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Christopher F. Zurn's *Deliberative Democracy and the Institutions of Judicial Review* (book review)

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DELIBERATIVE DEMOCRACY AND THE INSTITUTIONS OF JUDICIAL REVIEW

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————— by Christopher F. Zurn. New York: Cambridge University Press, 2007. 374pp. Cloth. \$85.00/ £48.00. ISBN: 9780521867344. eBook format. \$68.00. ISBN: 9780511276200. Reviewed by James A. Gardner, University at Buffalo Law School, State University of New York. E-mail: [jgard \[at\] buffalo.edu](mailto:jgard@buffalo.edu).

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In the forty-five years since Alexander Bickel branded US courts “countermajoritarian,” a thriving academic industry has pondered the “legitimacy” of judicial review, the practice whereby appointed judges possess final authority to evaluate the constitutionality of actions taken by democratically elected officials. Questions about the legitimacy of judicial review can be raised in one of two very different senses. In one sense, such questions ask whether judicial review is a normatively desirable institution as judged against some extraconstitutional standard of institutional merit, often a democratic one. In a trickier, internal sense, questions about the legitimacy of judicial review ask whether courts have maintained fidelity to the constitution in the actual practice of judicial review. In the first sense, the issue is whether judicial review should or should not be incorporated into some constitutional system. In the second sense, judicial review is accepted as a constitutional fact, and the issue is whether courts are doing it properly. In the first sense, the legitimacy of judicial review is a question of sound institutional design; in the second sense, it is a question of how judges ought to practice their craft.

Entire forests have been leveled in the production of books and articles about the legitimacy of judicial review, and the vast bulk of the work on this subject is by legal academics who have taken up the question in the second sense: their purpose has been to attack or defend a particular practice of judging. The great exemplar is of course Ronald Dworkin who, although he writes at times like a political theorist, has in fact been engaged throughout his career in elaborating a deeply grounded defense of a heroic brand of constitutional adjudication. Even Bickel himself, who initially raised the legitimacy question, had little to say in his writing about democracy and a great deal to say about judging.

In *DELIBERATIVE DEMOCRACY AND THE INSTITUTIONS OF JUDICIAL REVIEW*, Christopher F. Zurn, a political philosopher at the University of Kentucky, has struck off in a different direction: he seeks to offer a justification for judicial review in the external sense, by showing that judicial review is an institutional arrangement that comports, or can be practiced in a way that comports, with a normatively attractive theory of democracy. This is an unusual project for a philosopher. In the first place, for many political philosophers the question “Is judicial review democratic?” is simply an uninteresting one. For pragmatists, conventionalists,

neo-Aristoteleans, [*621] communitarians, utilitarians, Schumpeterians, Downsians, and even classically liberal Lockean, not much turns on whether any particular political institution deserves or does not deserve the label “democratic.” Second, even among contemporary democratic theorists (with perhaps the one significant exception of Jeremy Waldron), the desirability of judicial review is rarely contemplated, mainly because most theories of democracy are simply too coarse to specify particular institutional arrangements, a great variety of which could in at least some circumstances be compatible with most such theories. Third, inquiries into the democratic legitimacy of specific institutions can be treacherous territory for philosophers because it is difficult to evaluate constitutional institutions in isolation from one another (you want to talk anti-democratic? how about the Senate? the Electoral College? the presidential veto? bicameralism? separation of powers?), and because so many real-world contingencies influence the way institutions actually operate that ex ante judgments about their democratic bona fides are extremely risky.

Nevertheless, undaunted, Zurn attacks his project with obvious enthusiasm. The book’s main argument goes something like this. Zurn dislikes extant justifications for judicial review because, in his view, the democratic theories upon which they rest are unappealing. The book therefore begins by showing that the standard justifications for judicial review do in fact rest ultimately on some underlying theory of democracy – typically a theory that Zurn describes, accurately, as “majoritarian democracy and minoritarian constitutionalism” (Ch. 2). Zurn then proceeds at length to review and criticize this theory and its variants, eventually offering as a superior alternative a slightly tweaked version of Habermasian deliberative democracy. From this account of deliberative democracy, Zurn derives a conception of constitutionalism, which he calls “deliberative democratic constitutionalism.” This conception of constitutionalism is procedural rather than substantive – it takes the primary purpose of a constitution to be the maintenance of the conditions for a successful deliberative democracy rather than, say, entrenching various substantive norms. This conception in turn provides Zurn with a justification for some form of “constitutional review,” by which he means an institutionalized process to evaluate whether official actions fall within constitutional bounds. Zurn takes pains here to argue that deliberative democratic constitutionalism provides no a priori justification for allocating the function of constitutional review to a court; it could in principle reside in other bodies.

The book concludes with two chapters laying out briefly some proposals for institutionalizing constitutional review consistent with the premises of deliberative democratic constitutionalism. One of these proposals happens to be judicial review in the form of a European-style constitutional court, but Zurn also endorses other mechanisms and forums for public and governmental constitutional review – institutions, that [*622] is to say, in which deliberation about the meaning of fundamental law can occur. These include legislative and executive self-review panels, a Canadian-style “notwithstanding” clause permitting legislative override of judicial rulings, constitutional requirements of legislative specification, forms of judicial deference to other branches, easy constitutional amendment through popular participation,

and deliberative opinion polling, among others. Any or all of these institutions, Zurn speculates, might encourage appropriate reflection and dialogue both within and among the various official power centers, and between civil society and officialdom.

The book's main flaw, it seems to me, is that it tries to do too much, and so ends up doing rather little. Among the goals Zurn sets for himself are analyzing the work of virtually every major theorist of judicial review, providing a better justification for judicial review than any of these thinkers, reconciling constitutionalism and democracy, which are generally thought to be in tension, and working out a blueprint for institutionalizing deliberative democracy – and not just any deliberative democracy, but the best possible account of deliberative democracy. This is the work of a career, not a book.

Zurn is at his best and most interesting when engaged in exegetical analysis of the thought of others who have written on judicial review. Their work is treated fairly, engaged sympathetically, and analyzed perceptively. But Zurn takes on too many of them. In the first seven of the book's nine chapters, he manages to work over Alexander Bickel, Learned Hand, Jesse Choper, John Hart Ely, Robert Dahl, Michael Perry, Ronald Dworkin, Jeremy Waldron, Samuel Freeman, John Rawls, Christopher Eisgruber, Frank Michelman, and Jürgen Habermas. More importantly, these portions of the book do rather little of its real work in advancing the main argument, to the point where the book at times feels like a somewhat contrived vehicle for the delivery of exegetical analyses of thinkers Zurn wishes to discuss.

Zurn states plainly at the outset that he intends the book primarily as a work of institutional design (p.30), yet turns to this task only in the final two chapters. If the portions of the book laying the theoretical groundwork are somewhat more developed than necessary, this portion seems disappointingly underdeveloped. Wearing his institutional design hat, Zurn seeks to derive from his theory of democratic deliberative constitutionalism a set of institutional structures that, if constitutionalized, would help create in practice the conditions in which a normatively attractive deliberative democracy could flourish. Although Zurn deduces from his theoretical premises a variety of institutional arrangements that might conceivably do the job, the utility of his suggestions is compromised by his refusal to offer any particular view about the likely behavior of the human beings who will inhabit the institutions he describes. This, it seems to me, is a significant oversight in a work of institutional design.

Think, for example, of the work of James Madison, the father of modern [*623] constitutional design. Madison's ingenious innovation lay not in his political theorizing, which was standard-issue, eighteenth-century natural law metaphysics, but in yoking his political theory to a robust political sociology. That innovation permitted him to evaluate and compare the efficacy of highly specific alternative institutional arrangements. Contemporary constitutional designers are certainly entitled to replace Madison's political theory with a more appealing modern alternative, but if they are to apply that theory helpfully to questions of institutional design, they must also adopt some account of political behavior. That is why many contemporary works of constitutional design deal extensively with unruly real-world variables such as incentive structures, agency costs, transaction costs, political rationality, and political culture. Moreover, a new, fast-growing body of empirical research on the behavior of individuals in deliberative

settings suggests grounds for great caution in the construction of political institutions suitable for deliberative varieties of democracy (Mendelberg 2002).

Zurn repeatedly shows that he is aware that the nature of actual political behavior could make or break his institutional proposals, but he is content simply to note the problem without taking a position. "The problem of institutional design," he observes, "is . . . one of mediating between the ideal and the real" (p.323). It is, but Zurn's withdrawal from the field at this point in the argument leaves the reader with two chapters of concrete institutional proposals derived from high political theory, yet lacking any tools to evaluate their feasibility.

DELIBERATIVE DEMOCRACY AND THE INSTITUTIONS OF JUDICIAL REVIEW will be of interest mainly to political theorists concerned with the justifications for judicial review. Because it offers no prescriptive conclusions about the practice of judging, the book will likely be of somewhat less interest to legal scholars and political scientists who study constitutional adjudication. The book also makes a modest contribution to the growing literature on deliberative democracy, and so might be of interest to political theorists for that reason as well.

REFERENCE:

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