Constitution-Making: Process and Substance’ in Michel Rosenfeld and Andras Sajó (eds), *The Oxford Companion to Comparative Constitutional Law* (OUP 2012) 424.

¹⁷ Though of course that raises the question of ‘who are the people?’ and who determines that question: Claude Klein and Andras Sajó, ‘Constitution-Making: Process and Substance’ in Michel Rosenfeld and Andras Sajó (eds), *The Oxford Companion to Comparative Constitutional Law* (OUP 2012) 424.

¹⁸ Thomas M. ‘Franck, *The Emerging Right to Democratic Governance*’ (1992) 86 AJIL 46 .

¹⁹ Akhil Amar, ‘Consent of the Governed: Constitutional Amendment Outside Article V’ (1994) 94 Colum L Rev 457; Sanford Levinson, *Our Undemocratic Constitution: Where the Constitution Goes Wrong* (OUP 2008)

²⁰ On popular participation in constitution making see, Claude Klein and Andras Sajó, ‘Constitution-Making: Process and Substance’ in Michel Rosenfeld and Andras Sajó (eds), *The Oxford Companion to Comparative Constitutional Law* (OUP 2012) 422-426.

In addition, we argue that constitutional amendment serves a further more ‘presentist’ function, less directly connected to debates about inter-generational legitimacy, or the relationship between democratic actors across time. They provide a means by which, at least in some settings, democratic majorities may contribute to a process of constitutional ‘dialogue’ with courts about issues of *contemporary* constitutional morality. That is, they not only allow democratic majorities to ‘update’ or revise prior constitutional settlements. They allow democratic majorities to ‘trump’ or override a decision of a constitutional court they deem unreasonable or unjustified as a ‘reading’ of contemporary constitutional understandings, by substituting a new textual basis for subsequent acts of constitutional interpretation.²¹

This aspect of amendment is also significant for that central puzzle of modern Anglo-American constitutional theory – the democratic legitimacy of judicial review. If amendment procedures provide an effective mechanism of the re-assertion of democratic decision-making, it would seem to resolve or lessen the problem posed by giving judges the power to overturn the decisions of the majoritarian arms of government. To make this point in further detail we will revisit the democratic objection to judicial review raised by political constitutionalists such as Jeremy Waldron.

B. Political Constitutionalism and Weak Form Judicial Review

Political constitutionalists such as Jeremy Waldron raise serious objections based on principles of democracy to courts reviewing legislation for compatibility with constitutional norms. For Waldron, this democratic objection is particularly powerful for rights-based constitutional provisions, but potentially also applicable to judicial review of structural constitutional guarantees.²² Judicial review for Waldron violates a fundamental commitment in liberal societies to equal citizenship. ‘By privileging majority voting among a small number of unelected and unaccountable judges’, Waldron suggests, judicial review of legislation ‘disenfranchises ordinary citizens and brushes aside cherished principles of representation and political equality in the final resolution of issues about rights’.²³ In the face of reasonable disagreement about moral and political questions, Waldron argues, the most principled means of resolving such disagreements is by reference to a norm of majority decision-making which ‘is neutral as between ... contested outcomes, treats participants equally, and gives each expressed opinion the greatest weight possible compatible with giving equal weight to all opinions’.²⁴ Indeed, for this reason, judicial review is incompatible with rights-based constitutionalism. It is the respect for the moral autonomy of the individual which leads us to accord individual rights that should, in Waldron’s view, lead us to respect the process in which those individuals participate equally.²⁵

²¹ Claude Klein and Andras Sajó, ‘Constitution-Making: Process and Substance’ in Michel Rosenfeld and Andras Sajó (eds), *The Oxford Companion to Comparative Constitutional Law* (OUP 2012) 422-426.

²² Jeremy Waldron, ‘Some Models of Dialogue Between Judges and Legislators’ (2004) 7 SCLR (2d) 7, 36, reprinted in Ian Ross Brodie and Grant Huscroft (eds), *Constitutionalism in the Charter Era* (LexisNexis Butterworths 2004).

²³ Jeremy Waldron, ‘Some Models of Dialogue Between Judges and Legislators’ (2004) 7 SCLR (2d) 7, 36, reprinted in Ian Ross Brodie and Grant Huscroft (eds), *Constitutionalism in the Charter Era* (LexisNexis Butterworths 2004) 1353.

²⁴ Jeremy Waldron, ‘Some Models of Dialogue Between Judges and Legislators’ (2004) 7 SCLR (2d) 7, 36, reprinted in Ian Ross Brodie and Grant Huscroft (eds), *Constitutionalism in the Charter Era* (LexisNexis Butterworths 2004) 1389.

²⁵ See also Adam Tomkins, ‘In Defence of the Political Constitution’ (2002) 22 OJLS 157, 173-75 (making similar arguments based on arguments from political freedom).

Waldron himself, however, has conceded that it is only judicial review of a certain kind that is the target of political constitutionalists: judicial review that targets legislation rather than executive action, and which is ‘final’ in a formal legal sense. He explicitly notes that the democratic objection is to ‘strong’ forms of judicial review, or the ‘final’ resolution of issues about rights’ by courts, *not* all or any judicial involvement in constitutional rights protection.²⁶ He in fact concedes there can be democratic benefits to courts exercising ‘weaker’ or more penultimate forms of judicial review.²⁷

Our own view is that this kind of role for courts can significantly contribute to a form of constitutional government that treats citizens with equal concern and respect.²⁸ Consider a case in which parliament passes a law providing for the mandatory detention of any non-citizen who enters the country without a visa. Numerous laws of this kind have been passed by democratic legislatures in recent years.²⁹ Yet democratic legislators have also frequently overlooked the capacity for such laws to bear disproportionately on certain classes of non-citizen – those who face long delays in the processing of their applications for asylum, or other forms of complementary protection; those (such as children) who are particularly vulnerable in detention; and those who are stateless, or without proper identification, and thus practically unable to be removed or deported.³⁰ One argument for judicial review in these circumstances is that it can help bring these ‘blind spots’ to the attention of democratic legislators.³¹ This kind of role is one that many political constitutionalists endorse. Waldron, for example, suggests that judicial review may play a useful role where ‘the legislative majority is unsure about how far it should go in pursuing its own understanding of a provision of the Bill of Rights or about how extreme it is willing to be perceived as being in its legislation on some rights issue’.³²

The key question for political constitutionalists, however, is whether, if and when courts perform this role, legislatures retain scope to decide whether the decision reached by a court reflects the best, and most reasonable, considered judgment about the balance between competing rights and responsibilities in a particular context. Therefore, the dividing line between strong and weak-form judicial review for political constitutionalists depends on two key factors: first, the strength of courts’ remedial powers; and second, the degree to which court decisions can be overridden by the passage of ordinary legislation.

²⁶ Jeremy Waldron, ‘Some Models of Dialogue Between Judges and Legislators’ (2004) 7 SCLR (2d) 7, 36, reprinted in Ian Ross Brodie and Grant Huscroft (eds), *Constitutionalism in the Charter Era* (LexisNexis Butterworths 2004) 1353.

²⁷ Jeremy Waldron, ‘Some Models of Dialogue Between Judges and Legislators’ (2004) 7 SCLR (2d) 7, 36, reprinted in Ian Ross Brodie and Grant Huscroft (eds), *Constitutionalism in the Charter Era* (LexisNexis Butterworths 2004) 1353. See also Adam Tomkins, ‘The Role of Courts in the Political Constitution’ (2010) 60 UTLJ 1, 20.

²⁸ Rosalind Dixon, ‘Weak Form Judicial Review and American Exceptionalism’ (2012) 32 OJLS 487.

²⁹ Rayner Thwaites, *The Liberty of Non-citizens: Indefinite Detention in Commonwealth Countries* (Hart Publishing 2014)

³⁰ See, e.g., *Refugee Council of New Zealand v A-G* [2002] NZAR 717; *Al-Kateb v Godwin* (2004) 219 CLR 562; *R v Governor of Durham Prison, ex parte Singh* [1984] 1 All ER 983.

³¹ Rosalind Dixon, ‘Creating Dialogue about Socioeconomic Rights: Strong-Form versus Weak-Form Judicial Review Revisited’ (2007) 5 ICON 391; Rosalind Dixon, ‘A Democratic Theory of Constitutional Comparison’ (2008) 56 Am J Comp L 947; Rosalind Dixon, ‘A New Theory of Charter Dialogue: The Supreme Court of Canada, Charter Dialogue and Deference’ (2009) 47 Osgoode Hall LJ 235.

³² Jeremy Waldron, ‘Some Models of Dialogue Between Judges and Legislators’ (2004) 7 SCLR (2d) 7, 36, reprinted in Ian Ross Brodie and Grant Huscroft (eds), *Constitutionalism in the Charter Era* (LexisNexis Butterworths 2004) 31.

In strong form systems of judicial review, courts enjoy broad powers to issue declarations of invalidity, or to invalidate legislation for incompatibility with constitutional norms. Declarations of this kind also have the immediate effect (unless explicitly ‘suspended’ by a court) of depriving relevant legislation of legal effect. Many weak-form systems, in contrast, give courts only a much weaker power to make ‘declarations of incompatibility’. In the UK, for example, section 4 of the HRA explicitly recognises a power to make declarations of this kind; and a similar power has now been incorporated into charters of rights in the Australian Capital Territory and Victoria.³³ Further, what is defining about these remedies is that they have *no* effect on the legal rights or liability of individual parties before a court. Instead, they are designed to draw the attention of members of parliament to incompatibility between a particular statute and constitutional rights statute. As a matter of domestic law, members of parliament are under no direct legal duty to respond to the making of such a declaration.³⁴ For parliament, this creates an important source of power to override the substantive constitutional interpretation of particular rights arrived at by a court: parliaments may exercise a power of override in this context simply by inaction or non-response – or the deliberate ‘non-implementation’ of a court decision.

A second source of override power under rights charters such as the HRA is the power of parliament to pass ordinary legislation overriding the effect of a particular court decision. This form of override can potentially occur in two ways: either by passage of an ordinary legislative ‘sequel’ to a court decision, which seeks in some way to modify or override its effect and thereby rely on a power of implied repeal (implied repeal); or by the passage of legislation expressly overriding the rights provisions relied on by courts in a particular context (express repeal).

C. Political Constitutionalism and Constitutional Amendment

The political constitutionalist objection to judicial review is thus limited to powers of judicial review that are final and do not allow for democratic revision of judicial decisions. However, most political constitutionalists do not explicitly address formal powers of constitutional amendment as relevant to the strength or weakness of judicial review. For instance, although Waldron begins ‘The Core of the Case Against Judicial Review’ by mentioning the possibility of constitutional amendment as a means of revising the decision of the Supreme Court of Massachusetts’ decision in *Goodridge*,³⁵ which recognized a constitutional right to same-sex marriage under state law,³⁶ he does not consider whether amendment might answer democratic concerns about the legitimacy of judicial decisions.

Considered as a matter of principle, this omission is puzzling, especially for countries that have a single or canonical document labelled ‘the constitution’.³⁷ As we have argued, amendment procedures provide the key mechanism for formal constitutional change within a stable structure, and at the same time allow for the reassertion of democratic will. They also do so in a way that has two key advantages from the perspective of political constitutionalists. First, by making changes to the text of the constitution itself, amendment procedures

³³ See, e.g., Stephen Gardbaum, *The New Commonwealth Model of Constitutionalism: Theory and Practice* (CUP 2013).

³⁴ Rosalind Dixon, ‘A Minimalist Charter of Rights for Australia: The UK or Canada as a Model?’ (2009) 37 FL Rev 13. Compare Laurence R Helfer and Anne-Marie Slaughter, ‘Towards a Theory of Effective Supranational Adjudication’ (1997) 107 Yale LJ 273.

³⁵ *Goodridge v Department of Public Health* 798 NE 2d 941 (Mass 2003).

³⁶ Jeremy Waldron, ‘The Core of the Case Against Judicial Review’ (2006) 115 Yale LJ 1346, 1346.

³⁷ For the less puzzling nature of the omission in the context of a country (such as the UK) without a written constitution of this kind, see Part III.

generally provide a means of override that is highly decisive, and thus effective in allowing the assertion of the people's will with respect to the constitution.³⁸ Different judges, as one of us has noted elsewhere, will certainly differ in how much weight they ascribe to a constitution's text, as opposed to other constitutional sources.³⁹ But in most constitutional democracies, a near universal consensus exists that judges must pay *some* attention to the text of the constitution, in order to engage in a legitimate act of constitutional interpretation.⁴⁰ If the text of an amendment is drafted with sufficient care, it will thus generally be sufficient to force judges to at least somewhat reconsider a prior decision – even when they continue to regard it as correct on a more all-things-considered or unconstrained basis.

Second, as a means of override, constitutional amendment procedures meet one key criterion identified by political constitutionalists for the legitimacy of judicial review – it allows for the expression of 'rights disagreements' as well as 'rights misgivings'. Waldron in particular distinguishes between two potential sources of democratic disagreement with a court decision upholding human rights: forms of disagreement or 'dissensus' about the meaning or scope of particular rights in the relevant context ('rights disagreements'); and disagreements about the primacy, or priority, of relevant rights in a particular context ('rights misgivings').⁴¹ Both forms of disagreement are likely to arise in different contexts in a democracy, and if judicial review is effectively to preserve the capacity of the people to resolve disagreement about rights, there must be a mechanism for their expression. Political constitutionalism is directed at ensuring proper respect for reasonable disagreement about rights, and the respectful treatment of opposing views would be directly undermined by misrepresentation of the nature of these views. A particular problem will arise if all disagreements with a judicial determination as to rights are cast as rights misgivings rather than rights disagreements. If the people (through participatory institutions) are able only to 'override' rights rather than express an alternative conception of them, there is a risk that democratic override will be cast as unprincipled disregard for rights. Reservations of just this kind have been expressed about the express power of legislative override provided for under section 33 of the *Canadian Charter of Rights and Freedoms*. Because the power of override is expressed as a 'notwithstanding'⁴² provision, it allows parliaments to express disagreement only as a preference for a competing interest that overrides the right (a right misgiving), rather than a disagreement about the proper limits and meaning of a right.⁴³ One important criterion for assessing the adequacy of a power of democratic override, therefore, is whether it provides a means for expressing both forms of disagreement. A power of constitutional amendment also clearly allows legislators flexibility to express both rights disagreements *and* misgivings – by allowing legislators to direct changes to the constitutional text toward both the *prima facie* scope of relevant rights *or* relevant limitation clauses, or some combination of both.

³⁸ See, e.g., Rosalind Dixon, 'Amending Constitutional Identity' (2012) 33 *Cardozo L Rev* 1847; Rosalind Dixon, 'Partial Constitutional Amendments' (2010) 13 *U Pa J Int'l Con'l L* 643.

³⁹ Rosalind Dixon, 'Partial Constitutional Codes' (Unpublished manuscript 2014).

⁴⁰ Rosalind Dixon, 'Partial Constitutional Codes' (Unpublished manuscript 2014).

⁴² Section 33 (1) of the *Canadian Charter of Rights and Freedoms* provides 'Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature, as the case may be, that the Act or a provision thereof shall operate notwithstanding a provision included in [rights protection provisions of the Charter]'.

⁴³ Jeffrey Goldsworthy, 'Legislation, Interpretation, and Judicial Review' (2001) 51 *UTLJ* 75.

What, then, explains this apparent unwillingness of political constitutionalists to include the availability of constitutional amendment as a factor relevant to assessing the strength of judicial review?

III. Weak-Form Review & the Inferiority of Amendment as Democratic Override?

In this section, we consider three possible explanations: the practical unavailability of amendment procedures; notions of equality in voting; and the tendency of amendments to add too greatly to the overall length of a constitution. Each of these explanations, we suggest, has some real plausibility in the US, and to a lesser extent the UK, where Waldron is writing. But in many other constitutional democracies, they seem far less relevant: at best, in these countries such explanations may suggest limits to the role of constitutional amendment in certain circumstances. They do not provide anything like a categorical basis for rejecting amendment as a tool for democratic override. Because of this, attention to such procedures would also seem directly relevant to assessing the democratic legitimacy of judicial review in these countries.

A. Practical Unavailability

Perhaps the most obvious explanation for the comparative non-attention to constitutional amendment procedures by political constitutionalists is that constitutional amendment procedures may be subject to a range of obstacles, which make them an unlikely source of actual democratic override. Obstacles of this kind could take two forms: formal obstacles to amendment such as super- or double majority requirements in the legislature, or requirements of popular ratification; or informal obstacles, such as a pattern or practice of non-use of a power of constitutional amendment.

As to formal obstacles to constitutional amendment, an implicit focus on the US would make it entirely understandable for political constitutionalists to ignore, or overlook, constitutional amendment as a means of democratic override. While Article V has been used to override decisions of the US Supreme Court, including the 11th Amendment,⁴⁴ no-one could suggest that Article V provides any kind of routine power of democratic override: for an amendment to succeed under Article V, it must receive the support of a majority in Congress *and* be ratified by two thirds of state legislatures (or conventions).⁴⁵ There is some disagreement about just how difficult this makes amendment in the US: Sandy Levinson has suggested that it is so difficult that democratic principles in fact favour an attempt to replace the entire Constitution.⁴⁶ Vicki Jackson has counselled against this extremely pessimistic view, suggesting that formal amendment may still be possible in the US in some circumstances, given sufficient democratic mobilisation for such a change.⁴⁷ (There are certainly some examples in US history, including the 11th Amendment, where Article V has

⁴⁴ See, e.g., *United States Constitution* amend XI (overriding effect of the Supreme Court's decision in *Chisolm v Georgia* 2 US 419 (1793)); *United States Constitution* amend XIV (overriding effect of the Supreme Court's decision in *Dred Scott v Sandford* 60 US 393 (1857)). See discussion in Rosalind Dixon, 'Partial Constitutional Amendments' (2010) 13 U Pa J Con'l L 643; Rosalind Dixon, 'Weak Form Judicial Review and American Exceptionalism' (2012) 32 OJLS 487.

⁴⁵ *United States Constitution* art V.

⁴⁶ Sanford Levinson, 'United States: Assessing Heller' (2009) 7 ICON 316. See also Sanford Levinson, 'Designing an Amendment Process' in John Ferejohn, Jack N Rakove and Jonathan Riley (eds), *Constitutional Culture and Democratic Rule* (CUP 2001).

⁴⁷ Vicki Jackson, 'Paradigms of Public Law: Transnational Constitutional Values and Democratic Challenges' (2010) 8 ICON 517.

been successfully used to override decisions of the Supreme Court.⁴⁸) But whichever of these two views one takes, no-one suggests that Article V is easy to satisfy. Indeed, there has been no successful attempt to rely on Article V for this purpose since the early 20th century, and the passage of the 16th Amendment as a means of overriding the decision of the Supreme Court in *Pollock v Farmer's Loan and Trust Co*⁴⁹ (invalidating a federal income tax). This is also despite numerous calls to invoke Article V in order to override particular decisions of the Supreme Court over the last half-century.⁵⁰ Prominent examples include proposals to amend the Constitution to overturn the decision of the US Supreme Court in *Texas v Johnson*,⁵¹ and allow Congress to criminalise flag burning;⁵² and to override the Court's decision in *Roe v Wade*,⁵³ and allow broader regulation or limits on access to abortion.⁵⁴

In most other constitutional democracies, however, the formal obstacles to constitutional amendment are considerably less onerous than in the US. Comparing the difficulty of constitutional amendment across different jurisdictions is, of course, notoriously difficult.⁵⁵ For one, most countries have constitutional amendment procedures or requirements with multiple different stages or dimensions: amendments frequently require legislative and popular approval, but sometimes only one of the two. Legislative approval will sometimes require a majority of two houses of parliament, but in other cases, the approval of a single house may be sufficient; and some systems adopt requirements of delay, or double ratification, within the same voting body. These different requirements can also be difficult to compare in terms of stringency. Political scientists, however, have made several useful attempts to construct different indexes of comparison; and on these measures, it is clear that, given the filibuster rule in the Senate and stringent requirements for state ratification of proposed amendments, the US Constitution is now the *most* difficult of all constitutions to amend.⁵⁶ Similarly, if one focuses simply on the core dimension to amendment difficulty, namely the degree of super-majority support required for a constitutional amendment to obtain legislative approval, it is apparent that the US is a clear outlier in global terms. A survey of global constitutions by the Comparative Constitutions Project, for example, shows that for 142 constitutions, only 15 per cent of countries have US-style super-majority requirements for the legislative approval of amendments.⁵⁷ Most have legislative voting requirements that are closer to ordinary, or weak, super-majority requirements.

As to the actual record of constitutional amendment as a tool for democratic override, there is also an extensive – and quite recent – history of constitutional amendment being used as a means of overriding constitutional decisions by courts in constitutional democracies outside the US. The experiences of constitutional amendment in India and Colombia provide

⁴⁸ See *Goodridge v Department of Public Health* 798 NE 2d 941 (Mass 2003).

⁴⁹ 157 U.S. 429 (1895), *aff'd on reh'g*, 158 U.S. 601 (1895).

⁵⁰ See, e.g., Rosalind Dixon, 'Partial Constitutional Amendments' (2010) 13 U Pa J Con'l L 643; Jason Mazzone, 'Unamendments' (2005) 90 Iowa L Rev 1747; John R Vile, *Encyclopedia of Constitutional Amendments, Proposed Amendments, and Amending Issues, 1789-2002* (ABC-CLIO 2003).

⁵¹ 491 US 397 (1989).

⁵² See, e.g., Sen Res 12, 109th Cong (2006); HRJ Res 10, 109th Cong (2005); SJ Res 1980, 101st Cong (1989).

⁵³ 410 US 113 (1973).

⁵⁴ See H.J. Res. 261 (1973); H.J. Res. 427 (1973); H.J. Res. 769 (1973); H.J. Res.91 (1975); H.J. Res. 294 (1979); H.J. Res. 110 (1981); S.J. Res. 3 (1983).

⁵⁵ Zachary Elkins, Tom Ginsburg and James Melton, *The Endurance of National Constitutions* (CUP 2009).

⁵⁶ See Donald S Lutz, 'Toward a Theory of Constitutional Amendment' in Sanford Levinson (ed), *Responding to Imperfection: The Theory and Practice of Constitutional Amendment* (Princeton UP 1995); cf John Ferejohn, 'The Politics of Imperfection: The Amendment of Constitutions' (1997) 22 L & Social Inquiry 501.

⁵⁷ Comparative Constitutions Project <<http://comparativeconstitutionsproject.org/>> accessed 6 September 2014.

two good examples. For most constitutional amendments, Article 368 of the Indian Constitution requires only an absolute majority in both houses of the Indian Parliament, or two-thirds of members present and voting. A power of amendment has also been used on numerous occasions by the Parliament to override key decisions of the Supreme Court of India, and lower courts, on issues such as the scope of affirmative action, or reservations for so-called ‘backward classes’ of citizen, the scope for the criminalization of seditious or subversive speech, and the scope of compensation requirements for the taking of land or other property, as part of efforts at land reform or economic nationalization.

In Colombia, Article 357 of the Constitution provides that the legislature may amend the Constitution by ordinary majority vote – though only after twice considering or passing such an amendment. Article 358 likewise provides for amendments to be passed by popular referendum, with the support of an ordinary majority of citizens. The Colombian legislature has also successfully relied on these procedures to override several high-profile decisions of the Constitutional Court on the scope of socio-economic rights and the lawfulness of prohibitions on illegal drug use and possession. While courts in both Colombia and India have sought to impose limits on a formal power of constitutional amendment, to date, these limits have not been applied in either Colombia or India so as to systematically frustrate attempts at democratic override by constitutional amendment.⁵⁸

Constitutional amendment procedures are thus not only generally far less onerous than in the US. As the Colombian and Indian experiences show, in many constitutional democracies they are frequently used as an actual tool for democratic override. This by itself suggests that it may be misleading to treat the strength or finality of judicial review as an ‘either-or proposition’, with systems of (formally) weak-form judicial review preserving the legitimacy and systems of strong form review departing from it.

B. Super-Majority Requirements & Political Equality

A second response by political constitutionalists might be that to conclude that amendment procedures render judicial review democratically acceptable is nonetheless to make the wrong comparison. The point should not be that in most constitutional systems amendment is relatively more available than the practically impossible Article V procedure. Rather, the question should be whether amendment procedures are as available as ordinary legislative repeal or non-implementation. And the answer in the vast majority of jurisdictions is quite clearly ‘no’. Most amendment procedures not only adopt a higher super-majority threshold. They also impose other hurdles designed to promote deliberation, or protect minority interests, such as requirements of double or delayed passage, or popular ratification.

Recall that participation as the ‘right of rights’ is at the heart of Waldron’s argument.⁵⁹ Judicial review is necessarily democratically inferior to majoritarian decision-making because it overrules decisions made through processes in which the people have had equal rights of participation. So one response to our suggestion that amendment procedures allow for a democratic revision of judicial review is that amendment procedures which require super-majorities do not fully respect the equality of participation, instead weighting the scale in favour of the status quo.

⁵⁸ Rosalind Dixon and David Landau, ‘Transnational Constitutionalism and Amendment Limited Doctrine of Unconstitutional Constitutional Amendment’ (Working paper, presented at ICON Symposium on ‘The Challenge of Formal Amendment’ at the Inaugural AALS Academic Symposium on 5 January 2014).

⁵⁹ Jeremy Waldron, *Law and Disagreement* (Clarendon Press 1999).

We suggest, however, that while the argument has force in countries like the US, such an argument has far less persuasiveness in constitutional democracies with less strong traditions of political competition, or competition between political parties. In setting up the four basic assumptions that inform ‘The Core of the Case Against Judicial Review’, Waldron explicitly notes the assumption that, for democratic institutions to be ‘in reasonably good working order’, there should be ‘political parties, and that legislators’ party affiliations are key to their taking a view that ranges more broadly than the interests and opinions of their immediate constituents’.⁶⁰ Implicit in this understanding seems to be the view that legislative voting should be based on some consideration of the public interest, or a form of reasoned deliberation, rather than voting based on narrow sectional interest. Another version of this idea might be the understanding that every voter should have a roughly equal chance of being pivotal on a particular legislative vote or issue; or at least not systematically advantaged or disadvantaged in having their views carried into law by virtue of their particular connection to an individual legislator or factional interest.⁶¹ A commitment to political equality is best respected, according to Waldron, when the votes of individual citizens have ‘equal weight or equal potential decisiveness’; or every individual’s vote has ‘equal weight ... in the process in which one view is selected as the group’s’.⁶²

Now suppose that there is a system, such as the US or UK, where there are two or more major political parties that are relatively evenly matched. The argument often made by political scientists is that competition between such parties will help advance this kind of goal of impartiality: competition among parties generally ensures that parties respond to the concerns of the median voter, rather than the views or concerns of those voters who happen to be pivotal in particular electorates, or parties, or who are less broadly representative of majority views or understandings.⁶³ In such a system, a commitment to a norm of ordinary majority voting in the legislature will also make sense: it will be the rule that best ensures that all voters have a roughly equal chance of being pivotal on a given question, regardless of their particular identity, or connection to any given candidate, party of faction.

In contrast, in a system where there is greater asymmetry between parties or one party is consistently dominant, it may be far less likely that legislators will consistently consider the public interest, rather than the interests of members of their own party or electorate. Norms of majoritarian decision-making, in such circumstances, may thus no longer be the rule that best promotes norms of *substantive* equality of participation among voters.⁶⁴ Instead, the rule that best respects norms of equality may be a form of super-majority rule, which gives the non-dominant party, or citizens aligned with such a party, at least a somewhat greater chance of being pivotal in deciding on the merits of a particular issue.⁶⁵ A similar

⁶⁰ Waldron suggests that the presence of political parties is a feature of the four preconditions of legislative structure necessary for the Core case to apply, but does not fully explore their relevance to correlated voting of this kind: cf Jeremy Waldron, ‘The Core of the Case Against Judicial Review’ (2006) 115 Yale LJ 1346, 1361.

⁶¹ For the relationship between veil of ignorance ideas and constitutional design, see, e.g., John Rawls, *A Theory of Justice* (Harvard UP 1971); Adrian Vermeule, *Mechanisms of Democracy: Institutional Design Writ Small* (OUP 2007).

⁶² Jeremy Waldron, *Law and Disagreement* (Clarendon Press 1999) 114. Note that this is a more outcome-oriented conception of equality than one that emphasises thicker or more active forms of participation by citizens in processes of democratic self-government.

⁶³ See, e.g., Anthony Downs, *An Economic Theory of Democracy* (Harper 1957).

⁶⁴ Waldron acknowledges the possibility of a more substantive notion of equality in this context, but disagrees with its application, in the context of discussing the work of Charles Beitz: see Jeremy Waldron, *Law and Disagreement* (Clarendon Press 1999) 116.

⁶⁵ Compare Richard Holden, ‘Supermajority Voting Rules’ (Working paper 2004) (on how different distributions of voters can affect the optimality of various majority versus super-majority rules).

analysis applies where politics, or legislative behaviour, is dominated by particular *individuals* and families, rather than parties. The dominance of such individuals or families will often mean that, under majoritarian decision-making procedures, those aligned with particular individuals have a far greater chance of being pivotal on any given question than those outside the dominant family. A super-majority rule, which gives a greater chance of an effective veto, or being pivotal, to those without such dominant-party connections, may thus also be the form of voting rule that best promotes norms of substantive equality. In many real-world constitutional democracies, there also numerous examples where super-majority requirements for constitutional amendment do in fact co-exist with exactly these kinds of pattern of legislative dominance by particular parties, or individuals.

A good example involves the requirements for constitutional amendment in India. The Congress Party in India has dominated control of parliament for most of India's history: since India gained independence, it has been in power for all but 13 years.⁶⁶ This has allowed the Congress-controlled parliament to pass numerous amendments designed to override specific decisions of the Supreme Court of India without the need to gain substantial support from non-Congress Party aligned legislators. Indeed, in India, the argument is generally *not* that amendment procedures give non-Congress Party voters too much power to block proposed amendments, or disproportionate or unequal veto over majority proposals for constitutional override. Rather, the argument is generally that amendment procedures have been too readily available to Congress Party legislators, and thus a means by which would-be authoritarian leaders from within the party, such as Prime Minister Indira Gandhi, are able to remove various democratic checks and balances. The ready availability of constitutional amendment is also one reason for why the Supreme Court of India may have developed a set of implied limits on the power of amendment, which seek to protect the basic structure of the Indian Constitution from change under Article 368.⁶⁷

Of course, Waldron might respond to this by suggesting that countries such as India, or Colombia, are in fact outside the 'Core Case', or not countries that in fact have democratic institutions in truly 'good' working order. Such a response would also have some real plausibility: effective democratic competition between political parties that is robust, but not hyper-partisan or polarized may indeed be an important pre-condition for effective legislative rights-protection.⁶⁸ Such a response, however, also has the very clear effect of narrowing the scope of the 'Core Case': instead of applying to a large part of the democratic world, it would then apply at most to only a few dozen countries.⁶⁹ Even within those countries, there will also likely be cases where super-majority requirements for constitutional amendment do not offend *substantive* commitments to political equality.

We do not suggest that all super-majority requirements for successful amendment would be equivalent to requirements for ordinary legislative override, from the perspective of political equality. We simply suggest that, at the legislative stage at least, one should pause

⁶⁶ The Congress party was out of power between March 1977-January 1980 (Janata party), November 1989-June 1991 (BJP Government) and May 1996-May 2004 (BJP Government).

⁶⁷ Rosalind Dixon and David Landau, 'Transnational Constitutionalism and Amendment Limited Doctrine of Unconstitutional Constitutional Amendment' (working paper, presented at ICON Symposium on 'The Challenge of Formal Amendment' at the Inaugural AALS Academic Symposium on 5 January 2014).

⁶⁸ See Mark Tushnet and Rosalind Dixon, 'Weak-Form Review and its Constitutional Relatives: An Asian Perspective' in Rosalind Dixon and Tom Ginsburg (eds.), *Comparative Constitutional Law in Asia* (Edward Elgar 2014) 102 (on the need for democratic competition). See also Nathaniel Persily, *Solutions to Polarization* (Cambridge Press 2015) (on the dangers of polarisation).

⁶⁹ See, e.g., Rosalind Dixon, 'A Democratic Theory of Constitution Comparison' (2008) 56 Am J Comp L 947 (on countries that could be considered sufficiently democratic for various purposes).

before assuming that any form of super-majority requirement will necessarily give *substantively* ‘unequal weight’ to the votes of individual citizens. Whether or not this is true will depend largely on the specific political circumstances, and whether there are inequalities or pathologies in legislative voting patterns that mean that ordinary majority voting rules do not necessarily further goals of substantive political equality for participants in the political process.

This argument again suggests that it is misleading to treat the strength of judicial review and its democratic legitimacy as an either-or-proposition, with systems of weak-form judicial review preserving the legitimacy and systems of strong form review departing from it, regardless of the availability of constitutional amendment in a particular political context.

C. Narrowness & Constitutional Parsimony (versus Prolixity)

A third objection that political constitutionalists might pose in response to constitutional amendment as a means of override lies in the tendency of amendment to create pressures toward ‘prolixity’ or codification in a constitution. Political constitutionalists themselves favour a more flexible, framework-like approach to democratic constitutional drafting.⁷⁰ Almost all successful amendments will add to the overall length of a constitutional document. Though there are exceptions: some may seek to delete language that has been the basis of a disfavoured decision by a court, while others may seek to delete language that has been understood to create a limitation on government power.⁷¹ Most amendments, however, will seek to add at least some additional language to the existing constitutional text. This is particularly true where amendments are designed so as to overcome another potential objection to amendment as a means of democratic override – i.e. its potential for overbreadth, or ‘unintended’ interpretive consequences.

This feature of constitutional amendment has led several American constitutional scholars, including Kathleen Sullivan and Cass Sunstein, to express reservations about too ready use of amendment.⁷² It also provides a potentially persuasive explanation for why many constitutional lawyers (though not necessarily political constitutionalists themselves) reject the idea of amendment as fully equivalent to ordinary powers of legislative override. Yet potential for prolixity can often be addressed by careful and detailed attention to constitutional language. Through careful drafting it is possible to anticipate some potential overbreadth. It is possible simply to remove a particular piece of legislation from the scope of judicial review,⁷³ or to limit the scope of relevant legislative disagreement by simultaneously overriding and affirming aspects of a prior court decision.⁷⁴ The price, however, is simply that the drafters of a proposed amendment must use quite detailed, code-like constitutional language.⁷⁵

What are the likely consequences of this additional length in a constitution created by various constitutional amendments? In the US, there is a longstanding view that too much

⁷⁰ Rosalind Dixon, ‘Partial Constitutional Codes’ (Unpublished manuscript 2014).

⁷¹ See, e.g., 1967 amendments discussed in Part I.

⁷² Kathleen Sullivan, ‘Constitutional Amendmentitis’ (*The American Prospect*, 19 December 2001) <<http://prospect.org/article/constitutional-amendmentitis>>; Cass R Sunstein, ‘The Refounding Father’ (NY Books 2014).

⁷³ See, e.g., India 9th Schedule.

⁷⁴ See, e.g., Colombian fiscal sustainability amendments.

⁷⁵ ‘Code-like’ here denotes the idea of additional textual specificity, or detail, not the more traditional common law-civil law distinction between different modes of regulation: see, e.g., Rosalind Dixon, ‘Constitutional Redundancy’ (Unpublished manuscript 2014).

detail and prolixity in a constitution will pose a threat to a constitution retaining its ‘constitution-like’ status. The most famous statement of this view is found in the decision of the US Supreme Court in *McCulloch v Maryland*,⁷⁶ where Marshall CJ argued that by definition a constitution must be somewhat abstract or non-specific, or mark only ‘great outlines’ or ‘important objects’, rather than contain more ‘accurate detail’. If a constitution were too detailed, Marshall CJ suggested, it ‘would partake of the prolixity of a legal code’ in a way that would directly threaten its constitution-like status or ‘nature’.⁷⁷

What lies behind this view articulated by Marshall CJ, and endorsed by so many courts around the world? One potential explanation relates to the time-horizon for constitutions. Constitutions, Marshall CJ suggested, are designed to endure over the long-term, or ‘for ages to come’. The more detailed a constitution is, the more likely it also is to contain various ‘immutable rules’ – or long and detailed rule-like provisions – which are poorly suited to adapt to a society’s changing needs and circumstances.⁷⁸ Constitutional amendment, however, as Part I notes, provides at least a partial solution to this problem of constitutional updating.

Another potential explanation might be the relationship between code-like constitutional language and political participation. One of the key criteria of constitutional legitimacy, for political constitutionalists, will be whether there is an ‘active and engaged, public-spirited citizenry and a deep participation in political affairs’.⁷⁹ Processes of constitutional amendment may also potentially serve as a site of public participation of this kind – providing the text of the existing constitution is sufficiently understandable and accessible to the public to allow for such participation. The more detailed or code-like a constitution, as Marshall CJ himself noted, the less likely it may also to be ‘understood by the public’ or ‘embraced by the human mind’.⁸⁰

Similarly, political constitutionalists might argue that constitutional non-codification has distinct benefits in encouraging more active constitutional deliberation by legislators. In countries such as the UK, there is a widespread belief that constitutional non-codification has benefits. While the UK lacks a single, canonical document labelled ‘a constitution’, it has a long and successful history of political constitutionalism. Many commentators also draw a close connection between these facts, suggesting that political constitutionalism is enhanced when constitutional norms are expressed in general, flexible terms, rather than more narrowly codified or legalistic language.⁸¹

The difficulty with this argument, however, is that it clearly rests on a vision of constitutionalism that is neither generally shared across all constitutional systems and contexts, nor self-evidently normatively correct. First, there is a clear trend worldwide toward countries adopting a single, canonical document labelled ‘the constitution’. Moreover, even in countries without such a document, there is a trend toward increasing codification of certain elements of the constitution, such as those regarding common law rights and

⁷⁶ 17 US 316 (1819).

⁷⁷ 17 US 316 (1819), 407.

⁷⁸ *McCulloch v Maryland*, 17 US 316 (1819), 415.

⁷⁹ Adam Tomkins, ‘In Defence of the Political Constitution’ (2002) 22 OJLS 157, 175.

⁸⁰ *McCulloch v Maryland*, 17 US 316 (1819), 407.

⁸¹ Compare Janet McLean, ‘The Unwritten Political Constitution and its Enemies’ (Working paper, delivered at Symposium on Australian Constitutionalism at the Melbourne Law School on 13–14 December 2013); Stephen Gardbaum, *The New Commonwealth Model of Constitutionalism: Theory and Practice* (CUP 2013).

liberties.⁸² Among countries with written constitutions, there is also a trend toward increasing length or prolixity in constitutional drafting.⁸³ Developments of this kind also fundamentally change the baseline for judging notions of constitutional ‘parsimony-versus-prolixity’.

To treat constitutional amendments as necessarily threatening the parsimonious or ‘constitution-like’ status of a constitution, therefore, would once again seem to conflate American constitutional experience with constitutional experience more generally. In the US, the short and ‘pristine’ nature of the Constitution may mean that it would almost always seem incongruous for Congress to propose detailed amendments that sought to override particular court decisions.⁸⁴ In many other countries, in contrast, such amendments are both frequently proposed and enacted, and accepted as consistent with background norms of constitutional drafting. At the very least, the argument rests on a set of normative assumptions about constitutions – and constitutionalism – that are largely unexpressed by political constitutionalists, and which seem open to debate.

Our own view is that there are in fact a set of reasonably persuasive arguments that could be made against an overly prolix, or codified, approach to democratic constitutionalism, which could support the reluctance of political constitutionalists to treat amendment procedures as *fully* equivalent to ordinary legislative override as a means of expressing democratic disagreement.⁸⁵ But these arguments depend on a set of empirical assumptions about the relationship between constitutional language, interpretation and political practice that are clearly open to dispute, and require justification. To rely on such arguments as a basis for rejecting the relevance of amendment procedures to the democratic legitimacy of judicial review, without providing such justification, would thus seem to us once again to be unjustified.

V. Conclusions: Constitutional Theory and Comparison

In developing ‘The Core of the Case Against Judicial Review’ and related arguments, Waldron suggested that ‘what [was] needed [was] some general understanding, uncontaminated by the cultural, historical, and political preoccupations of each society’ of the theoretical arguments for and against judicial review in a democracy.⁸⁶ Judicial review, he suggested, is a global phenomenon, which requires examination from a philosophical and not merely local-historical perspective.⁸⁷ Because of this, he further suggested, what was needed was an attempt to ‘boi[l] the flesh off the bones’ of the practical experience of judicial review in various countries, to identify various core workings about assumptions, and to use those to generate various theoretical arguments.⁸⁸

In adopting this kind of stripped down account, however, we suggest that political constitutionalists have nonetheless been inevitably influenced by the jurisdictions they are working in, or are most familiar with. Jeremy Waldron’s critique of judicial review reflects

⁸² See, e.g., Stephen Gardbaum, *The New Commonwealth Model of Constitutionalism: Theory and Practice* (CUP 2013).

⁸³ Tom Ginsburg, ‘Constitutional Specificity, Unwritten Understandings and Constitutional Amendment’ in A Sajo and R Uitz (eds), *Constitutional Topography: Values and Constitutions* (Eleven International Publishing 2010); Rosalind Dixon, ‘Constitutional Redundancy’ (Unpublished manuscript 2014).

⁸⁴ Compare Kathleen Sullivan, ‘Constitutional Amendmentitis’ (*The American Prospect*, 19 December 2001) <<http://prospect.org/article/constitutional-amendmentitis>>.

⁸⁵ See, e.g., Rosalind Dixon, ‘Partial Constitutional Codes’ (Unpublished manuscript 2014).

⁸⁶ Jeremy Waldron, ‘The Core of the Case Against Judicial Review’ (2006) 115 Yale LJ 1346, 1352.

⁸⁷ Jeremy Waldron, ‘The Core of the Case Against Judicial Review’ (2006) 115 Yale LJ 1346, 1352.

⁸⁸ Jeremy Waldron, ‘The Core of the Case Against Judicial Review’ (2006) 115 Yale LJ 1346, 1352.

his intellectual links to the US, UK and his native New Zealand. Other political constitutionalists, such as Adam Tomkins, are similarly deeply connected to debates over judicial review in the UK, and other countries with UK-style parliamentary and common law traditions, such as Canada and New Zealand.⁸⁹ Evidence of this American and British focus is also apparent in the numerous references to American and British, and at times New Zealand, experience in the writings of political constitutionalists.⁹⁰

In the US and the UK, it also makes a great deal of sense for political constitutionalists such as Waldron and Tomkins to overlook constitutional amendment in debates over the democratic legitimacy of judicial review. In the UK, all constitutional norms are small 'c' constitutional in nature. Some of these norms are conventional; some common law in origin, and others statutory in nature.⁹¹ For statutory norms, at least, their origins in ordinary legislation will also mean that the Westminster Parliament has powers of amendment and express repeal that are completely co-extensive: nothing particular to the power of amendment, therefore, in any way alters the strong- or weak-form of judicial review under the UK's Constitution. The same is also true in New Zealand, where from time to time Waldron has made similar arguments.⁹²

Conversely, in the US, formal powers of constitutional amendment could be considered irrelevant for quite different reasons. The formally onerous nature of constitutional amendment in the US means that, for practical purposes, constitutional amendment is basically unavailable as a means of democratic override. The existence of robust political competition, at least at a national level, might mean that political constitutionalists could argue that any form of super-majority requirement, for constitutional amendment, violates democratic norms of political equality (The same also holds true for the UK.⁹³). Similarly, the general and parsimonious nature of the existing constitutional text in the US may mean that long and detailed constitutional amendments seem incongruous, as a means of democratic override, and thus that any override via the amendment process will carry a necessary danger of over-breadth, of the kind warned against by political constitutionalists.

In many countries, however, these assumptions will simply not hold true, or at least not nearly to the same degree as is true in the US or UK. In many constitutional democracies, constitutional amendment procedures are only moderately, not extremely, onerous. As the Colombian and Indian experiences make clear, legislative majorities also quite frequently invoke such procedures to override (or attempt to override) particular court decisions. The dominance of a single political party, or political figure or family, in the national legislature also often means that some (weak or moderate) super-majority requirement for the passage of such amendments affirmatively helps promote, rather than undermine, norms of political equality among voters in the face of constitutional democratic disagreement. Similarly, as the Colombian and Indian experiences also show, the existing level of detail in the text of various countries' constitutions can mean there is often nothing incongruous at all about amendments

⁸⁹ Adam Tomkins, 'In Defence of the Political Constitution' (2002) 22 OJLS 157; Adam Tomkins, 'The Role of Courts in the Political Constitution' (2010) 60 UTLJ 1.

⁹⁰ See, e.g., Adam Tomkins, 'In Defence of the Political Constitution' (2002) 22 OJLS 157; Adam Tomkins, 'The Role of Courts in the Political Constitution' (2010) 60 UTLJ 1.

⁹¹ Demarcating the bounds of a so-called 'unwritten' constitution is, of course, notoriously difficult, and one could potentially add a number of other sources to this list, including transnational ones.

⁹² See Jeremy Waldron, 'A Right-Based Critique of Constitutional Rights' (1993) 13 OJLS 18.

⁹³ See Paul Webb, *The Modern British Party System* (Sage 2000).

that make use of quite careful, detailed language in order narrowly to override particular court decisions.

This diversity among constitutional systems means that it may be unwarranted to treat the legitimacy of judicial review as an ‘either-or proposition’. Instead, the question of the legitimacy of judicial review may be better approached as both one of degree, and one informed by a variety of factors, including the availability, and context, for use of a power of constitutional amendment.⁹⁴ Waldron himself begins to move in this direction, by categorising Canada as occupying a ‘middle position’ between strong- and weak- form judicial review.⁹⁵ Waldron also questions the degree to which true legislative–judicial dialogue can occur without some form of deference, by courts, to true expressions of democratic disagreement by legislators.⁹⁶ From this perspective, it may be that, at other times, Waldron is in fact too quick to accept the democratic legitimacy of those forms of judicial review he identifies as falling on the ‘weak’ side of the strong–weak dichotomy.

In other contexts, however, political constitutionalists seem to gloss over questions of the actual practical degree of strength, or weakness, under particular formal constitutional models. One potential reason for this, we suggest, is that while explicitly attempting to be general and de-contextualised in the empirical assumptions they make, scholars such as Waldron are in fact heavily influenced by assumptions about background constitutional conditions that track those found in the US, or to a lesser degree, the UK – i.e. both high formal and informal barriers to constitutional amendment, strong norms of political party competition, and a background commitment to parsimonious constitutional drafting, or a ‘framework’-like constitution. None of these conditions are explicitly included in Waldron’s definition of what it means to have ‘judicial institutions’ that resolve constitutional disputes on a ‘final basis’, or to have ‘democratic institutions in reasonably good working order’.⁹⁷ Yet, the article has shown, they are also more or less necessary assumptions if we are to accept the decision by political constitutionalists largely to ignore amendment as a means of democratic override.

The focus on constitutional ‘ideal-types’ by political constitutionalists in this context has also arguably led them to gloss over important questions of degree in the actual strength, or weakness, of judicial review under weak-form systems of judicial review. It may even, at times, have led them quite substantially to overstate the democratic objection to judicial review in its stronger forms – by downplaying the degree to which even quite well-functioning legislative processes may be subject to certain practical limitations or ‘blockages’, which cause them systematically to under-protect certain kinds of rights. One of us, for example, has argued in prior work that the democratic objection to judicial review often radically understates the potential for both ‘blind spots’ in the legislative process, and ‘burdens of inertia’ of the kind that can radically undermine the degree to which legislative

⁹⁴ Aileen Kavanagh, ‘What’s So Weak about “Weak-Form Review”’: The Case of the UK Human Rights Act 1998’ (Working paper 2014); Mark Tushnet and Rosalind Dixon, ‘Weak-Form Review and its Constitutional Relatives: An Asian Perspective’ in Rosalind Dixon and Tom Ginsburg (eds.), *Comparative Constitutional Law in Asia* (Edward Elgar 2014) 102.

⁹⁵ Jeremy Waldron, ‘Some Models of Dialogue Between Judges and Legislators’ (2004) 7 SCLR (2d) 7, 36, reprinted in Ian Ross Brodie and Grant Huscroft (eds), *Constitutionalism in the Charter Era* (LexisNexis Butterworths 2004) 1356-1358.

⁹⁶ Jeremy Waldron, ‘Some Models of Dialogue Between Judges and Legislators’ (2004) 7 SCLR (2d) 7, 36, reprinted in Ian Ross Brodie and Grant Huscroft (eds), *Constitutionalism in the Charter Era* (LexisNexis Butterworths 2004) 1356-1358.

⁹⁷ Jeremy Waldron, ‘The Core of the Case Against Judicial Review’ (2006) 115 Yale LJ 1346, 1360-1362.

processes are actually responsive to democratic majority understandings.⁹⁸ These arguments would also be far more directly addressed, by political constitutionalists, if they were to adopt a more context-sensitive account of actual legislative functioning. A more general lesson to be drawn from a study of constitutional amendment and political constitutionalism in this context, therefore, is about the dangers of a wholly ‘boiled’-down approach to actual constitutional practice in constitutional theory. Indeed, we think this is a danger that is likely to arise in many areas of constitutional theory.

Constitutional theorists, like all of us, will inevitably be influenced by assumptions generated by observing the jurisdictions they are most familiar with.⁹⁹ But the diversity of global constitutional practice, and experience, will often mean that those assumptions turn out *not* to hold more generally. Understanding why, and to what extent this is true, will also be critical to assessing the actual real-world applicability of various constitutional theoretic arguments.

In seeking to offer general theoretical arguments, therefore, we suggest that a safer course for constitutional theorists may be to make much clearer, and more explicit, the jurisdictions they are drawing on or imagining in generating the ‘bare bones’ assumptions on which they then base their theoretical arguments. By doing so, they would create the conditions for a natural dialogue between constitutional theorists and scholars of comparative constitutional law about the actual generality, versus specificity, of their theoretical arguments, while still allowing both sets of scholars to do what they do best – i.e. for constitutional theorists to focus on fundamental ideas about democracy and legitimacy, and comparative scholars to focus on questions of context and degree of the kind we highlight in the chapter.

⁹⁸ Rosalind Dixon, ‘Creating Dialogue about Socioeconomic Rights: Strong-Form versus Weak-Form Judicial Review Revisited’ (2007) 5 *ICON* 391; Rosalind Dixon, ‘A Democratic Theory of Constitutional Comparison’ (2008) 56 *Am J Comp L* 947; Rosalind Dixon, ‘A New Theory of Charter Dialogue: The Supreme Court of Canada, Charter Dialogue and Deference’ (2009) 47 *Osgoode Hall LJ* 235.

⁹⁹ Behavioural psychologists often label this tendency a form of ‘availability bias’. A similar behavioural tendency is also ‘representativeness bias’, which involves the tendency of individuals to under-estimate the degree to which the sample (of information) they are observing is, or is not, representative of a more general pattern. See, e.g., D Kahnemann and A Taversky, ‘On the Reality of Cognitive Illusions’ (1996) 103 *Psychological Rev* 582