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RESEARCH ARTICLE

Deliberative constitutionalism 'without shortcuts': On the deliberative potential of Cristina Lafont's judicial review theory

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Abstract

Deliberative constitutionalism is one of the most important developments of recent decades in constitutional theory and practice. It is in this context that Cristina Lafont's *Democracy Without Shortcuts* was published. Lafont's theory provides an opportunity to advance the research agenda on deliberative constitutionalism since she offers a deliberative democratic reinterpretation of judicial review. According to this compelling and powerful idea, citizens can challenge any laws in constitutional courts and thus trigger democratic deliberation about rights. With this issue in mind, this article offers a general approach to deliberative constitutionalism, describes Lafont's reinterpretation of judicial review, and makes explicit five tensions in this reinterpretation of judicial review *vis-à-vis* deliberative constitutionalism: (1) the default authority in the interim; (2) the procedural type of constitutional amendment; (3) the scope of judicial review; (4) the irrelevance of constitutional amendments; and (5) the scope of constituent power.

Keywords: constitutional democracy; deliberative constitutionalism; deliberative democracy; judicial dialogue; judicial review

I. Introduction

Deliberative democracy has become one of the most dominant theories of democracy. Its growth has been so extensive that over the last few decades it has given rise to a constitutional trend known as *deliberative constitutionalism*, *dialogic constitutionalism* or *discursive constitutionalism*. Deliberative constitutionalism brings together various notable scholars united by a shared defence of the principles of deliberative democracy, as well as by their critique of the elitist features of contemporary legal theory, which confers supremacy on the institutional position of courts and their standards of rationality. However, deliberative constitutionalism is not at odds with judicial review, but rather tries to combine judicial review with inclusive dialogue.

It is in this context that Cristina Lafont's (2020a) book *Democracy Without Shortcuts: A Participatory Conception of Deliberative Democracy* was published. In the democratic realm, this innovative book endorses a participatory conception of deliberative

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democracy, while in the constitutional realm, it endorses what its author calls participatory constitutionalism. This conception offers an original justification for the democratic legitimacy of judicial review, which seeks to provide a paradigmatic opportunity for the exercise of democratic and deliberative self-government. In this way, Lafont proposes one of the most sophisticated and original instances of a constitutional model at the service of inclusive dialogue in support of the emerging deliberative constitutionalism. Hence, this theory provides an excellent opportunity to reflect on the current deliberative trend in constitutionalism.

The aim of my article is to criticize Lafont's justification of judicial review: 'Institutions of judicial review such as the Supreme Court may have the highest, but certainly not the final authority to decide questions of rights in democratic societies' (Lafont 2020a: 220). Specifically, I claim that while she endorses a deliberative model in the field of democracy, in the field of constitutionalism she remains committed to a strong model with judicial primacy. In this context, the problem is that, on the one hand, this strong model of constitutionalism does not take the objections to judicial review seriously, while on the other hand, it conflicts with the normative premises that are assumed in the democratic field. This problem can be seen in connection with five issues: (1) the default authority in the interim; (2) the procedural type of constitutional amendment; (3) the scope of judicial review; (4) the irrelevance of constitutional amendments; and (5) the scope of constituent power.

Accordingly, this article contributes to the literature for several reasons. The first is due to my examination of the novel justification of judicial review offered by Lafont's book, one of the most valuable in recent years. It is pertinent to fill this hiatus, as this book has until now been under-analysed. The second is because I advance the debate on the implications of deliberative conceptions of democracy and constitutionalism for judicial review. Filling this gap is relevant, as analyses of the shortcomings of courts in the light of the principle of democratic deliberation remain scattered and unsystematic. The third reason is because I provide novel arguments for rejecting the supremacy of the judiciary in constitutional interpretation. This is necessary because the strong model of constitutionalism still dominates at the global level.

The article is structured as follows: first, I offer a general approach to deliberative constitutionalism (section II); second, I describe Lafont's reinterpretation of judicial review (section III); and third, I make explicit five tensions between this reinterpretation of judicial review and deliberative constitutionalism (section IV).

II. The road to deliberative constitutionalism

The model of strong constitutionalism that emerged at the end of the eighteenth century and then expanded extraordinarily at a global level (Tate and Vallinder 1995) can be characterized by the following elements: (1) the organization of power and the recognition of fundamental rights is provided in a written and unified constitution, with a higher status than ordinary legislation; (2) the constitution has a rigid and counter-majoritarian reform procedure; (3) in order to guarantee constitutional supremacy, the constitutional court in a concentrated manner and with general effects (as in the European system) or the courts, in a diffuse manner and with specific effects for the case (as in the American system), have the power to carry out constitutional review of ordinary legislation; and (4) the final authority is in the hands of a constitutional court (as in the European system)

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or a supreme court (as in the US system) (e.g. Bayón Mohíno 2010; Ferreres Comella 1997; Linares 2008).

This model has since been questioned because of two circumstances. On the one hand, from the second half of the twentieth century through to the present day, multiple objections have been raised against the form of judicial review associated with strong constitutionalism. These critiques mainly concern the so-called counter-democratic difficulty of judicial review (Bickel 1962: 16) and denounce the judiciary's lack of legitimacy and democratic credentials to declare the constitutionality or unconstitutionality of those norms that concern the most fundamental aspects of civil society, potentially in conflict with its preferences or those of its political representatives. This criticism is just one of the objections that have had the most impact, since some other equally problematic aspects have also been objected to, such as the purely substantial nature of judicial review (Ely 1980: 97–214), the low epistemic value and lack of impartiality of judicial decisions on public matters (Nino 1997: 273), the insult to equal moral dignity, majority rule decision-making, the ideal of self-government and the fact of disagreement over rights (Waldron 1993: 36–38), taking the notion of constitutional supremacy to the extreme of judicial supremacy (Tushnet 1999: 6–32) and the rigid and strict nature of the system of division of powers (Gargarella 2014: 22–34). Still to this day, many of these problems remain largely neglected by the predominant trends in contemporary constitutionalism.

On the other hand, the deliberative turn in democracy, which took place a couple of decades later at the end of the twentieth century, offers normative tools to address such objections to constitutional jurisdiction. Deliberative democracy can be defined as a political decision-making model according to which legitimacy and impartiality depend on following an inclusive and dialogic process involving both public authorities and any potentially interested people or groups (e.g. Habermas 2008; Lafont 2020a; Levy and Kong 2018; Martí 2006). Deliberative democracy offers critical parameters that may be used to guide and critique political decision-making processes and existing constitutional practices.

Since its origin, deliberative democracy has expanded extraordinarily throughout the world (Martí 2006: 9, 16). Most scholars do not focus on whether this model is desirable; instead, it is often taken for granted (Martí 2006: 9, 16). In other words, most theoretical debates today are internal, rather than external, to the deliberative democratic model. Hence, most current academic controversies on this topic focus on how to best interpret this ideal model.

While deliberative democracy has become the predominant model, and has provided a myriad of normative tools for assessing and correcting decision-making methods and political institutions, it has been less far-reaching in the constitutional realm (Levy and Kong 2018: 2). In particular, it has not advanced systematically and contextually with regard to analysing and resolving the aforementioned objections to judicial review.

Thus, 60 years after the objections to the form of judicial review proposed by the strong constitutional model, and 40 years after the deliberative turn in democracy, the global context highlights the persistence of the problem: a juricentric and juristocratic constitutional model that has spread almost all over the world, and that has flatly ignored the objections to judicial review, as well as the deliberative turn in democracy.

The problem is even more striking when one realizes that the strong constitutional model is defended by many prominent commentators who have taken the premises of the

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deliberative conception seriously in the field of democracy – for example, Alexy, Dworkin and Rawls. The picture that emerges is therefore puzzling: many scholars who defend a deliberative conception of democracy – that is, starting from a position that is so demanding and different from others – arrive at the same result in the constitutional field as other scholars who defend conceptions of democracy that are quite different from, and less demanding than, the deliberative conception – for example, *The Federalist Papers*, Ferrajoli and Garzón Valdés. The result is an inconsistency. In other words, while endorsing a deliberative approach at the level of democracy, the vast majority of theories endorse a strong approach at the level of constitutionalism, which defends judicial primacy and thus does not take the objections to judicial review seriously. The problem is that this is incongruent with the demanding normative premises that are assumed at the democratic level.

Of course, a deliberative conception of democracy is not incompatible with any element of the strong constitutional model taken in isolation, e.g. constitutional rigidity, constitutional supremacy, qualified majorities, judicial primacy, *inter alia.* But it is incompatible with this model when all the previously listed elements (1-4) of constitutionalism, understood as a joint formula, are of a strong type (Martí 2014: 556).

This inconsistency highlights that, despite the aforementioned consensus that nowadays prevails concerning the principles of deliberative democracy, disagreements concerning the institutional arrangements and practices of constitutionalism are palpable. Thus, Martí (2014: 552) points out that, 'We all share the same ideal: one in which the people self-govern, respecting the rights of all others, while at the same time no one becomes tyrannical. But we disagree about the concrete institutional way to approach, if not achieve, such an ideal.'

The defects described above have gradually and slowly begun to be reversed since the emergence of deliberative constitutionalism at the end of the twentieth century. The novelty and attractiveness of this trend lies in its attempt to overcome the previous indifference and neglect. In this way, it aspires to carry out the contextual and systematic study of constitutional arrangements and practices in line with the deliberative democratic ideal.

Thus, deliberative constitutionalism endorses the normative principles of the deliberative theory of democracy, but is also concerned with explicating, evaluating and reversing the shortcomings of the institutional arrangements of constitutions. Hence, 'instead of focusing on the question of whether judicial review is illegitimate because it frustrates the democratic will', deliberative constitutionalism claims that 'judicial review is legitimate to the extent that it facilitates democratic deliberation, both *within* institutions of public power – *including the courts* – and *within wider society*' (Kong and Levy 2018: 634; italics in original). But, notwithstanding that deliberative constitutionalism provides room for a degree of judicial review, this is not enough as to justify the last authority in the hands of courts.

In a nutshell, this deliberative constitutional theory and institutional model can be conceived as 'a subfield of deliberative democracy' (Levy 2018: 351, 354), as 'a deliberative democratic approach to constitutionalism' (Ghosh 2018: 222), as a 'combin[ation of] theories of deliberative democracy and of constitutionalism' that provide 'a more complete picture of constitutional legitimacy' (Levy and Kong 2018: 7), as 'a field of scholarship that attempts to infuse constitutionalism with insights and teachings from deliberative democratic theory in order to strengthen the legitimacy of public power' (Cartier 2018: 58) or as 'the most persuasive conceptualization of the ideals embedded in constitutional democracy' (Zurn 2011: 66), among other views.

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Nevertheless, the lack of a systematic, contextual and coherent approach to constitutional design and practice, in line with the normative premises of deliberative democracy, has not yet been reversed completely, and much work remains to be done in this direction. On the one hand, it is necessary to develop a phase related to the contextual turn in deliberative democracy – that is, a phase that focuses on studying the possibilities and limits of this trend in situated contexts (Gargarella 2019: 33).

On the other hand, references to constitutional dialogue have now become commonplace. In this regard, Young (2019: 35) claims that, 'Constitutional or democratic dialogue has become almost ubiquitous in current constitutional discourse … as the panacea to the great debate as to whether courts or legislatures are the best-placed institution to provide the most legitimate protection of human rights.' Similarly, Schauer (2019: 423, 435) argues that, 'The idea of dialogue looms large in contemporary constitutional thought', and observes that, '"Dialogue" – or, sometimes, "discourse", or, sometimes "deliberation" – is a widely touted approach to political decision-making these days.' Likewise, Kavanagh (2016: 95) insists on the 'extraordinary popularity' of constitutional dialogue, and observes that, 'Over the last two decades, the metaphor of "dialogue" has captured the imagination of constitutional scholars the world over … the metaphor became a commonplace if not "ubiquitous".' (Kavanagh 2016: 83). Despite this growing interest in deliberative constitutionalism, many proposals in this trend still fall short of what a deliberative conception of democracy demands of constitutionalism. In other words, there is still a great deal of research by prominent scholars that defends constitutional variants that do not succeed in shedding their elitist traits, or in endorsing the regulative ideal of legitimacy proposed by the deliberative theory of democracy.

It is in this context that Lafont (2020a) published *Democracy Without Shortcuts*. This extraordinary book advocates the demanding ideal of democratic and deliberative self-government by the people. Concerning this ideal, as I have indicated, there is widespread consensus. However, as I have also anticipated, there are disagreements about how to best institutionalize this ideal. Accordingly, I will now reconstruct how Lafont articulates this ideal with the institution of judicial review (section III), before assessing its tensions with deliberative constitutionalism (section IV).

III. Lafont's reinterpretation of judicial review

Within the line of work presented above appeared Lafont's innovative book, which diverges from three alternative models of democracy: a *purely epistemic conception*, whereby citizens are expected to blindly defer to expertise to solve the problem of ignorance; a *profoundly pluralist conception*, whereby citizens are expected to blindly defer to the majority to solve the problem of disagreement; and a *lottocratic conception*, whereby citizens are expected to blindly defer to a random group of people to solve the problem of the poor quality of deliberation in the public sphere (Lafont 2020a: 161–62). According to Lafont, these models constitute mere *shortcuts* that are limited to avoiding the problems of present-day democracy, rather than solving them.

In contrast to these alternatives, Lafont (2020a: 105) defends a *participatory model of deliberative democracy*, according to which the importance of deliberation lies in allowing citizens to participate in the project of collective self-government. *Democracy Without Shortcuts* underscores that democratic legitimacy is intrinsically linked to the need for citizens to claim and identify with the political institutions and decisions they

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bring about. In contrast with other participatory views of democracy, Lafont's conception concerns deliberative participation in public discourse – that is, in opinion formation and political will.

On the basis of this understanding of deliberative democracy, Lafont (2020a: 228) defends a constitutional model that she calls 'participatory constitutionalism', from which she extracts a 'participatory interpretation of the democratic legitimacy of judicial review' (2020a: 222). This view of judicial review diverges from two other traditional positions. On the one hand, it diverges from those theories that criticize judicial review for its counter-majoritarian character, which affects the ideal of self-government and prevents political decisions on fundamental rights from being settled, directly or indirectly, by a popular majority. On the other hand, it diverges from those theories that defend judicial review on the basis that the substantial reasons of courts best protect rights against majority decisions. As Lafont points out, both of these views are based on a 'blind deference', whether this be to the majority rule (2020: 213–14) or to the decisions of the courts (2020a: 238). In her opinion, although in all democracies there is delegation or deference by the citizenry to the decisions of others, the incompatibility with the ideal of self-government arises when this deference is 'blind' – that is, when there are no instances of social control or contestation (2020a: 161–62, 219).

In contrast to these options, Lafont gives a normative argument for the legitimacy of judicial review that relies on its democratic functions and benefits (2020a: 224). This democratic reinterpretation conceives judicial review as intrinsically linked to both citizens' right to legal contestation (2020a: 239) and to equal political liberty (2020a: 233). So the right to legal contestation and equal political liberty guarantees citizens' communicative power – that is, their capacity to trigger participation in deliberation on rights issues. In this way, citizens can participate in the project of collective self-government.[1] This concedes to people the power to reopen public debate and the power to persuade others on the basis of reasons, rather than on the basis of secret ballots or numbers.[2] Indeed, the courts are obliged to examine the procedural parties' claims, listen to their arguments and give a reasoned response, even if they finally conclude that the raised opinion has little merit and therefore should be dismissed (2020a: 233). Lafont's reinterpretation owes its originality to the fact that she conceives judicial review as a request to initiate and promote democratic deliberation (2020a: 228–33). The democratic legitimacy of judicial review, as she puts it, lies precisely in the role it plays in guaranteeing citizens' participation, under equal conditions, in shaping the content and scope of their rights (2020a: 219). As a result, according to Lafont, criticism of judicial control for its alleged anti-democratic character, and for being inimical to equal political liberty, is enfeebled (2020a: 226).

[1]Chambers (2020: 77) has criticized this argument, claiming that for Lafont the institution that best embodies the ideal of self-government is judicial review. However, Lafont replies that, 'This is not how I understand the democratic significance of judicial review' (2020b: 105). She accepts that 'the fact that several commentators got this impression makes me fear that the structure of the book (culminating as it does with a discussion of judicial review) may, against my own intentions, be misleading and that I should have been clearer on this point so as to prevent misunderstandings … However, this interpretation does not try to elevate legal contestation to the quintessential exercise of self-government' (2020b: 105).

[2]Lafont (2020a: 210–11) clarifies that popular suffrage is not only secret, but can also be based on whatever reasons each individual considers appropriate. In contrast, with respect to the right to legal contestation that triggers judicial review, citizens must engage in public deliberation and offer public reasons to demonstrate the constitutionality or unconstitutionality of any political decision in question.

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In this way, Lafont contributes to the deliberative trend in constitutionalism.[3] Not only does she subscribe to a deliberative and participatory version of democracy; she also attempts to guide constitutionalism in the service of deliberative democracy. These contributions are in line with Habermas's (2008: 187, 195) 'co-originality thesis', which attempts to reconcile democracy – that is, self-government or public autonomy – and constitutionalism – that is, rights or private autonomy. According to Habermas, neither democracy nor constitutionalism takes priority; rather, they are 'co-original', which is to say that they have the same weight, or that they are internally linked and mutually enabling. From this perspective, rights are justified to the extent that they are the result of a discursive process, while the discursive process is justified to the extent that it is respectful of rights.[4] This connection between deliberative democracy and constitutionalism is also alluded to in terms of a double link: from inclusive dialogue to the creation of legitimate law – 'deliberation-to-law' – and from law to the promotion of inclusive dialogue – 'law-to-deliberation' (Kong and Levy 2018: 628; Levy and Kong 2018: 1–13). These contributions reinforce an increasingly broad and deep agreement about the need to advance towards a constitutionalism that is no longer orientated primarily to limiting political power, but instead to the communicative empowerment of the authorities and society at large.

Having presented Lafont's core ideas about judicial review in general terms, in the next section I will analyse their divergences from the deliberative trend in constitutionalism.

IV. Criticism of its deliberative potential

Despite Lafont's contributions to the deliberative trend in constitutionalism, one of her main arguments does not succeed in solving a problem that tends to afflict many constitutional theories. In this way, she fails to differ from several authors who, despite distinguishing themselves by defending a deliberative vision in the field of democracy, defend a strong vision in the field of constitutionalism. This is a problem, since the goal of deliberative democracy cannot fully be achieved through a strong constitutional model. In line with my argument, Chambers (2020: 77) has also complained that the 'direction that Lafont takes her argument in the final chapters of the book betrays the democratic ideal of self-government she articulates in the first half … It seems to me that Lafont goes off track'.

In particular, this tension with deliberative constitutionalism is confirmed when Lafont (2020a: 220) defends the judicial review with the following argument: 'Institutions of judicial review such as the Supreme Court may have the *highest*, but certainly not the *final* authority to decide questions of rights in democratic societies' (my italics).[5] On the basis of this argument, Lafont considers 'implausible' and 'inaccurate' Waldron's (1993)

[3]Although she offers reasons that are different from my own, Chambers (2020: 228) agrees that Lafont's approach to the right to constitutional challenge, derived from her participatory theory of deliberative democracy, makes a contribution to deliberative constitutionalism.

[4]Nino (1997: 190) agrees with this when he states that, 'The deliberative view of democracy based on the epistemic value of the process resolves this tension between procedure and substance. There can be no tension between the recognition of rights and the operation of the democratic process, since the value of the democratic process arises from its capacity to determine moral issues such as the content, scope, and hierarchy of rights.'

[5]It seems that Lafont's distinction is taken from Rawls (1993: 232), who claims that 'in constitutional government the *ultimate* power cannot be left to the legislature or even to a supreme court, which is only the

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characterization of judicial review as constituting an 'epistocratic shortcut', leading to 'blind deference' on the part of society towards the courts (Lafont 2020a: 220–21).

In support of her argument, Lafont cites the *Zappone* case of the Supreme Court of Ireland.[6] In this case, it was settled that the right to contract marriage contemplated by the Constitution of Ireland applied only to a man and a woman. This ruling generated a debate in the formal and informal public sphere that was very significant in terms of inclusion and the transformation of preferences on the subject. This in turn triggered a proposal to amend Article 41 of the Constitution to include the right to contract marriage without discrimination. To this end, a popular referendum was approved in 2015. In this context, Lafont (2020: 220–21) contends that the debate and the subsequent referendum should not be interpreted as a rejection of the *highest* judicial authority, but rather as a result of following it. What is interesting here, according to Lafont, is that Irish society, far from interpreting the judicial decision as *final* or definitive, continued to debate the issue and organized a referendum. Indeed, the constitutional amendment was based on the assumption that the *highest* judicial authority had correctly interpreted the constitutional text. At the same time, the debate and the subsequent referendum implied a rejection of the courts' *final* authority.

This example offered by Lafont constitutes a response to a court ruling through a constitutional reform. This is not a novel phenomenon. In the United States, for example, this practice has taken place four times: the 11th Amendment was a response to the ruling in *Chisolm v. Georgia* (1793), the 12th to *Dred Scott v. Sandford* (1857), the 16th to *Pollock v. Farmers' Loan and Trust Co.* (1895) and the 26th to *Oregon v. Mitchell* (1970). An amendment was also proposed in response to the ruling in *United States v. Eichman* (1990), although it did not succeed. This practice has even taken place previously in Ireland, where the 17th Amendment was a response to the ruling in *Attorney General v. Hamilton* (1993).

Moreover, for a long time scholars have alluded to the idea of a constitutional dialogue that is generated through this type of institutional reaction to court rulings. In this sense, it is said that judicial review 'lacks democratic legitimacy if the representative bodies cannot control, through constitutional reform, the interpretations of the judge' (Ferreres Comella 2000: 41). There have even been multiple studies that justify judicial review by citing the eventual dialogue that its exercise can generate when courts are responded to not only through constitutional reform, as in Lafont's example, but also through legislative reform (e.g. Ferreres Comella 1997: 202–09; 2000: 40–46; Linares 2008: 496–98; Niembro Ortega 2012: 139–49; Zurn 2002: 535–36).

In line with Lafont, and with the cited institutional experiences and studies, I take responding to court rulings through legislative or constitutional reform as promoting democratic deliberation. This generates at least three advantages. First, it contributes to obtaining greater democratic legitimacy, since it allows participation and debate in politics to be kept open, resuming and deepening it – even after the exercise of judicial review. This advantage is absent in those institutional systems and academic works that hold that the argumentation and the final decision on constitutional issues belong to the courts. Second, it promotes epistemic benefits since it allows the discussion of decisions to continue and, where appropriate, allows them to be corrected or modified in the light of

highest judicial interpreter of the constitution. *Ultimate* power is held by the three branches in a duly specified relation with one another with each responsible to the people' (my italics).

[6] *Zappone & Gilligan v. Revenue Commissioners & Ors* [2006] IEHC 404.

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new data or arguments. This advantage is absent from those institutional systems and academic works that tend to petrify law, or to treat it as something static and closed. Third, it ensures an ethical function, as it aspires to equal political dignity and equal consideration of the reasons and decisions of the constitutional jurisdiction, the remaining branches of government and society at large. This advantage is absent from those institutional systems and academic works that hold that the constitutional jurisdiction has standards of rationality superior to those of society at large and other branches of government.

However, despite its cited advantages, Lafont's argument has at least five problematic aspects, on which I will now elaborate: (1) the default authority in the interim; (2) the procedural type of constitutional amendment; (3) the scope of judicial review; (4) the irrelevance of constitutional amendments; and (5) the scope of constituent power.

The default authority in the interim

Defending judicial review on the grounds that the courts do not have final authority, but only the highest authority, overlooks the fact that, from a deliberative democratic perspective, it does not just matter which decision prevails definitively, but also which decision prevails in the interim.

On the one hand, Lafont's argument commits to the democratic deliberative principle, since she explicitly holds that the constitutional jurisdiction does not have the institutional last word. In this regard, she maintains that the possibility of reforming the constitution always remains open.[7] However, to mitigate the democratic objection, it is not enough to qualify the last word of the courts with the eventual possibility that they are responded to through a constitutional reform; rather, it is also necessary to moderate the highest authority that they hold in the interim – that is, the authority they have by default. In this sense, Bayón Mohíno (2010: 291, n. 14) argues that, in democratic terms, it does not just matter what the final decision is, but also why, during the time it takes parliament or a popular referendum to confirm or reverse the judicial decision, this decision must prevail against it.

The question of the default authority becomes more important when it is linked to how long this authority's response tends to take. Since constitutional reform procedures are difficult to overcome, judges are appointed either for life or for long periods, and parliaments do not usually insist on reform in response to court rulings, a considerable period of time tends to pass between a ruling of unconstitutionality and their response to it. The point is that in cases in which this period of time is considerable, the distinction between the supreme authority and the final authority blurs, to the extent that the supreme authority becomes final. On such occasions, the role of the courts threatens to become much more important and definitive than would be justifiable from a constitutional perspective that is committed to the principle of democratic deliberation.

Against this objection, Lafont (2020a: 225) argues that the scope of the *synchronic* perspective is very limited temporally speaking – that is, the perspective that focuses exclusively on how the courts can uphold a piece of legislation or annul it as unconstitutional at a specific moment in time. Instead, she argues, the implications of judicial

[7]The judicial last word can also be nuanced or have its reconsideration promoted through other means, such as the development of inclusive discussion processes, a change in the membership of the court or the enactment of a new law with similar content to the invalidated one.

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review should be analysed from a *diachronic* perspective, which allows the role of society and parliament after the court ruling to be captured.[8]

In my view, this proposal leads to validating some unattractive instances of dialogue. These dialogues are of the *dialectic* type – that is, the authorities and courts engage in dialogue at the same time as they decide, which happens at various moments in time; while it is *non-dialectic dialogues*, in which the authorities and courts engage in dialogue before, during and after deciding (Linares 2008: 487–88), that are desirable. If no room is made for this second type of continuous dialogue, courts and parliaments take decisions behind closed doors and without inclusive dialogue.

Moreover, once again, the democratic objection is not resolved by saying that the judicial authority can be reversed through a constitutional reform. This point can be illustrated with many examples, but here I will mention just two from the United States: first, the 14th Amendment to the US Constitution of 1868, which responded to the aforementioned *Dred Scott* ruling in 1857 by prohibiting slavery;[9] and second, the US Congress's approval of the first law regulating child work in 1916, which was invalidated by the Supreme Court two years later it. In response to the latter, a constitutional amendment was approved in 1924, which to this day has not been ratified by the number of states required by the reform procedure.[10] Taking into account both of these examples and Lafont's diachronic perspective, I do not find it reasonable to consider a constitutional reform to be a paradigmatic instance of democratic deliberation, given that its procedure is so demanding and that it may respond to a ruling many years later, or fail to respond even after multiple mobilizations and social and institutional debates.

Both of these cases, like many others, cannot be interpreted as democratic and deliberative since they are distorted by the privileged position of the judicial authority, which does not make the democratic objection disappear. Indeed, it cannot be ignored that, once the judicial authority expresses itself, it 'acquires force and solidifies, making it extremely difficult for citizens and their political representatives to make changes to it, even after many years of political mobilization and debate' (Gargarella 2005: 23–24). An alternative to the limitations of Lafont's argument in connection with the described problem would have to be sought in the institutionalization of procedures that allow the courts to be responded to through inclusive discussion within a reasonable timeframe.

In sum, there is an inconsistency in Lafont's (2020a) argument, between defending the principle of democratic deliberation in the field of democracy and her lack of criticism of the idea of the highest judicial authority in the field of constitutionalism. In other words, it is inconsistent with the principle of inclusive dialogue to keep the highest authority in the hands of the courts in the interim, in the hope that it can eventually be responded to through a constitutional reform. Above all, this is because in most cases the highest judicial authority also becomes the final authority, at least for a long period of time. What is striking about Lafont's argument is that, despite assuming such a demanding position at the level of democracy, it assumes a traditional position at the constitutional level, since it arrives at the same conclusion as those who do not subscribe to deliberative democracy – that is, the highest authority should remain in the hands of

[8]Lafont's view draws on that of Habermas (2001: 768; see also Habermas 2001: 774 and Habermas 2008: 465–66), who claims that 'the allegedly paradoxical relation between democracy and the rule of law resolves itself in the dimension of historical time, provided one conceives the constitution as a project that makes the founding act into an ongoing process of constitution-making that continues across generations'.

[9]In relation to this, see Linares (2008: 498, especially n. 18).

[10]In relation to this, see Dahl (1956: 106–07).

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the constitutional jurisdiction since at the end of the day it remains possible to reform the constitution.

In response to this problem, and by way of example, a constitutional system such as the one in force in the United Kingdom is more consistent with the principle of democratic deliberation. There, when there is a judicial declaration of incompatibility, the law that has been declared incompatible prevails, and it is for parliament to decide whether it complies with that ruling or not, to which end it would have to pass a new law (*Human Rights Act*, section 4.6). Unlike the Canadian constitutional system, which is also *weak* in the sense that it allows legislative responses to judicial decisions (Canadian Charter of Rights and Freedoms, section 33), in the United Kingdom it is the law that is declared incompatible that governs in the interim – that is to say, the default authority is parliament's.

The procedural type of constitutional amendment

Defending judicial review on the grounds that the courts do not have final authority because they cannot prevent constitutional reform also fails to distinguish between the varying degrees of rigidity or flexibility of constitutions. Implementing in a constitution the possibility of reforming its content also requires implementing a procedure so that such reform can be carried out, which can take two forms: on the one hand, *aggravated*, when a more demanding amendment mechanism is envisaged than the one required for sanctioning infraconstitutional norms; and on the other hand, *ordinary*, when the envisaged amendment mechanism is identical to the one envisaged for sanctioning infraconstitutional norms. In turn, in either case, the reform procedure can also be, on the one hand, *counter-majoritarian*, in which case the reform process does not commit to the democratic rule that decisions are to be taken by the majority of society or by the majority of its political representatives; and on the other hand, *majoritarian*, in which case the reform process does commit to that rule.

Ordinary and majoritarian reform procedures, as Lafont (2020a) affirms, limit the final authority of the courts. This applies, for instance, to the aforementioned case of the British system, where the distinction between constituent power and constituted power fades away since, in virtue of the principle of parliamentary sovereignty, parliament is enabled to fulfil the functions of both legislative assembly and constituent assembly. Here the ordinary and majoritarian character of the constitutional reform procedure can be seen, as laws and rulings can be repealed or modified through the same mechanism: approval by both chambers and royal assent. The reform procedure is also ordinary and majoritarian in Ireland, since Article 46 of the Irish Constitution requires approval by a simple majority of both chambers, followed by a popular referendum.

In contrast, *aggravated and counter-majoritarian reform procedures* not only make constitutional reform difficult and remote, but also tend to leave citizens without the tools to activate the reform procedure or to make reform proposals. Such ends have been explicitly pursued since the origins of constitutionalism in North America, which was extraordinarily expanded to the majority of constitutional systems, with traces that remain to this day.

Therefore, against Lafont's (2020a) argument, it should be highlighted that this type of procedure, rather than limiting or reducing the final authority of the courts, tends to accentuate it. Zurn (2002: 535), for instance, agrees with Lafont's argument, saying: 'Instances of judicial review are … never completely final given the basic possibility for amendment by citizens and legislatures built in as a basic structure of modern

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constitutions.' Unlike her, however, he clarifies that if 'constitutional amendment is close to impossible then the democratic elaboration of the system of rights becomes a chimera and the possibility of judicial usurpation becomes all too real' (Zurn 2002: 535). In other words, the 'relative finality of judicial pronouncements is inversely proportional to the ease with which amendments can be voted on and adopted' (Zurn 2002: 535). Waldron (2005: 327–28) has also stated that 'such processes are usually made very difficult', so the 'objection is not rebutted by pointing to a formal opportunity for amendment or change; the nature and extent of that opportunity is precisely what is being objected to', and for this reason, 'the opportunity for constitutional amendment adds nothing to the case'. Likewise, Bayón Mohíno (2010: 291, n. 15) insists that when 'the parliamentary majority … cannot react by changing the constitution when it disagrees with constitutional judges' interpretation of it, this is precisely what gives rise to the democratic objection'. In the same sense, Niembro Ortega (2012: 142) warns that the 'high political costs [and the] difficulty involved in reforming the constitution … make this very unlikely to succeed, so there is a risk of closing down deliberation once a ruling has been delivered'. In line with this, Linares (2008: 496–98) points out that in the field of responses to judicial rulings through legislative and constitutional reform, 'it is important to distinguish again between constitutions of moderate and majoritarian rigidity and constitutions of supermajoritarian rigidity'. Of the first, he says that 'it is to be expected that according to this formula the debate will be deeper and more intense', since it unfolds in various stages in a short space of time – for example, a law of Congress followed by a ruling of unconstitutionality, constitutional reform by Congress, elections of representatives, and ratification of the reform by the subsequent Congress (Linares 2008: 496–98). Concerning the second stage, without ignoring that 'a reinforced majority of Congress could respond to an adverse ruling by approving a constitutional reform', he affirms that 'they greatly limit Congress's capacity to respond by making constitutional reform costly', 'given that reinforced majorities are difficult to unite (above all in matters that ignite heated controversies), it is normal for a considerable period of time to pass between the ruling of unconstitutionality and the constitutional reform' (Linares 2008: 496–98). In short, by making constitutional reform unlikely, this type of procedure limits the capacity to respond to the judicial authority, and ensures the predominance of that authority, which ends up becoming final, whereby the democratic objection is revitalized.

Although Lafont (2020a: 225–26) adopts an approach that she calls *holistic*, which diverges from those that she calls *juricentric*, she then sidesteps the issue that 'we cannot consider judicial review independent of the amending power' (Dahl 1956: 106). Indeed, 'the proper institutionalization of constitutional review crucially depends on balancing between these two extremes in the light of other structural and political features of a specific constitutional state' (Zurn 2002: 535).[11] In short, Lafont refers to responses to court rulings through constitutional reform without clarifying anything about the rigidity of constitutions. Yet rigidity, being a gradual quality, can even reach the extreme of a constitution being 'petrified' – or at least some of its contents.

In response to this problem, and by way of example, it seems that flexible and democratic reform procedures of constitutions are more committed to the principle of democratic deliberation. Concerning their advantages, Zurn (2002: 536) argues that they

[11]In the same vein, Martí (2014: 556) points out that, 'Judicial review, as any other single institutional mechanism, cannot be isolated from its institutional framework, and then assessed separately from it.'

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'reduc[e] the finality of judicial review' and 'relieve the pressure on a constitutional court', which in turn helps to 'increase the legitimacy of constitutional court decisions'. In other words, he insists that these suggestions 'are more consonant with the legitimacy requirements of deliberative democracy … They are offered in the hope that the realization of popular sovereignty through democratic constitutionalism is an ongoing historical project, one that must ultimately be open to the participation of all citizens' (Zurn 2002: 536).

The scope of judicial review

Defending judicial review on the grounds that the court does not have final authority because it cannot prevent constitutional reform also fails to distinguish between the various scopes of judicial review. In this sense, Lafont (2020a: 211, n. 39) explicitly admits that, 'For the purposes of my argument, it does not matter which institutional form constitutional review takes, whether it be weak or strong judicial review or a different solution altogether.'[12] However, the validity of her argument that the courts do not have final authority, but rather the highest authority, is inseparable from the scope of judicial review.

In this regard, the alternatives are multiple, since there could be established, for instance, systems with *judicial primacy*, systems with *legislative primacy*, systems with *popular primacy* or systems of an *eclectic type*. Of course, a position – which Lafont (2020a: 224) also rejects – according to which there is just one universal and correct answer for all institutional systems would be inadequate, since that answer depends not only on normative questions, but also on empirical questions for each specific context.

Nevertheless, it is important to highlight that, in systems with judicial supremacy, constitutional reform could be judicially invalidated. This is admitted by Rawls himself (1993: 237–240). It is not always possible to reverse the decisions of the constitutional court since, paradoxically, it is usually considered competent to judge the constitutionality of constitutional reform (Guastini 2008: 47, n. 23). So, in a system with judicial primacy, the constitutional jurisdiction does not just have the highest authority, but also the final authority, as can be seen in those institutional practices and academic works that deal with (judicially) unconstitutional constitutional amendments.

The case is different in systems of weak judicial review, which are characterized by removing from the courts not only the highest authority, but also the final authority, since they allow responses to court rulings through legal and constitutional reform. In these circumstances, constitutional reform predominates over the unconstitutionality rulings that have been issued previously. Besides, once the constitution has been reformed, the judicial authority – if it exists – would be unable to rule on the constitutionality or otherwise of this reform.

Lafont's (2020a) argument is thus inadequate since, on the one hand, she maintains that the constitutional jurisdiction has no final authority while, on the other hand, she fails to side with a weak form of judicial review. But the final authority of the courts can disappear in systems with weak judicial review. This is not to deny that responding to court rulings through constitutional reform can have a place in systems with strong judicial review; rather, it is to make explicit that in such systems, constitutional reform does not have to consist of an open dialogue since it must conform to judicial

[12]Lafont (2020a: 211, 224) returns to this statement on at least two occasions.

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jurisprudence. Hence, it is possible to think of cases in which the courts, despite having a strong review, opt to defer to constitutional reform, but this would be a mere contingent matter that would depend solely on the will of the judges in office. This seems to be the case that Lafont offers in support of her argument, since responding to the *Zappone* ruling through constitutional reform was only possible because the constitutional jurisdiction decided not to proceed with analysing the constitutional reform.[13]

In this context, it would be more appropriate to side with weak judicial review and argue that, in terms of intrinsic value, it has stronger democratic credentials. This premise would be compatible with what Lafont's (2020a) book already maintains – that is, that the scope of judicial review will ultimately depend on the balance between the aforementioned normative reasons and the instrumental value of each specific context.[14]

Another problem that derives from not endorsing weak judicial review, or from removing the highest authority of the courts in 'ordinary politics', has to do with Lafont's need to appeal to 'extraordinary politics' or constitutional reform as her main way of qualifying the final authority of the courts.[15] However, the problem of the legitimacy of the final authority of the courts is not solved by saying that they do not have the power to carry out or prevent constitutional reform for at least the following two reasons.

On the one hand, if the constitutional reform procedure – whatever form it takes – can be reviewed judicially, then there is no difference from legislative responses to court rulings (Niembro Ortega 2012: 146). Therefore, the aim of Lafont's argument – which is to seek in a response through constitutional reform the same as what would be achieved by a response through legislative reform – makes no sense. In other words, it makes no sense to seek in extraordinary politics what one would find in ordinary politics – that is, judicial supremacy. In consequence, it is again necessary to side with a weak form of judicial review.

On the other hand, understanding constitutional reform as the main mechanism for moderating the final authority of the courts is not the most attractive approach, given a deliberative conception of democracy. In similar terms, Chambers (2020: 79) has reproached Lafont by saying that 'deliberative democracy has much to say about everyday politics [and] ordinary law-making'. Indeed, the theory of deliberative democracy and diverse institutional experiences offer several alternatives that are much more interesting for ordinary politics.[16]

[13]In fact, Lafont (2020a: 221, n. 4) admits that the High Court's *Zappone* ruling could have been overturned not only by constitutional reform, but also by the judicial review of the Supreme Court.

[14]Lafont (2020: 224, n. 18) is explicit that her argument is 'normative' and 'therefore compatible with a variety of empirical circumstances … The normative argument aims to answer the question of whether a specific institution serves some key democratic function and is therefore legitimate from a democratic point of view. Once it is determined that an institution (judicial review, democratic parliament, etc.) serves a democratic function, this opens up the empirical question regarding how we can ensure that the institution works as intended, how to best avoid any potential anti-democratic drawbacks, and so on.' At the same time, Lafont (2020a: 241) explains that her book is not dedicated to studying the specific circumstances of each context, as these are very different in each country, and it is very difficult to offer a single answer for all of them. The same position is taken by Bayón Mohíno (2010: 320) and Waldron (2005: 343–45) when they claim that it is too difficult to compare decision-making procedures that have different instrumental values, which are context-dependent.

[15]The distinction between two expressions of democracy – extraordinary law-making and ordinary law-making – is due to Ackerman (1991: 290).

[16]In relation to this, see Gargarella (2014).

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Although Lafont says that she does not side with any specific form of judicial review – which, as I showed above, is inconsistent with her argument – towards the end of the book she argues that, 'The best institutional way to take away the finality of judicial decisions about rights that are made by institutions with highest national authority is to create transnational courts with the authority to subject such decisions to further scrutiny and to prompt appropriate legislative changes' (2020a: 241).[17] Thus, the inconsistency of her argument with her claim that it is unnecessary to defend a weak form of judicial review is aggravated when she ends up defending another form of judicial authority. Indeed, she proposes to remove the final decision-making power from the judicial authority at the national level simply to entrust it to another judicial authority at the transnational level. This transfers the problem to the transnational sphere, where the criticisms directed at the national courts are radicalized and reproduced. Of course, my proposal does not imply denying the possibilities of dialogue that can be set up with transnational organizations, but rather emphasizes that at the national level there are also alternative ways 'to take away the finality of judicial decisions about rights', and that Lafont takes no position on these – particularly on weak forms of judicial review. The problem, once again, is that Lafont arrives at the same institutional response as those who support a strong (neo) constitutional model, which is to say that her proposal at the level of constitutionalism is out of step with her normative premises defended at the level of democracy.

The irrelevance of constitutional amendments

Defending judicial review on the grounds that the courts do not have final authority because they cannot prevent constitutional reform also ignores the relative importance of this procedure as the only way to modify the constitution and qualify the final authority of the courts.

Indeed, the constitution is also transformed, even when its text remains intact, through interpretations of it that are in constant flux (Habermas 2008: 615).[18] The democratic problem is revitalized when one takes into account that these interpretations of the content and scope of the constitution are made by the courts – which, as Lafont (2020a) affirms, have the highest authority. In other words, through judicial interpretation of the constitution, without any need for the text to be reformed, it is feasible to change its meaning in shifts so significant that they sometimes become as profound as the formal reform procedures themselves. Therefore, the fact that judicial review can modify the constitution as much as or more than a reform reveals that constitutional reform has a certain 'irrelevance' (Strauss 2001: 1459).

[17]Notwithstanding this argument, Lafont (2020a: 58–59, n. 45) points out that 'the creation and rationale of transnational institutions of judicial review … can be explained … as providing additional venues of scrutiny for claims of rights violations that take away the finality of national decisions … the point of creating transnational legal venues that can be triggered when available national venues have been exhausted is not to establish a final authority. To the contrary, the point of enabling an institutional dialogue between transnational and national institutions is to keep the possibility of contestation and debate open until a settled view on the rights in question emerges, and this alone can bring the process to a proper end.'

[18]But – importantly for this article – not only through interpretation. For there are other forms of informal constitutional reform, such as desuetude, the change of a constitutional custom, the ratification of an international treaty on constitutional matters, unconstitutional legislation that is not repealed and continues to be applied, and certain practices in the administrative sphere, among others.

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I therefore think that Lafont's argument fails to consider the problems that are seen in judicial authority from the critical perspective of democratic deliberation. 'Our constitutions, in many respects, are far from clear and univocal, and we can reasonably disagree about how to interpret them' (Martí 2014: 550), but it is unacceptable for the resolution of these disagreements to remain in the hands of the highest authority, which, as discussed above, in many cases becomes final, at least for a considerable period of time.

The scope of constituent power

Finally, defending judicial review on the grounds that the courts lack final authority because they cannot carry out or prevent constitutional reform also overlooks the various scopes of constituent power. Thus, while constituent power conceived in *sovereign* terms has unlimited scope, constituent power conceived in *post-sovereign* terms is limited by immutable contents and, in some cases, by the judicial review to which the amendment is subjected (Arato 2017). Therefore, in the first case, as Lafont (2020a) affirms, responses to court rulings through constitutional reform are foreseeable.

However, in the second case, contrary to what Lafont expects, the possibilities of qualifying the final authority of the courts by responding to their rulings through constitutional reform are non-existent or severely reduced. Such is the case with many constitutions that establish intangibility clauses – for example, Italy (Article 139), France (Article 89), Germany (Article 79.3), Greece (Article 110) and Portugal (Article 288), as well as various theories that appeal to ideas such as 'implicit material limits' or 'conceptual limits', and that understand constitutional rights as 'restricted areas', 'undecidable content' or 'trump cards against the majority', and thus as insulated from constitutional reform. In this sense, a paradigmatic example of so-called post-sovereign constituent power was that of the post-apartheid South African Constitution, which was carried out in accordance with the substantial guidelines of a provisional constitution, and whose final text was reviewed by the Constitutional Court, which took that interim constitution as a parameter. In short, these cases make it difficult, if not impossible, to respond to court rulings through constitutional reform.

On the other hand, the rights and principles entrenched in constitutions are formulated in abstract terms, are controversial in meaning and often conflict with each other, so it is necessary that someone has the power to decide what their scope, content and contours are (Bayón Mohíno 2010: 311). Under these circumstances, the constitutional principles and rights are not removed from every decision-making power, but inexorably remain in the hands of the decision-making power '*of someone*' (Bayón Mohíno 2010: 311, italics in original). The problem is that, in the aforementioned cases of post-sovereign constituent power, the final decision-making power usually remains in the hands of the courts so the exercise of the power of reform is limited. In such cases, constitutions do not just have reform procedures that are difficult to carry out, as I claimed above; even when these procedures are successfully carried out, there are many aspects that remain out of the hands of the majorities and their political representatives and, instead, in the hands of the courts.

In sum, the constitutionalization of political issues has its advantages, but at the same time it is not free of tensions with the principle of democratic deliberation. Concerning its advantages, Lafont (2020: 228, 236) submits that it allows structuring the process of debating and making decisions on controversial issues in terms of rights and freedoms – that is, arguing for the compatibility or incompatibility of the controversial issue with those

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rights and freedoms, and in such a framework, judicial review plays a key role. Along the same lines, Ferreres Comella (2000: 39, 47) maintains that this 'can be seen as a means to guarantee and preserve the practice of giving and asking for reasons', and 'creates incentives for the majority to take seriously the onus of giving reasons in defence of the law in that forum, in light of a set of constitutional principles that the majority itself accepts'. However, besides the already exhibited tension generated by the constitutionalization of certain issues through aggravated and counter-majoritarian reform procedures, here I have been concerned to propose that this tension increases when unmodifiable constitutional issues are settled. This reduces the number of issues on which society and its representatives can deliberate and decide democratically, since the courts continue to decide on them not only with the highest authority, but also with the final authority. Lafont (2020a), in contrast, denies that this removes political affairs from the public sphere, suggesting that, conversely, it transfers affairs of constitutionality to that sphere.[19]

In sum, these five problematic aspects show that despite subscribing to a deliberative vision at the level of democracy, Lafont's book, like many other works, still maintains a strong vision at the level of constitutionalism. In this way, the theory of judicial review offered by works like this is out of step with what the normative premises of deliberative democracy require of constitutionalism.

V. Conclusion

Deliberative democracy has become one of today's most dominant theories. Such has been its expansion that, in recent decades, a deliberative turn has also been taking place in the constitutional field. But deliberative democracy has not achieved the same dominance in this field because, although it is endorsed by the vast majority of scholars, their works do not accord with what the normative premises of deliberative democracy require from constitutionalism. What we see, then, is puzzling: many theories, which defend the ideal of inclusive dialogue in the democratic realm, propose strong institutional designs that are in tension with that ideal in the constitutional realm.

However, the current trend in deliberative constitutionalism seeks to overcome these inconsistencies. In this context, Lafont's book offers a powerful and inspiring justification for judicial review. Taking into account its appeal and influence, my aim has been to analyse Lafont's reinterpretation of judicial review *vis-à-vis* deliberative constitutionalism. The conclusion that emerges from my analysis is that the deepening of deliberative constitutionalism – a deliberative constitutionalism 'without shortcuts' –still requires Lafont's extraordinary theory of judicial review to undergo certain adjustments.

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[19]The constitutionalization of political affairs has been criticized by many authors (e.g. Waldron 2005: 261–63; Zurn 2002: 502–03), as has, more specifically, Lafont's position on this issue (Chambers 2020: 73, 76).

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