

The Social Foundations of Constitutions
Between the People
and the Constitution
The Constitutional Role(s) of
the Legislature

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Executive Summary

What role does the legislature play in constitutional democracies? This broad question can be answered in several ways. The legislature's role in government is both enabled and limited by constitutional rules. Representative legislatures connect 'the people' to the constitutional system of government, and thereby play an important legitimating role in the structure of government. The legislature also plays a vital role in interpreting, applying, and generating constitutional norms.

This paper analyses the different senses in which the legislature's relationship to the constitution can be understood. I then consider recent support amongst some constitutional theorists for an active legislative role in the interpretation and development of the constitution on normative grounds. While broader recognition of the role that legislatures can play in relation to constitutions is valuable, there are other matters of concern relating to the realities of legislatures, in relation to representation, accountability, and deliberation, which merit greater consideration in constitutional literature.

The Relationship between the Legislature and the Constitution

Constitutional democracies during the twentieth century have come to share two features: a broadly representative political body (the legislature) and a constitution, which provides for a set of rules and procedures that are more basic than the ordinary law, passed by legislatures.¹ This constitution may include a written document, the Constitution, but for the purposes of this paper I use the term constitution to refer to the fundamental rules which establish the framework and institutions of government, and thereby structure the exercise of public power. These rules may be legal or non-legal;² hence the term 'constitutional' is used to describe legally enforceable rules as well as fundamental principles and practices enforceable only in the political realm.³

Constitutions empower legislatures to make law, set policy, check the other branches of government, and in parliamentary systems, select the executive. The rules provided by constitutions are both constitutive and regulative, placing constraints on what legislatures may do.⁴ The constraints in turn may be largely procedural or may include substantive protection of certain social goods. In this sense, we can identify, in relation to a given constitution, the role given to the legislature (to pass laws, to select the executive, or to confirm judicial appointments) and the limits placed on the legislature's role (not to pass judgement on individual cases or not to legislate in violation of certain individual rights). Moreover, the constitution may itself give the legislature the power to amend constitutional rules, for instance, the Article V amendment procedure under the United States Constitution.

Much attention in Anglo-American constitutional law and theory has concerned the relationship between the constitution and the legislature, and this attention has focused on one aspect of that relationship:

constitutional constraints (or the lack thereof) on legislative power. Constitutional lawyers and theorists have extensively debated how such constraints can be justified and what the proper role of the legislature ought to be, predominantly in relation to fundamental rights and freedoms. As Amy Guttmann states, 'theorists and practitioners of constitutional democracy alike have yet to fully grasp just how legislatures and courts should divide up the labor of furthering democratic and constitutional values.'⁵

In this debate, courts and judicial decision-making have received rather more attention than legislatures. Of course, analysis of legislatures at a *general* level suffers from the problem that real-world legislatures are varied in composition and strength, and in terms of designated functions. In this paper, I will concentrate predominantly on the English speaking world: the United States, United Kingdom, Canada, Australia, and New Zealand.⁶

In this first part of this paper, I want to draw attention to two further ways in which we can understand the constitutional role of the legislature. Beyond the role handed to it by the constitution, the legislature also plays at least two roles in relation to the constitution in the above-mentioned constitutional systems. First, the legislature(s) provide a linkage to the people; an important legitimating function (although the degree to which the legislature is considered to be distinctively the people's branch of government may vary). Second, the legislature can play a significant role in interpreting, constructing, and applying constitutional norms in the course of its law-making functions. This more active engagement with the constitution can be seen not only in countries that tend towards political constitutionalism but also in countries with a more juridical constitution.

The voice of the people

The democratic calibre of the legislature – its relationship to the people, formalized through regular elections – plays a vital legitimating role in democratic constitutionalism. The fact that the legislature is a regularly elected, large assembly of representatives of the people supports the legitimacy of the law and the legitimacy of public action pursuant to the law. The type of legitimation I am referring to here is the symbolic variety: a matter of the people selecting representatives, thereby indirectly playing a role in producing the laws that govern them and authorizing policies. Officially passing law and approving policies is known as the *manifest legitimation* that the legislature provides to law and government action.⁷

Though we might regard the legislature as representing the voice of the people, or as embodying the public or general will, we cannot expect the legislature to reflect the actual public will on any given issue because, almost invariably, a unanimous opinion will not exist amongst the people. In fact, constitutions provide the rules and structures that form an artificial or constructed public voice, which overcomes the plurality and disagreement in actual public voices.⁸ Constitutions provide the framework which allows the electorate to express itself coherently.⁹

In the British tradition, beyond its law-making role, emphasis has also been placed on the importance of Parliament as a civic forum: an arena in which concerns are raised, criticisms levelled, and justifications made for public action.¹⁰ Mill considered that Parliament was not an appropriate body to govern, but it was the forum for the full airing of grievances and opinions. This is another sense in which Parliament plays a legitimating role: by providing this type of forum, it offers a 'release valve' which serves as a more latent legitimation to the exercise of public power, since government officials are open to formal criticism and required to provide formal justifications for their conduct.¹¹ In a more active sense, members of the legislature may also play a role of mobilizing consent and helping to win acceptance for government policies.¹²

The democratic calibre of the legislature, and its consequent legitimacy as a law-making body, is also a factor at play in constitutional and public law. It is one of the contemporary arguments for judges to be constrained from engaging in law-making; for judges to refrain from frustrating the purpose of legislation when interpreting it; to be restrained or deferential in the exercise of judicial review functions. It also animates the idea that where laws limit rights, they should do so expressly, in primary not delegated legislation, because ultimately the express consent of the legislature carries a high value in democratic constitutionalism, higher than the decisions of the executive alone.¹³

The extent to which the legislature is *distinctively* the people's branch of government depends on the nature and history of the country in question. Stephen Gardbaum argues that in certain European countries, the legislature has been understood as 'the distinctive institutional manifestation of popular sovereignty' and ideas about the supremacy of the legislature reflect the historical triumphs of the 'people' against the Crown and the elites, for instance in England and France.¹⁴ He compares this with the United States, where legislatures are not considered to be the distinctive collective organ of the people, rather that limits that are placed on legislatures are limits that the people, when asserting their sovereignty through the Constitution place upon their leaders, rather than upon themselves.¹⁵ It has been argued that, under the US Constitution, popular sovereignty was not institutionalized in one particular organ of government.¹⁶ Bruce Ackerman's idea of democratic dualism strikes a similar note: the voice of the legislature remains separate to the true voice of the people.¹⁷

Certainly the idea that the legislature, or Parliament, is distinctively the people's branch of government is more forceful in Commonwealth countries with a Westminster system of government than in the United States. This can also be explained by the fact that, in a separation of powers system, the principal conduit of public accountability of government action is not the legislature, as the executive is elected

separately. Nonetheless, even if, in the United States, the legislature may not be distinctively the voice of the people, it is the primary institution through which the people 'of here and now' make public decisions on law and policy.¹⁸ It remains the representative branch of government, which distinguishes it from other, more specialized and expert branches of government.

Constitutional interpretation and development in the legislature

Legislatures also actively engage with the constitution, both by interpreting and applying constitutional rules, and by developing aspects of the constitution through their ordinary legislative powers.¹⁹

The United States, Canada, the United Kingdom, Australia, and New Zealand occupy distinct positions with regard to the degree of legislative and judicial supremacy over the content and meaning of the constitution. This can also be described in terms of a spectrum between political and juridical forms of constitutionalism. Each system has a different level of judicial reach and power over the interpretation and application of constitutional norms, even across the four countries that share the tradition of parliamentary supremacy.

Political constitutionalism

The doctrine of *parliamentary supremacy* confers upon Parliament the formally unrestricted power to pass legislation. The other branches of government are bound to follow the laws passed by Parliament and only Parliament can amend or repeal its laws. The doctrine is best exemplified by the formal status of New Zealand's Parliament. Its formal status has recently been questioned in the United Kingdom by virtue of the status of European Community law and the Human Rights Act 1998.²⁰

Parliamentary supremacy may also continue to be a relevant principle in a country with a written constitution. In Australia constitutional rules concerning federal matters, enumerated in the written constitution, are subject to binding judicial review,²¹ but the Westminster style of government, and the

position of fundamental democratic rights and freedoms, is largely left to be protected by constitutional conventions and ordinary law. Hence, parliamentary supremacy is still an important principle in Australian political and constitutional discourse, particularly in relation to fundamental rights and freedoms, even though no Parliament in Australia can be said to have legally unfettered powers.²²

Constitutional lawyers who proclaim parliamentary supremacy as a constitutional principle do not claim that the legislature's law-making power is unconstrained, rather that those constraints are political and non-justiciable.²³ Constraints can be imposed by parliamentarians themselves, and by the prevailing political culture expressed by the public. Hence, New Zealand and the United Kingdom do have a constitutional scheme of government, with rules which structure the exercise of public power and the relationship between the branches of government, and thereby do regulate public power. Unwritten constitutional conventions and fundamental statutes (maintained by custom and political culture) play this organizing role.

There is a difference, however, between constitutional conventions in the sense of clear and established practices, compliance with which is relatively easy to determine, and more nebulous constitutional principles or conventions. For instance, Marshall's account of constitutional conventions states that, 'though it is rarely formulated as a constitutional rule, the most obvious and undisputed convention of the British constitutional system is that Parliament does not use its unlimited sovereign power of legislation in an oppressive or tyrannical way. This is a vague but clearly accepted conventional rule...'²⁴ Similarly, the separation of powers, freedom of speech, or the right to a fair trial, may be widely considered to provide limits to legislative power, yet those principles remain in the realm of politics for interpretation and application.

Hence, Parliament can engage in the interpretation of what constitutional principles require of it when considering a Bill criticized for violating the separation

of powers, for example. A good illustration of this is the debate in the United Kingdom over the Prevention of Terrorism Act 2005, which introduced a system of control orders for terrorist suspects. Legislative and public debate, (though severely limited by the rapid timetable on which the Bill was passed) concerned the propriety of the legislation on the grounds of such principles as the separation of powers, the right not to be detained without criminal charge, due process, and fair trial rights. The parliamentary debates on the Bill indicate the range of ways such principles may be interpreted, from requiring judicial oversight of control orders to requiring that the system of control orders itself be rejected as oppressive.

Additionally, significant aspects of the constitution may not be convention, but law, taking the form of statutes rather than a separate constitutional document, thereby becoming more embedded and less susceptible to amendment than other legislation. For example, in the United Kingdom, the Parliament Act 1911 was passed after clashes between the House of Commons and House of Lords prompted calls for institutional reform. Today, the relationship between the Houses is covered partly by statute (the Parliament Acts of 1911 and 1949) and partly by convention. It has been argued in relation to the European Communities Act and the Human Rights Act that Parliament has engaged in developing the constitutional framework of government in new ways, changing the organization of public power in the United Kingdom and introducing principles that limit the exercise of parliamentary power.²⁵

The claim that the legislature plays a role in interpreting and developing constitutional norms is not especially controversial in countries with a parliamentary supremacy (or modified parliamentary supremacy) system, assuming it is accepted that constitutional rules may be non-legal and that the constitution may develop gradually. Parliament plays this role when it considers the limits on the exercise of its power that stem from fundamental constitutional principles, and when it passes legislation that shapes and modifies the structure of public power in a fundamental way.

Judicial constitutionalism

In systems with written constitutions enforced by judicial review, the relationship between the legislature and the constitution is usually presented in more passive terms: the legislature functions under the constitution rather than actively engaging in decisions about the constitution. In fact, legislatures also interpret and generate constitutional norms in systems with written constitutions, in countries whose framework of government is understood as embodying juridical constitutionalism, such as the United States.

Judicial supremacy in constitutional interpretation is the orthodox understanding of the United States Constitution and judicial interpretation of the Constitution has been the overwhelming focus of American constitutional law.²⁶ While debate may continue on the desirability of judicial supremacy, its contemporary existence is a basic fact about the American constitutional regime, accepted even amongst those who are opposed to it on normative grounds.

But even in the United States, judicial review does not occupy the entire space for interpretation and development of the constitution. For one, the written Constitution does not comprise the entirety of the United States constitution; there is also a conventional component to the constitution.²⁷ Congressional enactments, 'ordinary legislation', provide for essential aspects of the framework of government: establishing basic institutions of the executive, independent regulatory agencies, and electoral rules.²⁸ Daniel Farber has drawn attention to the fact that 'major parts of the fundamental structure of government are due to congressional action rather than constitutional text or judicial interpretation. Such legislation ... gain their stability (as in Westminster constitutionalism) from custom rather than judicial enforcement.'²⁹

In a similar vein, John Ferejohn and William Eskridge have described the importance of what they refer to as 'super-statutes'. These laws, instituted after intense normative debate, seek 'to establish a new

normative or institutional framework for state policy and over time ...“stick” in the public culture such that the super-statute and its institutional or normative principles have a broad effect on the law.³⁰ Examples relied upon include the Sherman Antitrust Act 1890 and the Civil Rights Act 1964.³¹ The way in which such laws are interpreted is a hybrid of statutory, common law, and constitutional interpretation. They tend to trump ordinary legislation and assume a fundamental status in the legal system.

Hence, we can see that even US Congress plays a role in developing basic rules about the framework of government and the exercise of public power, procedural and sometimes substantive, that may become politically entrenched, even if they are more easily changed than the Constitution itself. We should note, however, not everyone would agree that these rules should be considered as constitutional law, which is reserved for the application of the Constitution itself.³²

Even in the case of the written Constitution, the legislature engages in constitutional interpretation while exercising its law-making powers. In the United States, there is an alternative tradition to that of judicial supremacy, namely, departmentalism, which recognizes an independent role for each branch of government to interpret the Constitution independently.³³ Departmentalism raises a wide range of issues, and has been most discussed in relation to the executive branch. Here, I want to focus specifically on the legislature, and its consideration of the Constitution in the legislative process.

The extent of legislative constitutional interpretation is open to debate. Lajoie et al. argue that the legislature is involved in constitutional interpretation in its daily enactments: each time it passes a statute there is at least an implicit decision that the legislation is within their jurisdiction and complies with constitutional norms.³⁴ But as others have pointed out, legislatures in judicial review constitutional systems sometimes pass legislation despite thinking that the legislation is unconstitutional, in order to gain the advantage of

taking a particular stance, or because they consider constitutionality to be a matter for judges.

Whether or not it can be claimed that the legislature always implicitly applies constitutional norms in passing legislation, it is clear that legislatures under juridical constitutionalism do engage in explicit debate over the application of the Constitution. Whittington et al., in their thirty-year study of Congressional committees, found that Congressional committees ‘regularly encounter the Constitution in the course of carrying out their normal responsibilities’.³⁵ They also found that the Judiciary Committee tended to dominate congressional consideration of constitutional issues, indicating that engagement with the Constitution has become a specialization within Congress. Mark Tushnet argues that non-judicial decision-makers in the United States have incentives to ‘orient themselves to the Constitution’ and that to a large extent these incentives are provided by socialization.³⁶

The above examples illustrate that judicial supremacy does not equate to judicial exclusivity in constitutional interpretation: in fact, judicial review may feed back into the legislative process and encourage legislators to engage in constitutional review of their own. In the European context of abstract (and binding) constitutional review, Alec Stone Sweet has identified pragmatic incentives for legislators to apply constitutional standards to legislation. His theory of judicialization of politics posits that just as constitutional judges increasingly behave like legislators, legislators act as constitutional judges do. This behaviour is brought about by the desire for stability (that is, the desire to ensure laws as enacted will withstand constitutional review) as well as the political incentives for opposition parties to challenge the constitutionality of legislation, and thereby drive political debate on constitutionality.

Of course, the system of abstract review, occurring after the legislative process, can produce different institutional effects to concrete constitutional review in ordinary courts. Nonetheless, the expectation that

particular legislation will end up before the courts can produce similar incentives under concrete constitutional review to consider constitutionality in the legislative process. In fact, studies have found that a majority of members of Congress believe that Congress has a duty to arrive at a constitutional interpretation independent to that of the US Supreme Court.³⁷

However, one theme that emerges is the legalized nature of the interpretation of the Constitution in the legislature, with legal arguments, judicial precedent, lawyer-like deliberation, and legal advice playing a significant role in the accounts of Tushnet, Whittington et al., and others. (Whittington et al. remark on the legalized discourse in the Judiciary Committee; Tushnet draws attention to legal staff as an institutional feature of legislatures created in response to incentives to engage in constitutional interpretation.) Simply because the legislature engages in interpreting and applying constitutional rules, this does not mean that this interpretation is independent of judicial interpretations.

Nonetheless, the role of the legislature in deciding the constitutionality of legislation, particularly in its review and committee proceedings, has its own importance. First, in concrete judicial review systems, the vast majority of legislation and policies are never subject to constitutional judicial review, making legislature's self-limitation to constitutional rules an important aspect of constitutionalism.³⁸ Second, the judiciary may carve out particular areas where it is restrained in exercising judicial powers and defers to the legislature's own evaluation of what the constitution requires. Tushnet has argued that the areas in which the US Supreme Court will not decide the constitutionality of political behaviour on the basis of the 'political question' doctrine provide examples of areas in which Congress is left to determine the meaning of the Constitution.³⁹ But even where matters are justiciable, judges may nonetheless be deferential to the legislature's attempt to adhere to constitutional norms. Lastly, legislative enactments can promote and advance substantive constitutional norms, going beyond the minimum standards that a court may impose, for instance, anti-discrimination legislation and equal opportunity initiatives.

The Case for Legislative Constitutionalism

So far I have considered two ways in which we can understand the relationship between the legislature and the constitution, beyond simply thinking of legislatures as governed by the constitution. Constitutions structure and empower legislatures to act as a constructed public voice, and the representative legislature in turn plays an important role in legitimating the exercise of power and the content of laws as democratic. Moreover, legislatures develop some basic rules of the constitution through legislation and interpret constitutional principles in the exercise of their powers, whether or not these principles are enumerated in a formal, written Constitution.

So far, I have not sought to advance an explicitly normative argument about the role of the legislature, rather laying out a basic understanding of two roles that legislatures actually play in the countries I have focused on. But the dominant debate concerning the constitutional role of the legislature is a normative one: to what extent should substantive external constitutional constraints be imposed on legislatures by the judiciary with respect to certain fundamental social goods – ordinarily, fundamental rights and freedoms?⁴⁰ This is a complex debate. At its deepest, it can be a debate between the liberal democratic theory's emphasis on limited government and civic republicanism's emphasis on self-realization of the political community and popular sovereignty.

My focus here, however, is on the particular argument that legislatures produce more just or legitimate answers than courts when they interpret and develop the constitution, and therefore they should have the final say over constitutional meaning. This argument develops from the two points above: legislatures are the people's branch of government and have a greater democratic legitimacy than the other branches of government and the legislature *can* engage in interpreting

constitutional principles and developing a stable framework of rules, even rules governing its own composition and powers. By contrast to judicial interpretation of constitutional norms, legislatures represent the people and allow for the people themselves to participate in the meaning and development of the fundamental commitments of the political community.

There are two versions of this legislative constitutionalism, as it relates to fundamental rights and freedoms. The first version excludes a role for judicial review and supports the interpretation and application of fundamental rights by the political branches of government alone, subject to the political constraints provided by the legislature's relationship with the polity. This is a parliamentary supremacy argument that does not reject fundamental rights, but seeks their protection by democratic representatives rather than courts.

The most prominent proponent of what I will refer to as rights-based legislative constitutionalism is Jeremy Waldron.⁴¹ He develops the well-known critique about the nature of fundamental rights jurisprudence: that decisions on the scope and permissible limitation of broadly worded fundamental rights are subject to intense political disagreement. Waldron makes two types of arguments, the first of which relates to the relative legitimacy of courts and legislatures to decide matters of constitutional rights. Here the right to democratic participation consistently favours the legislature. Waldron also strongly defends majority voting as a decision-making mechanism even for matters of principle, as it respects each participant's equal status. Waldron relies on the idea of the legislature as a legitimate public voice, as a result of careful rules through which, it is argued, each (enfranchised) member of the polity's views are equally valued. In Waldron's own words, 'a representative's claim to respect is in large measure a function of his constituents' claim to respect;

ignoring him, or slighting him or discounting his views is a way of ignoring, slighting or discounting *them*.⁴² The second type of argument relates to the capacity of the legislature to reach principled answers to difficult moral questions, owing to its size and capacity to reflect the diverse range of viewpoints in society. Legislatures are also better at making these decisions than judges because these are not issues of legal interpretation, but important political and moral questions which legislatures can address directly, 'undistracted by legalisms'.

The second version of legislative constitutionalism, commonly referred to as 'democratic dialogue', embraces a role for the legislature without rejecting judicial review. Since the late 1990s, theories of democratic dialogue have achieved a particular prominence in constitutional literature. The way in which putative instruments of democratic dialogue ensure a meaningful role for the legislature – the ability to ultimately reach its own judgment on constitutional interpretation – is to reserve the ultimate right to decide constitutionality of legislation to the legislature in relation to most, if not all, fundamental rights.

The central idea of democratic dialogue is weaker judicial review where judicial decisions are capable of some form of legislative reversal or veto⁴³ or are declaratory rather than corrective or coercive.⁴⁴ We can thereby draw on the strengths of judicial review on fundamental rights: the independence of the judiciary; reasoned legal analysis; consideration of how legislation operates in concrete cases; a focus on the individual which may be lost in general public debate; and the protection of minorities, who may be marginalized in the political sphere. Judges can bring concerns to the attention of the legislature, giving the legislature and the public better information about the effects of the legislation and the judiciary's opinion of whether the legislation is acceptable. But ultimately, the legislature holds the power to make the final decision, the expectation being that it will take this power seriously (or will be required to by public concern) and carefully consider whether impugned legislation is acceptable.

There is much to commend the idea of democratic dialogue. At a theoretical level, it promises a way forward in the so-called rights vs. democracy debate. The scope and limitation of fundamental rights, particular in cases of competing rights or public interest, is difficult and controversial and there is often no obvious correct answer. We can choose *not* to remove these matters from the politics, by expressly engaging the representative assembly and the courts. Existing bills of rights described as 'dialogic', by leaving the final word on what the legislature may do to the legislature itself or by not permitting judges to strike out legislation, can, it is argued, respect the legitimacy and ability of the legislature to reach its own decisions about the proper limits of its legislative powers. At the same time, these dialogic bills of rights do institute fundamental rights as prioritized claims subject to external review as well as institute particular safeguards to ensure that these principles are paid due regard in the legislative process itself.⁴⁵

But even if one considers this idea of harnessing both the courts and the legislature to decide matters of constitutionality to be attractive in theory, there are a series of practical matters that deserve attention:

1. *The quality of legislative deliberation.* How does legislative constitutionalism square with the reality that, in parliamentary countries the executive plays a very strong legislative role and most bills are not subject to meaningful parliamentary deliberation?
2. *The nature of constitutional interpretation.* Is it satisfactory if the process of interpreting and applying fundamental rights by legislatures is an exercise in applying legal standards, with reference to previous judicial decisions and legal arguments, such as the US Congress practices above? Arguably this type of legislative constitutionalism gives rise to similar concerns as those surrounding judicial supremacy; namely whether judges should ultimately decide what fundamental constitutional principles require,

thereby legalizing what are essentially political and moral decisions.

3. *Unelected legislative chambers.* Do unelected legislative chambers have some role to play in deliberation, even though they fall outside the democratic justification for legislative constitutionalism?

There are potential responses to each of these matters, though I will not be considering them here.⁴⁶

I want to take this opportunity to explore a further concern. If we move beyond the descriptive claim that legislatures do play a role in interpreting and applying constitutional norms, to the normative claim that legislatures should play an important, if not the ultimate role in determining the meaning of constitutional rights because of their democratic character, then we should also have regard to the actual relationship – not just the symbolic one – between legislatures and the people.

Returning to the Construction of the Public Voice

Earlier in the paper, I referred to the legislature as an artificial or constructed voice of the people. Certainly, this distinguishes the legislature from the courts, or administrative agencies, who do not claim to be representative of the people, rather claim particular expertise to perform their functions. Nonetheless, the constructed nature of the public will as manifested through the legislature gives us cause to reflect on enthusiasm for the legislature's engagement in the interpretation and development of constitutional norms, even if we are to accept the claim of Waldron and others that this process involves political and moral issues that are not the matter of professional legal expertise. How defensible is it to consider the legislature to be the voice of the people on constitutional issues?

The nature and composition of legislatures has not received a great deal of attention from those who advance legislative constitutionalism. But it raises some important questions in relation to both the legitimacy and capability arguments that are advanced for representative assemblies engaging in constitutional interpretation. Dimitrios Kyritsis has drawn attention to the way in which even Waldron, who argues forcefully for the people's right to participate in all aspects of the community's governance,⁴⁷ tends to conflate the legislature and the people.⁴⁸ Clearly they are not the same thing, and Kyritsis properly identifies that the space between the legislature and the people depends on the sense in which representatives 'represent' the people.⁴⁹

There are a variety of ways in which members of the legislature may represent the people. One type of representation is descriptive, wherein the representative resembles those being represented.⁵⁰ The idea that the legislature should reflect the population, 'in miniature, a portrait of the population at large',⁵¹ was popular with the Anti-Federalists in the eighteenth century.⁵² This approach to representation leads to similar results as a 'mandate' concept of

representation. Under both conceptions, we expect representatives to make the decisions that their constituents would themselves make, but under descriptive representation, it is because representatives share the circumstances and social attributes of their constituents, rather than because they are fulfilling a promise to, or a mandate from, voters.⁵³

Is descriptive representation important to the legitimacy and/or the capacity of the legislature to produce good answers to constitutional questions when they arise? If so, it is something that legislatures in the English speaking world have fared poorly at. The representation of women is an example. In descriptive terms, women comprise half the population but do not comprise half of the legislature(s) in any of the countries I have focused on. Yet a variety of important constitutional matters (abortion, religious dress, discrimination, and equal opportunity) relate directly to women. Similar arguments can be made about ethnic and religious minorities.

I am not seeking to argue that we should necessarily prefer courts for this reason (only in recent times have some of the highest courts begun to approximate some gender parity). Rather, I want to draw attention to how legislatures are constructed. There are a variety of ways to create a legislature, and various factors including the organization of constituencies, voting rules, the electoral system, and political finance rules will all affect the composition of the legislature, and the nature of the constructed public voice.⁵⁴

McCormick argues that the modern, generally class-anonymous constitutionalization of the people allows the wealthy to dominate common citizens.⁵⁵ He raises the interesting (and controversial) argument that forms of constitutionalism that provide separate institutions for elite and non-elite population may in some ways be preferable to a unitary sovereign people.⁵⁶ But there are less radical ways of changing

the composition of the legislature. It has been documented that list-based proportional representation systems yield many more female legislators than single member district systems of representation.⁵⁷ So there may be ways to establish the electoral system to provide for better descriptive representation. There has been little exploration, however, of whether the poor record of descriptive representation of important groups in society *matters* to the above arguments that legislatures are more capable and more legitimate to make decisions on constitutional rights.

One could argue that descriptive representation does not matter very much. There is a fairly fundamental problem with descriptive representation that even those within the same social group disagree, sometimes fiercely, about what is in their best interests and what is just. Moreover, a person may also belong to a variety of social groups, meaning descriptive representation is only ever partial.

A further response is that we do not expect representatives to resemble their constituents and thereby act as a conduit for their interests and convictions. There are a variety of other types of representation, falling under the broad category of 'trustee' representation, where the representative exercises some degree of independent judgement in making their decisions.⁵⁸ So, even if representatives do not resemble the population, they may nonetheless represent them in the *formal* sense of being elected and accountable to their voters,⁵⁹ or in the *substantive* sense of making decisions that do serve the interests of citizens,⁶⁰ in the '*gyroscopic*' sense of simply making what they believe is the right decision for the community,⁶¹ or in the '*surrogate*' sense of representing people who may not be their constituents in the electoral sense, but nonetheless who are affected by their decisions.

Ordinarily, the case for legislative constitutionalism is supported by formal representation: the greater accountability of the legislature to the people. If judges develop constitutional norms in ways that are widely unpopular, they cannot be removed, whereas

legislators can be voted out of power.⁶² Jane Schacter has argued that in the formulation of Bickel's 'counter-majoritarian' difficulty of judicial review, legislative accountability is stated as a fact, referring to this as the 'accountability axiom'.⁶³ Drawing on leading political science studies, she argues that 'elections cannot sustain the heavy institutional burden that Bickel and others place on them to deliver accountability'.⁶⁴

Schacter is one author to turn to empirical studies of political behaviour in addressing the question of accountability in a constitutional context. She makes the valid point that political science literature is often a descriptively rich source, though not directly concerned with a normatively defensible notion of accountability. What the literature does document is low levels of public knowledge about the actions of their representatives, that voters are mixed in using their votes to sanction representatives, and may in fact use their votes in a forward-looking manner instead, and that there are significant disparities in the success of different groups in holding representatives accountable. Moreover, a large degree of political energy is spent shaping public opinion for electoral advantage. To Schacter, ultimately, legislative accountability is too thin, sporadic, and unequal to fulfill the *normative* claims of those who say legislatures act with the consent of the governed.⁶⁵

Schacter's argument relates to empirical studies of American politics. A different dynamic is at play in, for instance, a two- or three-party parliamentary system in a unitary state, such as the United Kingdom. Strong party ties, a centralized form of government, and the close relationship of the executive and the legislature make for more transparency in terms of the actions of government, whereas the diffusion of power across different branches and different levels of government make it more difficult to attribute political responsibility. On the other hand, in strong party systems, representatives are as much party delegates as constituency representatives, particularly in seats that are considered to be electorally 'safe'. This

raises the separate, but related, issue of how much effect representatives actually have over legislation and policy. Moreover, Schacter's concerns over the manipulation of public opinion are as pertinent, if not more salient in the context of centralized large party structures and lower levels of dissent.

The above arguments illustrate some aspects of the complexity of the relationship between the legislature and the people. Each type of representation raises its own questions about the sufficiency of existing electoral practice. And each has important implications for the case for legislative constitutionalism. For example, the case for legislative constitutionalism fundamentally relies on substantive, surrogate, or gyroscopic representation for the concerns of non-citizens, children, and others who cannot vote to be represented. It also relies on these forms of representation insofar as certain groups which do have the vote nonetheless may be unable to hold representatives accountable because of their poor voting power.

What should be clear is that the 'democratic legitimacy' of representative legislatures and their capacity to reach the best answers is not a self-evident or undifferentiated thing. Nor should it be: we should be able to critically evaluate the reality of our legislatures and how they interact with the population.

Part of that evaluation should consider routes to participation beyond elections alone. There are other ways in which people may engage with the legislative process and thereby prompt members of the legislature to represent their interests in a substantive sense, such as the formation of civil society groups or through complaints raised with an independent Ombudsman or commission that may report to the legislature. The legislative process may be structured to allow greater participation, for example, where legislative committees solicit evidence and submissions from the public. Lastly,

litigation itself provides a particular route for participation. Here, weak judicial review may enhance representation of certain groups otherwise marginalized in ordinary politics by drawing the legislature's attention to putative violations of their fundamental rights through judicial declarations of incompatibility.

Thirty years ago, John Hart Ely presented his defence of judicial review of fundamental rights on the grounds of securing minimum rights to those who are systematically excluded from the political process.⁶⁶ He sought to stress the representation-reinforcing role that judicial review can play, and embed judicial review within a democratic framework. The judiciary can also protect the rules of the game, in the sense of preventing manipulation of the electoral process to exclude certain groups. (This rationale would explain why, in Canada, legislatures cannot legislate, notwithstanding the Section 2 right to vote in the Canadian Charter.)

That said, deficiencies in representation do not necessarily support the case for a wide-ranging judicial supremacy.⁶⁷ It would be odd to automatically respond to problems of political representation with calls for the judiciary to have the ultimate power over fundamental moral and political principles.⁶⁸ Rather, what such arguments should do is cause us to be wary of axiomatic understandings that decisions of representative legislatures are decisions of the people, and think critically about the strengths and weaknesses of real-life legislatures. Different institutional arrangements and social settings will provide for different types of legislatures, a different 'public voice'. We may find, for instance, that the case for legislative constitutionalism is much stronger in relation to some legislatures than others, and that the justification can be strengthened further by making modifications to how legislatures are elected and how they operate, or creating new forms of participation to complement the legislature.

Conclusion

In the first part of this paper, I discussed how legislatures do not simply function under the constitution, but that they play certain important roles in relation to the constitution. In constitutional democracies, the elected, representative character of the legislature is a vital component of our understanding of these countries as democracies, and legitimates the system of laws, public action pursuant to the law, and the actions of the executive in parliamentary systems. Legislatures also play a role in providing the rules that comprise the constitution and interpreting fundamental principles during the legislative process. Legislatures, either consciously or through regular practices, can be constitution builders, and can perform this role even when there is a written constitution.

It is important to recognize the role that legislatures play in interpreting and developing the constitution. Unless there is judicial review of all legislation and unless we establish every rule concerning the framework of government in a written document, both of which are impractical at best, legislative self-regulation is an important component of a functioning constitutional democracy.

But it is a different thing to make the argument that legislative interpretations should be supreme because this best respects the people's right to govern themselves. There is a significant space between the legislature and the people in contemporary democracies. Any theory which relies upon the democratic legitimacy of the legislature's decisions on constitutional norms needs to take this into account. At the very least, there needs to be a clearer sense in the literature of what proponents of legislative constitutionalism expect representatives to actually do. Advocate the interests of their constituents, to then be aggregated in a majoritarian way? Represent even those people who do not vote

for them, or whose votes do not much matter in practice? Reach an independent judgement on the best answer for the community as a whole, either by themselves, or as a consequence of careful deliberation with others? Vote as their party requires them to? Each of these responsibilities accords with different conceptions of democracy.

My own view is that democratic dialogue and rights-based legislative constitutionalism are best allied to deliberative conceptions of democracy, which in turn require a real diversity of perspectives in public debate and require representatives not to simply represent the interests of their constituents, but reach a conclusion on the best decision for the entire community, having had the benefit of hearing the different perspectives and arguments from the full range of people affected.⁶⁹ This view has significant implications for the electoral system and the legislative process, and it does not exclude a role for judicial review. But it is not the only view.

For some, it may be enough to say that legislatures are elected and thereby more democratic than courts: in effect a comparative institutional argument rather than a free-standing one. Yet, this observation, apart from relying on a highly attenuated concept of democracy, leaves us in the unsatisfactory position of having no grounds upon which to decide between the different ways in which legislatures can be constituted and the ways in which legislative processes can vary. At worst, it encourages us to ignore ways in which we can improve our democratic institutions. A focus on defending existing democratic institutions against judicial review or defending judicial review against claims of illegitimacy should not cause us to lose sight of the other ways in which our constitutional system can better approximate our democratic ideals.

Notes

1. Guttman, A. (2006) 'Foreword: Legislatures and the Constitutional State'. In: R. Bauman and T. Kahana (eds), *The Least Examined Branch: The Role of Legislatures in the Constitutional State*. Cambridge: Cambridge University Press, ix.
2. Wheare, K. (1991) *Modern Constitutions* quoted in: D. Miller et al, *Blackwell Encyclopaedia of Political Thought*. Oxford: Wiley-Blackwell, 103.
3. Furthermore, constitutional rules may be 'nominal', that is, describing the organization of power, or *garantiste*, that is, encapsulating fundamental rules which limit the exercise of power; hence not all constitutions express the ideal of constitutionalism or limited government. See Sartori, G. (1962) 'Constitutionalism: A Preliminary Discussion', *American Political Science Review* 56: 853, 855-61. Although Sartori himself seeks to classify entire constitutions as nominal, *garantiste*, or *façade*, a given constitution may contain all three types of rules.
4. Schauer, F. 'Legislatures as Rule Followers'. In: Bauman and Kahana, 469.
5. Guttman, op. cit., ix
6. This is not to suggest this is a group of similar constitutional systems. Rather this sample itself provides a variety of constitutional structures.
7. Packenham, R. (1970) 'Legislatures and Political Development'. In: A. Kornberg and L. Musolf (eds), *Legislatures in a Developmental Perspective*. Durham NC: Duke University Press; Norton, P. (1993) *Does Parliament Matter?* New York: Harvester Wheatsheaf, 131.
8. Webber, J. 'Democratic Decision-making as the First Principle of Contemporary Constitutionalism', in Bauman and Kahana, 418-19.
9. Holmes, S. (1995) *Passions and Constraints: On the Theory of Liberal Democracy*. Chicago: University of Chicago Press, 167 argues that we cannot speak of popular government without 'some sort of legal framework which enables the electorate to express a coherent will'.
10. For example, see Mill, J. S. (1861) *Representative Government*, Chapter 5. Available at: <http://ebooks.adelaide.edu.au/m/mill/john_stuart/m645r/chapter5.html>; Amery, L. S. (1948) *Thoughts on the Constitution*. New York: Oxford University Press, 12; Norton, P. (2005) *Parliament in British Politics*. Basingstoke: Palgrave Macmillan, Chapter 1.
11. Packenham, op. cit., in his account of the multi-functional nature of legislatures introduced the idea of latent legitimation, arguing that, merely by meeting regularly and uninterruptedly, Brazil's legislature produced amongst the population and the elites a wider and deeper sense of the government's moral right to rule than would otherwise have been the case.
12. Beer, S. (1966) 'The British legislature and the problem of mobilising consent', reprinted in P. Norton, *Legislatures*. Oxford: Oxford University Press.
13. Cass Sunstein makes this point in the introduction to *Designing Democracy: What Constitutions Do* (2001) Oxford: Oxford University Press, citing the 1999 Israeli Supreme Court decision on the legality of torture (*Association for Civil Rights in Israel v The General Security Service*) and the British Human Rights Act as illustrations of this principle.
14. Gardbaum, S. 'The New Commonwealth Constitutionalism', *American Journal of Comparative Law*, 49: 707-60, 740. In relation to France, he cites the doctrine that the acts of the legislature are the supreme expression of the people's general will (La Loi est l'expression de la volonté générale: Art 6 *Declaration des Droits de l'Homme et du Citoyen*).
15. Ibid, 741.
16. Wood, G. (2001) *The American Revolution: A History*. London: Weidenfeld & Nicholson, 159-62.
17. Ackerman, B. (1991) *We the People: Foundations*. Cambridge MA: Harvard University Press.
18. Ackerman himself describes the work of legislatures as ordinary politics, as opposed to constitutional politics which is 'higher law making'. The latter only occurs in exceptional moments of 'heightened political consciousness'.
19. Interpretation of rules and the construction or development of rules are overlapping concepts. In what follows, for convenience, I treat the interpretation of constitutional rules somewhat separately from the development of new constitutional norms. But I do not mean to convey that these are entirely distinct concepts: some forms of interpretation may understandably be described as construction.
20. Yet, each of these developments were introduced by statutes, and are not protected against future repeal by UK Parliament.
21. It can be argued that no less is possible in a truly federal system, which needs an independent body to decide the line between central and state government powers (cf. the United Kingdom and New Zealand). A. V. Dicey argued that federalism results in legalism and the dominance of the judiciary in the constitution, though he wrote before the Australian experiment with a federal, Westminster parliamentary system. See *Introduction to the Study of the Law of the Constitution* [1885] (10th Ed 1959), 175.
22. This has been demonstrated by the terms of reference of recent consultation by the Australian Federal Government on a possible Australian Charter of Rights, which explicitly states: 'The options identified should preserve the sovereignty of the Parliament and not include a constitutionally entrenched bill of rights.' Available at: <http://www.humanrightsconsultation.gov.au/www/nhrcc/nhrcc.nsf/Page/Terms_of_Reference> (Last accessed 26 October 2009).
23. Loveland, I. (2006) *Constitutional Law, Administrative Law and Human Rights: A Critical Introduction* (4th edn), Oxford: Oxford University Press, 304; Griffith, J. A. G. (1979) 'The Political Constitution', *Modern Law Review*, 42: 1.
24. Marshall, G. (1984) *Constitutional Conventions*. Oxford: Clarendon Press, 9.
25. Elliot, M. (2006) 'Parliamentary sovereignty and the new constitutional order: legislative freedom, political reality and convention', *Legal Studies*, 22: 340, argues that though the constitutional reform programme undertaken by the Blair government was formally consistent with the doctrine of parliamentary sovereignty, it has nonetheless altered the political and constitutional environment within which legislative power is exercised, and in the short term (though perhaps not in the long term) this change in reality can be accommodated by means of constitutional conventions.

26. See Eskridge, W. and Ferejohn, J. 'Super Statutes: The New American Constitutionalism'. In: Bauman and Kahana op. cit., 312-25, who explain the three premises that the standard account of American constitutionalism rests on the documentary premise, the jurocentric premise, and the premise of the distinction between fundamental law and statute.
27. Jon Elster has argued this point, see Elster, J. (2009) 'How Constitutions Shape and Change Behaviour', Herbert Spencer Lecture, Oxford, 19 February 2009. Elster uses the independence of the Federal Reserve Board as an example: Elster, J. (1997) 'Ways of constitution making'. In: A Hadenius (ed) *Democracy's Victory and Crisis*. Cambridge: Cambridge University Press, 123-4.
28. Farber, D. 'Legislative constitutionalism in a system of judicial supremacy'. In: Bauman and Kahana, op. cit., 446 argues that Congree was the architect of the modern civil service, establishing the charters of the State department, the treasury and the attorney general.
29. Farber, *ibid.*, 431.
30. Eskridge, W. N. and Ferejohn, J. (2001) 'Super-Statutes', *Duke Law Journal*, 50: 1215, 1216.
31. '...the Civil Rights Act is a proven super-statute because it embodies a great principle (antidiscrimination), was adopted after an intense political struggle and normative debate and has over the years entrenched its norm into American public life, and has pervasively affected federal statutes and constitutional law.' *Ibid.*, 1236.
32. *Ibid.*, 1217; Farber argues for several laws to be considered 'constitutional' in the sense used in this paper, that is, constituting the framework of government, or at least quasi-constitutional. Farber, op. cit., 435, 446.
33. The concept draws on the attitudes of Jefferson towards the Constitution. Whether each branch should interpret the Constitution independently, or mindful of the other branches, is the divide between formal and functional departmentalists. The former favour the idea of political clashes that would result from competing interpretations, while the latter put forward a theory of interbranch respect for the other branches' functions.
34. Lajoie, A. Bergada, C., and Gelineau, E. 'Legislatures as Constitutional Interpretation: Another Dialogue'. In: Bauman and Kahana, op. cit., 390-91.
35. Whittington, K. E., Devins, N. and Hicken, H. 'The Constitution and Congressional Committees: 1971-2000'. In: Bauman and Kahana, op. cit., 397.
36. Tushnet, M. 'Interpretation in Legislatures and Courts: Incentives and Institutional Design'. In: Bauman and Kahana, op. cit., 376.
37. Peabody, B. (2004) 'Congressional Constitutional Interpretation and the Courts: A Preliminary Inquiry into Legislative Attitudes, 1959-2001', *Law and Social Inquiry*, 29: 127.
38. Hiebert, J. (2005) 'Interpreting a Bill of Rights: The Importance of Legislative Rights Review', *British Journal of Political Science*, 35: 235. Lajoie et al., op. cit., have made this point in the Canadian context, finding that 99.5% of legislation enacted in the post Canadian Charter era (1983-2004) has been unchallenged, though this figure appears to be based on invalidation of legislation rather than the broader case of consideration of constitutionality by the court.
39. Tushnet, op. cit., 358.
40. The debate over judicial review is ordinarily about substantive limits on law-making power, rather than procedural or structural components of the constitution. Judicial review on certain structural matters, for example, federal divisions of power, raise a different set of issues.
41. See Waldron, J. (1999) *Law and Disagreement*. Oxford: Oxford University Press.
42. *Ibid.*, 109.
43. In Canada, judicial decisions can be vetoed under s33 *Canadian Charter of Rights and Freedoms*; in the UK, interpretation of legislation to make it consistent with fundamental rights can be displaced by a clearer reformulation of the legislation.
44. Such as declarations of incompatibility under the UK Human Rights Act and the Australian state level human rights instruments.
45. Mechanisms such as statements of compatibility encourage legislators to vet legislation, similar to what occurs in systems of binding judicial review.
46. I have considered these matters in a separate piece on legislative rights review: Sathanapally, A. (2008) 'Parliamentary protection of human rights: theory and practice' (MPhil in Law thesis).
47. Waldron, op. cit., 213.
48. Kyritsis, D. (2006) 'Representation and Waldron's objection to judicial review', *Oxford Journal of Legal Studies*, 26: 733.
49. *Ibid.*, 741.
50. Pitkin, H. (1972) *The Concept of Representation*. California: University of California Press, Chapter Three.
51. Adams, J. [1776] *Thoughts on Government* quoted in Manin, B. (1997) *Principles of Representative Government*. Cambridge: Cambridge University Press, 111.
52. *Ibid.*, 111.
53. *Ibid.*, 111.
54. Ely, J. H. (1980) *Democracy and Distrust: A Theory of Judicial Review*. Cambridge, MA: Harvard University Press, and Holmes, op. cit., have argued that constitutions ultimately concern the formation and pre-conditions of democratic institutions, rather than simply the limitation of them. This provides the basis of their defence of constitutional judicial review as consistent with democratic decision-making.
55. McCormick, J. (2007) 'People and Elites in Republican Constitutions: Traditional and Modern'. In: M. Loughlin and N. Walker, *The Paradox of Constitutionalism*. Oxford: Oxford University Press, 124.
56. *Ibid.*, 124-25.
57. Rule, W. (1987) 'Electoral Systems, Contextual Factors, and Women's Opportunity for Election to Parliament in Twenty-Three Democracies', *Western Political Quarterly*, 40: 477-98.
58. It is worth noting however, the tensions that arise over Waldron's arguments based on the diversity of the legislature, if in fact the legislature is fairly socially homogenous, but is acting on trust for the diverse population. This undercuts his case for the legislature's capability to reach better answers. Kyritsis, op. cit., explores the theoretical consequences of the trustee model of representation, which he argues gives representatives' decisions a greater weight than citizens. Arguing that political representation therefore has an aristocratic element itself, he goes on to argue that judges

undertaking judicial review are in fact not much different from members of the legislature, but this seems to take the point too far.

59. Pitkin, *op. cit.*

60. Pitkin, *op. cit.*

61. Mansbridge, J. (2003) 'Rethinking Representation', *American Political Science Review*, 97: 515, 520-22.

62. Given that my interest here is in examining the putative link between the legislature and the people, I will only note other important critiques of this argument: that constitutional norms should not be vulnerable to such short-term political popularity, or that there are in fact limits on judges' abilities to make widely unpopular decisions. On the latter point, see Lajoie et al., *op. cit.*; Sunstein, C. 'If the public would be outraged by their rulings, should judges case?', Foundation for Law Justice and Society Annual Lecture, Oxford 24 May 2007. Available at: <www.fljs.org/Sunstein>.

63. Schacter, J. 'Political Accountability, Proxy Accountability and the Democratic Legitimacy of Legislatures'. In: Bauman and Kahana, *op. cit.*, 45-46.

64. *Ibid.*, 72-73.

65. Schacter further considers the way in which American political science has considered various types of 'proxy accountability', for instance, political representatives tend to anticipate voter reactions, voters can use informational shortcuts to make rational decisions despite meagre information, or may be directed by more informed voters. She argues none of these devices generate a robust legislative accountability; rather each incorporates structural inequalities and create significant risks of voter manipulation.

66. Ely, *op. cit.*

67. Ely himself remarked that 'we may grant until we're blue in the face that legislatures aren't wholly democratic, but that isn't going to make courts more democratic than legislatures.' *Op. cit.*, 67.

68. Webber makes a similar argument in relation to deficits of participation. *Op. cit.*, 425

69. See 'Analysing Legislative Rights Review' in Sathanapally. *Op. cit.*

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