Deliberative Constitutional Amendments

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There is continuing debate within constitutional theory over the nature and function of constitutions, their provisions and their amendment. In examining this debate, two main theories come into play—the aggregative approach and the deliberative democratic approach. The aggregative approach is based on the idea that constitutions are mechanisms through which preferences of the people are translated into policy decisions by allocating authority to representative institutions. The deliberative approach, on the other hand, posits that constitutions are grounded in public reason, through deliberation, and serve to restrict when and how a government can affect its population's interests. By taking a mid-level theoretical approach to comparative constitutional law, the author argues that although Switzerland's use of referendums for constitutional amendment and prospective reform of the Canadian Senate cases can be interpreted as both aggregative and deliberative processes, they are more aptly classified as the latter. The author concludes by identifying opportunities to bring the countries' constitutional amendment processes closer to deliberative democratic ideals and suggests specific initiatives for both the Swiss and Canadian amendment processes.

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Introduction

Constitutional amendment processes raise some of the most pressing issues in constitutional theory. In this article, I will examine two. First, analysis of constitutional amendment processes can lead us to questions about the very nature of constitutions. On the one hand, we can imagine a constitution to evidence the equilibria of power and the self-interested bargains amongst those who had sufficient power to impose their political will on the constitution-making process. On the other hand, we can think of a constitution as the *output* of processes that can be justified in deliberative terms, and the *source* that institutions of a given polity draw upon in order to justify their acts when vital national interests are at stake. If one were to frame debates about constitutionally entrenched amendment processes in these terms, one would ask whether they should

be understood primarily to regulate exercises of political will or as acts of collective deliberation.[1]

Second, constitutional amendment processes can raise basic questions about the appropriate distribution of authority and functions of actors in a constitutional order.[2] One might argue that constitutions allocate authority to representative institutions and channel political power through them. According to this view, courts should generally defer to the decisions of the political branches.[3] If extended to the processes of constitutional amendment, this position might suggest that the act of constitutional amendment lies beyond the competence, or legitimate reach, of the judiciary. In contrast, one might claim that constitutions are essentially power-constraining mechanisms: They prevent political actors from infringing on some sets of important interests.[4] When disputes arise as to whether a specific instance of state action violates such interests, an institution must adjudicate, and for many theorists courts are the optimal forums of adjudication.[5] For the purposes of this article, one might broach the distribution of authority question by asking whether constitutional

1. There is a deeper question about whether the people can appeal to a concept of law that would authorise an exercise of political power outside of the framework of the positive law. See Martin Loughlin, "What is Constitutionalism?" in Petra Dobner & Martin Loughlin, eds, *The Twilight of Constitutionalism?* (Oxford: Oxford University Press, 2010) 47 at 51. Loughlin seems to find the resources for answering this question in the affirmative when he describes what he calls "ancient constitutions", in which

> the constitution expressed a political way of being. Understood as such, constitutions can no more be made than language is made: like language, constitutions evolve from the way of life of certain groups that come to conceive of themselves as 'a people' or 'nation'. There may come moments when attempts are made to specify some of the basic rules of political existence in a text, but this document no more provides the source of the nation's constitution than a grammar book is the authoritative source of a language. In this understanding, written constitutions cannot provide the foundation of governmental authority.

Ibid at 49.

2. See *ibid* at 56–58 (contrasting the Madisonian and Hamiltonian views of constitutionalism).

3. *Ibid* at 56–57.

4. *Ibid* at 57–58.

5. For a survey of the literature and a distinctive, non-consequentialist version of this argument, see Yuval Eylon & Alon Harel, "The Right to Judicial Review" (2006) 92:5 Va L Rev 991.

amendment processes should be viewed primarily through the lens of power allocation or power constraint, and as a corollary, whether the political branches engaged in constitutional amendment should or should not be subject to judicial oversight.

We can frame these two debates in terms of a larger contest between aggregative and deliberative democratic theories.[6] According to the former, democracy aims primarily to aggregate preferences and translate them into legal and policy outcomes. Constitutions, in this view, are mechanisms by which interest groups attempt to gain advantage and entrench a set of policy preferences against future reversals. Also, courts are limited to enforcing the original bargains and/or deferring to the ongoing policy choices of the political branches.[7]

By contrast, the core claim of deliberative democratic theory has been articulated by Amy Gutmann: "[P]ersonal freedom and political equality are valuable to the extent that they express or support individual autonomy—the willingness and ability of persons to shape their lives through rational deliberation."[8] Gutmann continues that "persuasion [is] the most justifiable form of political power because it is the most consistent with respecting the autonomy of persons, their capacity for self-government".[9] The central challenges for deliberative democrats who address issues of constitutional governance and design are: (1) ensuring political power is exercised and guided by norms of persuasion; and (2) identifying means of safeguarding the autonomy interests of citizens. In the deliberative view, a constitution should ideally be the *result* of deliberation in which parties take one another's views into account as they establish the basic terms of political interaction and should *constitute*

6. See Cass R Sunstein, *Designing Democracy: What Constitutions Do* (New York: Oxford University Press, 2001) at 7.

7. See e.g. William M Landes & Richard A Posner, "The Independent Judiciary in an Interest-Group Perspective" (1975) 18:3 JL & Econ 875. For an application of this "insurance theory" to developing democracies, see Jodi S Finkel, *Judicial Reform as Political Insurance: Argentina, Peru, and Mexico in the 1990s* (Notre Dame, Ind: University of Notre Dame Press, 2008). See also Tom Ginsburg, *Judicial Review in New Democracies: Constitutional Courts in Asian Cases* (Cambridge, UK: Cambridge University Press, 2003) at 23.

8. Amy Gutmann, "Democracy" in Robert E Goodin, Philip Pettit & Thomas Pogge, eds, *A Companion to Contemporary Political Philosophy*, 2nd ed (Oxford: Blackwell, 2007) 521 at 527. See also Hoi L Kong, "Election Law and Deliberative Democracy: Against Deflation" (2015) 9:1 JPPL 35 at 36 [Kong, "Election Law"].

9. Gutmann, *supra* note 8.

a framework that guides and constrains government action subsequent to the constitutional founding.

If one accepts that constitutions provide this kind of a framework, constitutional amending formulas can be understood as mechanisms through which a polity can deliberate about the reasons that are embedded in a constitution, and in particular, about the conditions under which change to the public reason of a polity,[10] as it is enshrined in a constitution, can be undertaken.[11] In this deliberative democratic view, courts play a central role in overseeing constitutional amendment processes, insofar as they can require governments to offer reasoned justifications for actions taken under constitutional authority, including acts relating to the constitution's amendment.[12]

This article aims to engage the debate between aggregative and deliberative theories of constitutions in the context of constitutional amendment processes, and has two primary goals. First, it will examine amendment processes in two jurisdictions—Switzerland and Canada—in order to assess whether they should be characterized as deliberative or aggregative in nature. In so doing, the analysis will engage theoretical debates about the nature of constitutions and constitutional amending formulas, and argue for the value of the deliberative position and the significance of characterizing a given constitutional order and its amending regime as deliberative in nature.

Second, the article will argue that there is a range of plausible institutional mechanisms for rendering constitutional amendment processes optimally deliberative. The specific choices made in a given constitutional order are driven by features of that order, and highlight different aspects and strands of deliberative democratic theory. In the course of pursuing these two goals, I will aim to contribute to the literature on comparative constitutional law, and will next place the article within this body of writing.

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10. This article draws upon John Rawls' conception of "public reason". See John Rawls, "The Idea of Public Reason" in James Bohman & William Rehg, eds, *Deliberative Democracy: Essays on Reason and Politics* (Cambridge, Mass: MIT Press, 1997) 93.

11. See Sunstein, *supra* note 6 at 240.

12. This idea of the deliberative democratic conception of judicial review has been expressed by Sunstein when he writes of "the creative use of judicial power, not simply to 'block' democracy but to energize it and to make it more deliberative". *Ibid* at 241.

Adopting Vicki Jackson's classification scheme, one might situate the present article relative to a universalist position that aims, through comparative analysis, to stake out a position in theoretical debates, and a position she calls conceptual functionalism.[13] In the former approach, comparative analysis is "a central means of trying to answer important jurisprudential or philosophical questions".[14] The universalist's goal is to use "legal sources as examples to help to refine, and to clarify, the analytics of a general problem in democratic or political theory".[15] By contrast, conceptual functionalists "hypothesize about why and how constitutional institutions or doctrines function as they do, and what categories or criteria capture and explain these functions".[16] They cite examples from a set number of systems that allow them to "conceptualize in ways that generate comparative insights or working hypotheses that can be tested through other methods".[17]

This article does not line up neatly with either camp. Although I do undertake a comparative analysis in order to answer an important jurisprudential question about the nature of constitutional amending formulas, I do not attempt to extract from the comparative examples a resolution of a specific problem in democratic or political theory. In addition, while I do offer hypotheses about why constitutional amending formulas take the form they do in the jurisdictions under examination, my objective is not to generate hypotheses or insights that are subject to further testing. Instead, the primary purpose of this article is to engage in an exercise of mid-level constitutional theory that aims to show the various ways that constitutional amending formulas, in different constitutional contexts, can give effect to deliberative democratic theory's aspirations.[18]

13. Vicki C Jackson, "Comparative Constitutional Law: Methodologies" in Michel Rosenfeld & András Sajó, eds, *The Oxford Handbook of Comparative Constitutional Law* (Oxford: Oxford University Press, 2012) 54 at 60–63.

14. *Ibid* at 61.

15. *Ibid* at 60.

16. *Ibid* at 63.

17. *Ibid*.

18. For an example of this mid-level constitutional theorizing in which normative political theory is examined against a set of concrete institutional and political circumstances, see Hoi L Kong, "Republicanism and the Division of Powers in Canada" (2014) 64:3 UTLJ 359.

This mid-level theoretical approach to comparative constitutional law has several features and aims. First, the approach understands the influence between theory and comparative analysis to be reciprocal in nature. The comparative analysis clarifies significant elements of the relevant theory, and at the same time, the theory illuminates distinctive features of the institutional contexts that are compared. Second, the approach is distinctively normative and prescriptive. Through the reciprocal movement between theorizing and comparative assessment, the approach allows the theorist to offer prescriptions that are sensitive to the specific institutional contexts to which they apply. The mid-level comparative constitutional law theorist therefore tests theoretical claims against specific institutional contexts, and assumes that a given theory will have different applications depending on the features of those contexts. This theorist, moreover, adopts an expressly prescriptive stance that aims to respond to, and shape, the deep normative commitments of the relevant constitutional polities.

Before broaching either of the main goals of this article, or undertaking its comparative methodology, I will reflect on what is meant by a constitutional amendment and the normative significance of acts of constitutional characterization. This will provide definitional clarity and set the theoretical terms that this article's arguments will follow.

I. Constitutional Amendments: Definitions and Characterizations

The question of what constitutes a constitutional amendment has been the subject of some debate. Certain changes to a constitutional framework are of such a magnitude that it is implausible to label them as amendments; they are better characterized as initiatives that give effect to a constitutional revolution. Whereas *amendment* implies change that alters a constitutional order while ensuring that that order retains a recognizable shape, the concept of constitutional *revolution* implies

a fundamental change.[19] It is these latter kinds of changes that eternity clauses, such as those in the German constitution, aim to safeguard against.[20] To alter the features of these foundational principles of a given order, whether they are enshrined expressly in a constitutional text or not, would be to effect a revolution and not an amendment.

Acts of constitutional interpretation lie at the other end of the spectrum. In these, courts change the constitution because its terms are given a novel meaning, but the change occurs within the relatively stable framework of existing constitutional understandings.[21] Whether a particular act should be considered to be an interpretation or an amendment can be a matter of controversy. Critics who charge courts with overstepping their boundaries in constitutional review cases often claim that the judiciary is "legislating", but I think the better rendering of the charge is that courts are amending a constitution, rather than simply interpreting what a constitution means. By contrast, when defenders of a given contested decision claim that the court is engaged in a legitimate *interpretation* of the constitution, I believe they typically mean that the court has not extended the constitution beyond its recognizable limits.

Finally, authors have claimed that mere adherence to a constitutional amending formula need not result in a constitutional amendment, properly understood, if that adherence does not significantly alter the constitution.[22] For instance, a measure that complied with an amending formula but only enshrined a universally accepted understanding of a constitutional provision would not be understood to be an amendment because it would not alter the constitution in any significant way.

For present purposes, I will define an amendment as a change to a constitution that significantly alters its meaning, but does not

19. For a similar distinction between changes that occur within a constitutional paradigm and those that occur outside of such a paradigm, see Walter F Murphy, "Merlin's Memory: The Past and Future Imperfect of the Once and Future Polity" in Sanford Levinson, ed, *Responding to Imperfection: The Theory and Practice of Constitutional Amendment* (Princeton, NJ: Princeton University Press, 1995) 163 at 172–73.

20. See e.g. *ibid* at 176.

21. For an analysis of the relationship between amendment and interpretation, see Sanford Levinson, "How Many Times Has the United States Constitution Been Amended? (A) < 26; (B) 26; (C) 27; (D) > 27: Accounting for Constitutional Change" in Levinson, *supra* note 19, 13 at 14–18.

22. See *ibid* ("[t]here is no reason, I am arguing, to call a numbered textual addition a genuine 'amendment' unless it truly changes the pre-existing legal reality" at 26).

fundamentally change the constitutional order.[23] This definition is significant because, as we shall see, the dividing line between revolution and amendment is pertinent to the Swiss case, while the borderline between amendment and interpretation is relevant to the Canadian case. With this definition stipulated and explained, I will now consider the issues that surround attempts to characterize the process of constitutional amendment.

In general, selecting between aggregative and deliberative characterizations of a set of constitutional facts can be a complex affair. This is because a constitution is at one and the same time the product of political choices and a source of normative reasoning. Consider the division of powers provisions of a federal constitution. These reflect constitutional bargains struck at the moment of a constitutional text's coming into being. Yet, once enshrined, they are the object of ongoing interpretation, as courts and political actors alike seek to structure the evolving political relationships within the constitutional order in light of the normative commitments they glean from the constitution.

Given this mixed character of constitutions, one might pose the more fundamental question of why they should be considered authoritative. On the deliberative democratic view sketched above, a constitution is authoritative because it is a body of reasons to which an appeal can be made in order to justify state institutions and actions to those who are subject to their authority. According to John Rawls, "our exercise of political power is proper and hence justifiable only when it is exercised in accordance with a constitution the essentials of which all citizens may reasonably be expected to endorse in light of principles and ideals acceptable to them as reasonable and rational".[24]

23. There are alternative ways of classifying amendments and related constitutional changes. See e.g. Donald S Lutz, "Toward a Theory of Constitutional Amendment" (1994) 88:2 Am Pol Sc Rev 355. Moreover, many theorists of constitutional amendments hold to the view that any changes consistent with the procedures set out in a constitutional amending formula constitute valid amendments. See e.g. John R Vile, "The Case Against Implicit Limits on the Constitutional Amending Process", in Levinson, *supra* note 19, 191. See also, Yaniv Roznai, "The Theory and Practice of 'Supra-Constitutional' Limits on Constitutional Amendments" (2013) 62:3 ICLQ 557.

24. Rawls, *supra* note 10 at 96.

If we accept this view of constitutional authority, we should attempt to interpret, wherever possible, a constitution in ways that can render its terms reasonable in Rawls' sense. In this deliberative democratic view, a constitution provides the framework of reasons that is the normative point of reference against which state action is understood, measured and justified. If this is true, the processes governing constitutional amendment should also be understood in light of this requirement of justification.

One feature of constitutional amending formulas, which would seem to require an explanation, is that they often impose burdensome requirements on legislative bodies. One way of understanding such requirements is to view them as the outputs of political bargains and as attempts to secure such bargains against subsequent reversal.[25] Yet this interpretation does not tell us why we should accept either the amendment process—or any resulting constitutional amendment—as authoritative. In the constitutional theory literature, such processes are often understood to be anti-democratic because they bind future democratic majorities to a consensus that they may not share.[26] According to this criticism, such amendments can become binding in effect because those in positions of power are willing to enforce them[27] or because the people obey them as a matter of habit or fear.[28] However, neither of these explanations offers compelling normative reasons for accepting the authority of a constitution. If we were to accept as sufficient for establishing constitutional validity the mere fact that those in power are willing to enforce a constitution, including its amending formula, and that citizens

25. For a critical analysis of this conception of constitutional amendments, see Stephen M Griffin, "Constitutionalism in the United States: From Theory to Politics" in Levinson, *supra* note 19, 37 at 40–41.

26. See Stephen Holmes, "Precommitment and the Paradox of Democracy" in Jon Elster & Rune Slagstad, eds, *Constitutionalism and Democracy* (Cambridge, UK: Cambridge University Press, 1988) 195 at 195.

27. This view of all law, including constitutional law, can be gleaned from Schmitt's view of decisionism, which he derives from Hobbes' conception of sovereignty, and is quoted in Rune Slagstad, "Liberal Constitutionalism and Its Critics: Carl Schmitt and Max Weber" in Elster & Slagstad, *supra* note 26, 103 at 110.

28. The argument against entrenching tradition through a constitution is well-established in the literature. See e.g. Holmes, *supra* note 26. "According to Locke, 'an Argument from what has been, to what should of right be, has no great force.' Paine endorsed this view with a vengeance. Democracy, for him, was the routinization of impiety." *Ibid* at 201 [footnotes omitted].

habitually follow its terms, we would seem to be committed to accepting that a simple compilation of authoritarian commands could be considered to be a constitution. But such a conception of a constitution seems to offer no reasons for accepting its authority. It only seems to explain why an exercise of power is effective, and as such, it fails to explain why a constitution is normatively distinct from any generic and unjustified exercise of public power.[29]

In order to avoid this implication, we need to offer a different interpretation of amendment processes that highlights their role in supporting the reason-giving function of constitutions.[30] Consider the case of constitutional amending formulas that impose higher than normal burdens on legislative processes.[31] In the deliberative view, these burdens create conditions for broader or deeper deliberation than is the case in situations of ordinary legislative change. If, as in Canada, those deliberative hurdles only apply to legislative bodies, a deliberative democratic theorist might claim that such bodies are the appropriate *loci* of the relevant forms of deliberation, and their outputs will therefore be supported by public reason in the sense set out above. This claim is bolstered by the fact that legislatures have the resources to study intensively the potential effects of a constitutional amendment and are habitually faced with questions of governance that affect the polity as a whole. As such, they are well practiced in the inevitable balancing of interests and concerns that legislation of any kind entails and are likely to adopt the correct perspective.[32] This would also explain the role ordinary parliaments in the Westminster system play in amending the constitutive terms of their

29. The problem as stated can be understood in light of the debate between liberal constitutionalists, on the one hand, and Schmitt and his followers on the other. See David Dyzenhaus, "Introduction: Why Carl Schmitt?" in David Dyzenhaus, ed, *Law as Politics: Carl Schmitt's Critique of Liberalism* (Durham, NC: Duke University Press, 1998) 1.

30. In the general context of constitutional ordering, Holmes has explained that "Constitutions may be usefully compared to the rules of a game or even to the rules of grammar." Holmes, *supra* note 26 at 227.

31. For a discussion of these, and their counter-majoritarian effects in the American context, see David R Dow, "The Plain Meaning of Article V" in Levinson, *supra* note 19, 117 at 121–22.

32. For a summary of these kinds of arguments in favour of legislative and against direct democratic rule, see Stephen Tierney, *Constitutional Referendums: The Theory and Practice of Republican Deliberation* (Oxford: Oxford University Press, 2012) at 24 [Tierney, *Constitutional Referendums*].

polities. Defenders of the parliamentary system and its defining features—including its incorporation of powerful political parties and open and competitive electoral campaigns—claim that it is an ideal system for facilitating public deliberation about a constitution's terms.[33] According to this view, well-functioning legislatures are part of a system of competitive political parties that present broad policy platforms—that are themselves the result of internal party deliberation—and that include items dealing with constitutional amendments. If citizens can vote on these platforms with relatively high levels of information, then the amendment process likely satisfies the requirements for public justification.[34] As we shall see shortly, similar deliberation-focused arguments can be made about the role of referendums in constitutional amendment processes.

The discussion in this section should not be taken to imply that existing amendment processes perfectly capture the deliberative ideal set out above. Indeed, proposals are often made for bringing them closer to that ideal, and some will be offered below. The point here is that if we are to characterize amendment processes and their constitutions as grounded in public reason and not mere projections of political will, we will need an account that demonstrates why they should be accepted as authoritative.

II. Concrete Cases: Deliberative Democracy and Contextual Analysis

In this Part, I will work out in greater detail what such a demonstration will look like in concrete sets of circumstances. As part of this discussion, I will also examine what role courts should play in the amendment process. If we accept that courts are in the best position to articulate what the public reason of a constitution consists of, and to hold constitutional actors to its terms,[35] then we might envision a role for courts in supervising the amendment process. By contrast, if we think that the amendment process

33. See Richard Bellamy, *Political Constitutionalism: A Republican Defence of the Constitutionality of Democracy* (Cambridge, UK: Cambridge University Press, 2007) at 175.

34. See Adam Tomkins, *Our Republican Constitution* (Portland, Or: Hart, 2005) ch 4 at 115ff.

35. See Rawls, *supra* note 10 (the judiciary is "the only branch of government that is visibly on its face the creature of that reason [public reason] and of that reason alone" at 111).

is fundamentally one in which political actors assert their political will, or are engaged in deliberative practices that lie beyond the supervisory capacities of courts, we would be suspicious of such a role. I turn now to consider how these and the other debates described above play out in the concrete circumstances of the Swiss case.

A. Switzerland and the Ban on Minarets: A Deliberative Democratic Amendment Process?

In this section, I will focus on how best to characterize the 2009 popular initiative that resulted in the insertion into the Swiss Federal Constitution of a clause that bans the construction of minarets. Under Article 139 of the Federal Constitution, a group of citizens can, via a popular initiative that garners the support of at least 100,000 signatories, propose an amendment to the constitution. The procedures surrounding this form of popular initiative are complex, and I will only focus on a few elements, without delving deeply into the relevant timelines, or examining in depth all of the actors.[36]

First, a federal authority conducts a preliminary analysis of the title and text of the initiative. Once approved, the title and text are published.[37] From that point on, those responsible for the popular initiative must gather 100,000 signatures within a set time frame.[38] Once the relevant authority certifies the signatures, the initiative is filed with the Federal Council for examination.[39] The Council must then, within a specified time period, present to the Federal Assembly a report on the merits and validity of the initiative. The Federal Assembly must in response pronounce on the validity and merits of the initiative.[40] Article 139 of the Federal Constitution sets out three conditions of validity: unity of form, unity of subject matter and conformity with the imperative rules of international law.[41] The courts have established a fourth condition: The

36. The following discussion of the amendment process summarizes material found in Andreas Auer, Giorgio Malinverni & Michel Hottelier, *Droit constitutionnel suisse*, 3rd ed (Bern: Stämpfli, 2013) vol 1 [translated by author and Camilla Rothschild].

37. See *ibid* at 246.

38. See *ibid*.

39. See *ibid* at 247–48.

40. See *ibid* at 248–49.

41. See *ibid* at 249–52.

initiative must be practicable.[42] If the Federal Assembly decides that an initiative does not meet these conditions of validity, it may invalidate it, in whole or in part.[43]

If, however, the Federal Assembly decides that an initiative satisfies the conditions for validity, it may nonetheless assess its merits, and has four options:

> (1) it can approve the initiative and recommend its acceptance by citizens; (2) it can oppose the initiative by recommending its rejection; (3) it can oppose the initiative by means of a counter-proposal and recommend the rejection of the initiative and acceptance of the counter proposal; or (4) it can submit the initiative to the citizenry with no recommendation.[44]

Once submitted to the people for a referendum vote, an initiative must be approved by a majority of the population of the entire country, as well as a majority of the cantons.[45] Yet even if an initiative is approved by this double majority and enters into force, a question arises as to whether or not the amendment applies directly, and therefore, whether it requires legislative measures to be effective.[46]

The initiative concerning the banning of minarets was proposed by the Democratic Union of the Centre and the evangelical conservative Federal Democratic Union parties, and opposed by other major political parties, as well as major religious groups. The initiative attracted 115,000 signatures. Both the Federal Assembly and the Federal Council found that the initiative did not fall within any of the grounds for invalidity set out in Article 139. In particular, they found it did not violate any peremptory norms of international law—the *jus cogens*. However, both recommended that the initiative be rejected on its merits. The Federal Assembly validated the initiative and put it before the people for a vote. The initiative passed the double majority vote and is now enshrined as Article 72(3) of the Federal Constitution.[47]

42. See *ibid* at 252–53.
43. See *ibid* at 249.
44. *Ibid* at 253.
45. See *ibid* at 254.
46. See *ibid* at 260–61.
47. For the above narrative of the events surrounding the ban, see Lorenz Langer, "Panacea or Pathetic Fallacy? The Swiss Ban on Minarets" (2010) 43:4 Vand J Transnat'l L 863 at 865–75.

The debate this amendment gave rise to has been well framed by Moceckli, as opposing,

> on the one hand, those who depict the people as the absolute sovereign on whose will, finding its expression in direct democratic processes, no limits can be imposed with, on the other hand, those who argue that in a state based on the rule of law, even the people must comply with certain fundamental rules, including respect for human rights, and that courts can review expressions of the popular will for compliance with these rules.[48]

Doctrinally speaking, the debate pits those who—relying on Article 190 of the Federal Constitution—argue that conflicts between law that complies with the Federal Constitution but violates international law should be resolved in favour of the latter against those who argue that newer constitutional law should prevail over conflicting international law.[49] These latter scholars argue that the express language of Article 139 of the Federal Constitution only renders invalid those constitutional initiatives that violate peremptory norms of international law, and that a refusal to apply Article 139 would "make a mockery of the democratic process".[50] Moreover, these scholars argue that if it is the intention of the voters in an initiative to violate international law, such an intention should trump the requirements of international law in the constitutional context, just as a similar legislative intention should in the context of ordinary legislation.[51] The Federal Council agreed with this group of scholars in a 2010 report.[52]

For present purposes, the doctrinal disagreement is important only insofar as it highlights the underlying debate between aggregative and deliberative views of constitutional amendments. For my purposes, the extent of human rights constraints imposed by international law is significant not primarily because it is authorized by the Federal Constitution (although of course that matters as a question of positive law), but because it highlights an obligation of reasoned justification.

48. Daniel Moeckli, "Of Minarets and Foreign Criminals: Swiss Direct Democracy and Human Rights" (2011) 11:4 HRLR 774 at 775.

49. *Ibid*. Article 190 states: "Le Tribunal fédéral et les autres autorités sont tenus d'appliquer les lois fédérales et le droit international." *Constitution fédérale de la Confédération suisse* art 190 [*Swiss Const*].

50. Moeckli, *supra* note 48 at 784.

51. *Ibid* at 785.

52. *Ibid*.

In the deliberative democratic view, citizens with interests affected by government action undertaken pursuant to the constitutional provision banning the construction of minarets are owed a justification that they could reasonably be expected to accept. Human rights provisions, in this view, are instruments for identifying sets of vulnerable interests that citizens reasonably expect to have secured against infringements by the state. A broad interpretation of such rights will bring into the scope of protections a set of vulnerable interests and populations broader than that which is protected by the bare *jus cogens*.[53]

In addition, I would like to pose the question of whether we should understand exercises of the popular initiative in aggregative or deliberative terms. The aggregative case is perhaps easier to make. The Article 190 *jus cogens* limit should be read in light of the limits imposed by Articles 194(2) and 193(4), which state that in cases of partial and total revisions of the Constitution, "[l]es règles impératives du droit international ne doivent pas être violées".[54] These articles are, in effect, eternity clauses that set out the foundational norms of the Swiss polity. Any change to them would amount, in the definitional terms that we set out in the beginning of this article, to a revolution and not an amendment. Such a conclusion is bolstered by the fact that their alteration is expressly prohibited, and thus by the terms of the Swiss Constitution itself, would not be understood to constitute an amendment. It is important, however, to note that the Federal Assembly determines whether these limits are

53. It is worth noting that the protections provided by the *jus cogens* can be understood to be "essential for the very existence of the democratic legal order itself". Erika de Wet, "The Prohibition of Torture as an International Norm of *jus cogens* and Its Implications for National and Customary Law" (2004) 15:1 Eur J Intl L 97 at 105. The argument in the main text would extend the argument in order to claim that certain basic human rights are similarly essential to the democratic legal order, and therefore should not be overridden by means of a constitutional amendment.

54. *Swiss Const*, *supra* note 49, art 193(4). According to Article 138, the entire Constitution is subject to reform by means of a popular initiative and referendum. Article 138 states: "100 000 citoyens et citoyennes ayant le droit de vote peuvent, dans un délai de 18 mois à compter de la publication officielle de leur initiative, proposer la révision totale de la Constitution. Cette proposition est soumise au vote du peuple." *Ibid*, art 138 [footnotes omitted].

violated and that the courts cannot review any such determination.[55] As a consequence, if the Federal Assembly decided to validate a popular initiative that proposed an amendment contrary to the *jus cogens*, and submitted it to a referendum vote, the ultimate power to determine whether it would enter into the Constitution would lie with the people.

Theorists with aggregative leanings, including Loughlin,[56] might argue that this institutional allocation of authority vests in the people the power to make decisions about the fundamental limits of constitutional change, and therefore gives to the sovereign people the power to define for themselves, in Carl Schmitt's terms, who constitutes the friend and who the enemy.[57] In this view, there is no place for the judiciary to review the decisions of the people in this context, not because such review can find no textual warrant, but because it is fundamentally illegitimate as it interferes with a prudential and will-expressive act of the people. It is only the people themselves, Schmitt argues, engaged in an act of self-definition, who can define the enemy, and only they can determine whether a given group presents a threat to their own "form of life".[58]

What role might a constitution have according to this conception of the constituent power? Loughlin has argued that the "constituent power [expresses itself], as the generative aspect of the political power relationship".[59] Loughlin seems to suggest that although the constituent power finds expression in constitutional law via certain institutional forms, and is thereby subject to some normative constraints, it exists as a force outside of any formal legal limits and can be understood as a pure

55. See *ibid* ("[l]orsqu'une initiative populaire ne respecte pas le principe de l'unité de la forme, celui de l'unité de la matière ou les règles impératives du droit international, l'Assemblée fédérale la déclare totalement ou partiellement nulle", Article 139(3)); *ibid* ("[l]'Assemblée fédérale a en outre les tâches et les compétences suivantes: elle statue sur la validité des initiatives populaires qui ont abouti", Article 173(1)(f); *ibid* ("[l]es actes de l'Assemblée fédérale et du Conseil fédéral ne peuvent pas être portés devant le Tribunal fédéral. Les exceptions sont déterminées par la loi", Article 189(4)). I thank Eva-Maria Belser and Michael Hanni at the Institute of Federalism, Fribourg, Switzerland for assisting me with this analysis.

56. Martin Loughlin, "The Concept of Constituent Power" (2014) 13:2 European J Political Theory 218 [Loughlin, "Constituent Power"].

57. Carl Schmitt, *The Concept of the Political* (Chicago: University of Chicago Press, 1996) at 26.

58. *Ibid* at 27, 76–77, 136.

59. Loughlin "Constituent Power", *supra* note 56 at 218.

expression of political will in pursuit of the interests of the people.[60] In the context of the Swiss constitutional order, Loughlin might say that the constituent power finds its concrete expression in the people exercising their political will to identify who should be treated with equal regard. Those who fall outside of the class of political equals are "dominated", but such domination is the inevitable result of any political decision that involves the clashing of interests.[61] Domination is a necessary consequence of governing, and specific instances of it are brought under the normative control of law only at the expense of compromising the power to engage in prudential decision making that inheres in exercises of constituent power. In Loughlin's view, as I have set it out here, the popular initiative banning the construction of minarets, as well as any other amendment that violated fundamental human rights, should be understood to be an exercise of the aggregated will of the Swiss polity, and not as an expression of public reason.

I would like to explore another possible interpretation of the popular initiative. Such a reconstruction would view the power of popular initiative as one element of a sophisticated constitutional architecture that seeks to ensure that foundational constitutional decisions, as well as much of the ordinary business of governing, can be reasonably justified to those who are subject to the state's authority. Consider first the mechanism of Article 139(5) of the Swiss Constitution, under which the Federal Assembly can react to an initiative by issuing a recommendation or a counter-proposal. This is one instance whereby the popular will of the people can be confronted by the considered reasons of a representative assembly.[62] Moreover, the double majority requirement enshrines one form of minority protection, namely that which is expressed in the jurisdictional distribution of authority to cantons, which themselves

60. *Ibid* at 232–33 (in order to avoid totalitarian implications, Loughlin claims that the people's identity is always open).

61. *Ibid* at 227.

62. For an examination of the various ways in which Swiss semi-direct democracy aims to combine the benefits of representative and direct democracy, see Wolf Linder, "Direct Democracy" in Ulrich Klöti et al, eds, *Handbook of Swiss Politics*, 2nd revised ed (Zurich: Neue Zürcher Zeitung, 2007) 101 at 110. One concern with citizen-initiated referendums is that they will reflect the will of the minority that introduced them, and will not represent the considered judgment of representatives about the aggregated interests of the public. See e.g. Laurence Morel, "Referendum" in Rosenfeld & Sajó, *supra* note 13, 501 at 505.

reflect sectional interests, including those of language and religion.[63] The double majority requirement provides a structural protection for those who may be particularly vulnerable to acts of majority political will that disregard their interests.[64] Even when a popular initiative fails, it can have the effect of stimulating public debate, forcing compromise and putting on the public agenda issues that policy elites might otherwise ignore.[65] But the diffusion of forums for deliberation extends beyond the specific instance of the popular initiative. I will only list a few here.[66] The equal power in the Federal Legislative Assembly of the Conseil des États, (which provides essentially equal representation) and the Conseil National (which has proportional representation), ensures in the eyes of some Swiss commentators that "les decisions ne se fondent pas sur la règle de la majorité, mais sur la recherche d'accords à l'amiable ou de compromis".[67] Similarly, the executive branch—the Conseil Fédéral—is comprised of representatives from all the principal political parties, in proportion to their representation in the Conseil National.[68]

63. For the history of Swiss federal institutions that reflect and protect these kinds of differences, see Andre Eschet-Schwarz, "Can the Swiss Federal Experience Serve as a Model of Federal Integration?" in Daniel J Elazar, ed, *Constitutional Design and Power-Sharing in the Post-Modern Epoch* (Lanham, Md: University Press of America, 1991) 161.

64. For discussion of the increasingly controversial role that the double majority requirement plays in safeguarding cantonal and minority interests, see Hanspeter Kriesi & Alexander H Trechsel, *The Politics of Switzerland: Continuity and Change in a Consensus Democracy* (Cambridge, UK: Cambridge University Press, 2008) at 39. For a description of minority groups whose interests have and have not been protected by the double majority requirement, see Adrian Vatter, "Federalism" in Klöti et al, *supra* note 62, 77 at 85–86.

65. See Linder, *supra* note 62 at 112–13. Morel underlines these functions of the Swiss referendum when he describes "the capacity of popular initiatives to be an alternative channel for raising issues, and, as the example of Switzerland shows, for encouraging representatives to be more responsive and accommodative in the preparation of legislation (which would also result in creating a stronger attachment of the people to the political system)". Morel, *supra* note 62 at 506.

66. For an argument that the institutions of Swiss federalism instantiate a conception of consensual, rather than majoritarian democracy, see Wolf Linder, « Fédéralisme Suisse et Culture Politique » in Oscar Mazzoleni, ed, *Fédéralisme et decentralisation: L'expérience Suisse et les nouveaux défis européens* (Lugano, Switz: Giampiero Casagrande editore, 2003) 43 at 56.

67. Antoine Bevort, « Démocratie, le laboratoire Suisse » (2011) 37:1 Rev du Mauss 447 at 449.

68. *Ibid* at 450.

Furthermore, directly deliberative opportunities at the federal level are afforded by constitutionally enshrined referendum processes in addition to the specific ones that are the subject of the present article.[69] These referendums are joined by various popular rights at the cantonal and communal levels. At the cantonal level, citizens have rights to popular initiatives for ordinary legislation, and not only constitutional amendments.[70] Several cantons have also introduced financial referendums, which subject certain spending initiatives to voter approval.[71] In the communes, opportunities for direct deliberative democracy arise in representative "Parlements communaux" or through direct participation in "assemblées communales", where citizens come together not merely to vote, but to take part in decisions, intervene in debates and raise governance questions.[72] Perhaps the most prominent form of this kind of deliberative democracy is the *Landsgmeinde*, which is an annual assembly of all citizens held in the canton of Glaris, Appenzell Rhodes-Intérieures, in which political and judicial authorities are voted in and political questions are debated.[73]

Each of these mechanisms for popular participation rests on the assumption that ordinary citizens have an important role to play in governance,[74] and this has been seen to express deliberative democratic ideals. These various mechanisms give to the body politic the deliberative power "à travers la maîtrise de l'agenda politique, l'animation des débats

69. *Ibid* at 452.

70. *Ibid* at 453.

71. *Ibid*.

72. *Ibid* at 457.

73. *Ibid* at 459.

74. This role of the people has been described expressly in light of the power to amend the constitution:

> Au sein d'un ordre constitutionnel, l'organe suprême est celui qui est habilité à réviser la loi fondamentale qu'est la constitution. La Constitution fédérale confère cette qualité de *constituant* à la majorité du peuple et à la majorité des cantons, étant entendu que, depuis 1874, la volonté de ces derniers est exprimée par le résultat de la votation populaire en leur sein. L'organe investi du pouvoir constituant est donc le corps électoral fédéral, mais pour que ce pouvoir soit exercé valablement, il faut une double majorité, à savoir celle des citoyens suisses prenant part à la votation au niveau de l'ensemble du pays et celle des citoyens suisses prenant part à la même votation dans une majorité de cantons.

Auer, Malinverni & Hottelier, *supra* note 36 at 21 [emphasis in original] [citations omitted].

politiques, et un réel pouvoir de décision".[75] Participation increases the capacity of the Swiss voter to be informed and thus to eschew rational ignorance.[76] It is important to note that, as has been discussed above, the effectiveness of the popular initiatives cannot be seen to rest only on the rate at which they are accepted, but also in their ability to influence policy deliberations. Seen in this light, the popular initiative is only one piece of an elaborate architecture of deliberation, which extends from the structures of elite compromise enshrined in the federal constitutional arrangements, through to the instruments of direct democracy and local governance. What may, at first glance, appear to be an instrument for the expression of will, on closer examination is revealed to be a part of a complex structure of deliberative democratic governance.

B. Deliberative Reforms and the Substance/Procedure Debate

I have thus far assessed the popular initiative banning minarets in light of two general theories of constitutional amendment. I have argued that one can think of the initiative in deliberative democratic terms. I will now discuss how the initiative could have been rendered optimally deliberative.

Recall that the underlying ideal of deliberative democracy states that citizens should be governed by a system of law that they can be reasonably expected to accept, and that the constitution is itself the source of criteria for determining what counts as reasonable in this respect. The challenge posed by the minarets ban is whether any such reasons are available to the citizen subject to the prohibition. Although voter attitudes are not determinative of the meaning of laws generally, or of constitutional provisions in particular, a desire to limit the expansion of Islam was among the motivations of those who supported

75. Bevort, *supra* note 67 at 467.
76. *Ibid* at 469.

the constitutional ban.[77] Legal scholars have noted that a blanket ban on construction would likely constitute a disproportionate limit on religious freedoms,[78] but I would like to focus more specifically on the effect that such a restriction would have on those adherents, motivated as it was by a desire to exclude them from the political community. It is unlikely that in light of this motivation, the restriction could be considered to be reasonable by those subject to its authority. In this case, a constitution, which should be the source of public reasons for a polity,would include within it a provision that violated the requirements of public reason.[79]

Therefore, even if the decision-making procedures and the political culture within which the citizen initiative is undertaken can be broadly understood to evidence a deliberative democratic conception of political practice, one might consider reforms. We could, for instance, imagine a court decision or a constitutional reform that would result in expanding the scope of protections offered by Article 139 and defining the concept of incompatibility with international law more broadly.[80] But since any such interpretation or amendment could be overridden by a subsequent popular initiative, it seems more prudent—not to say more consistent with the constitutional structure—to offer proposals for shaping the initiative process itself. Several have been considered in the literature. For example, the Federal Council has proposed a preliminary review by a government department of any initiative to determine whether it conforms to international law. The authors of the initiative would be informed of

77. See Jean-François Mayer, « Analyse: le peuple suisse décide d'interdire la construction de minarets » (29 November 2009), *Religioscope* (blog), online: <religion.info/french/articles/article_454.shtml#.VPpE9_nF-So>. "Ces mouvements sont tous convaincus que l'implantation de l'Islam en Europe est le début d'une invasion non militaire, qui sera suivie par l'imposition d'une domination islamique et d'un système légal islamique. Interdire les minarets représente donc, dans cette optique, un signal fort pour enrayer ce mouvement." *Ibid.*

78. Stéphane Grodecki, « Construction de minarets: une interdiction inapplicable » (2010) 28:1 Plaidoyer 57.

79. One can see an analogous version of this argument in Rawls' claim that "[a]t the Founding, there was the blatant contradiction between the idea of equality and the Constitution and chattel slavery of a subjugated race", and his conclusion that the Reconstruction Amendments brought the Constitution in line with basic constitutional values. John Rawls, *Political Liberalism* (New York: Columbia University Press, 2005) at 238.

80. Grodecki, *supra* note 78 at 61.

its non-compliance, and "a 'warning sign' would be added to signature sheets, informing potential signatories as to whether the initiative violates *jus cogens* or other norms of international law".[81] Although this reform might enable citizens to be more informed, authors note that "empirical evidence suggests that the vast majority of Swiss citizens do not care much about the legal implications of the popular initiatives they vote on".[82] Indeed, such a warning may have the unintended effect of galvanizing nativist sentiment, as a vote in the face of it would be a means of resisting foreign influence.[83]

In order to address this issue, one might consider more far-reaching measures. To assess their prospects, we will begin with ideal features of constitutional referendums, which Ron Levy has identified. I will single out two: first, that "voters must be *well-informed* about the context of a proposed constitutional change (e.g., the state of devolved power in Scotland), about the proposed legal reform (e.g., details of a secession plan) and about its key consequences";[84] and second, that "voters, faced with inevitably conflictual values, interests and consequences, must engage in *trading-off* judgments".[85] Some of the proposals set out above align with the informational requirement, but one could imagine going further and requiring participation in, for instance, an online tutorial in which potential voters are required to examine materials and assess trade-offs of any reform option before voting.[86] The costs of such a reform measure are evident: It would likely severely depress turnout and may have disproportionate impacts on certain already under-represented groups in a polity.[87] One rejoinder might be that, at least in cases where fundamental rights are at issue, a requirement that voters be well informed

81. Moeckli, *supra* note 48 at 786–87.

82. *Ibid* at 788–89.

83. *Ibid* at 789–90.

84. Ron Levy, "'Deliberative Voting': Realising Constitutional Referendum Democracy" [2013] Pub L 555 at 567–68 [emphasis in original].

85. *Ibid* at 568 [emphasis in original].

86. *Ibid* at 569. Cynthia Farina and the Cornell eRulemaking Initiative have designed a website and protocols that aim to induce citizens to engage in precisely this kind of reflection. See Cynthia Farina et al, "Democratic Deliberation in the Wild: The McGill Online Design Studio and the RegulationRoom Project" (2014) 41 Fordham Urb LJ 1527.

87. Levy, *supra* note 84 at 570.

and cognizant of the costs of their actions does not seem to be overly demanding.[88]

A final reform measure might involve changing the process by which an initiative is drafted. A 2011 Icelandic experiment with online public constitutional drafting might provide a model for reform. During the experiment, "[a] 25-member council posted weekly videos and text on leading social networking media, giving interested citizens extensive opportunities to view deliberations, and to comment on and help shape developing constitutional drafts."[89] Levy has noted that citizens could be more involved in the process if they chose. They could vote on progressively narrowing sets of constitutional options, with the aim of "raising levels of public affective investment and sustained intellectual consideration of constitutional options".[90] The details would need to be worked out, but one could imagine that, at least for initiatives in which fundamental human rights are at issue, this kind of iterative popular engagement might be adopted for the Swiss case.[91] Cass Sunstein has argued that this kind of ongoing deliberative engagement can lessen tendencies of polarization, even in the face of deep disagreements. According to him, citizens engaged in concrete exercises of institutional design can come to mutually agreed-upon outcomes, even in the absence of agreement over fundamental questions of principle.[92] Moreover, this kind of iterative process might implicitly open a range of political positions to deliberative debate and examination.[93]

88. This requirement responds to a standard criticism of referendums that voters are in general less knowledgeable than representatives and so are less competent to legislate in the public interest. See Morel, *supra* note 62 at 506.

89. Levy, *supra* note 84 at 573.

90. *Ibid* at 574.

91. Such a measure would bring the referendum more in line with institutions of "'pure' direct democracy (assembly democracy), which alone allows the collective elaboration and deliberation of policies (considered essential to achieve compromise and enlightened decisions)". Morel, *supra* note 62 at 506.

92. *Supra* note 6 at 8–9. In this respect, the design proposal would attempt to (1) minimize group polarization, in which "groups of like-minded people move one another to increasingly extreme positions" and (2) to realize "the value of *incompletely theorized agreements*—a process by which people agree on practices, or outcomes, despite disagreement or uncertainty about fundamental issues". *Ibid* [emphasis in original].

93. See Samantha Besson, *The Morality of Conflict: Reasonable Disagreement and the Law* (Portland, Or: Hart, 2005) ("every position on which we vote should have had a chance to be stated in order to ensure an informed, principled and others-regarding vote" at 252).

In the end, regardless of the depth and quality of deliberation, voters might ultimately decide in the privacy of the voting booth to support measures that subject their fellow citizens to restrictions that cannot reasonably be justified to them. At this point we face one of the most difficult dilemmas of deliberative democratic theory. David Estlund has argued that if one holds to a *proceduralist* conception of deliberative democracy, one will be committed to accepting the possibility of *outcomes* that are contrary to the underlying principles of deliberative democracy. As a consequence, one will accept infringements on some sets of autonomy interests. By contrast, if one holds to a *substantive* conception of deliberative democracy, one diminishes the importance of deliberative processes and compromises the *epistemic value* of deliberation.[94]

Resolving this dilemma in a given context will require a careful analysis of the relevant institutional and constitutional architecture.[95] In the Swiss case, because of the power of the institutions of direct democracy and the ease with which the constitution can be amended, any attempt to secure a specific substantive constitutional solution is always vulnerable to popular challenge. As a result, the more promising approach would seem to be to focus on introducing more and better democratic deliberation into political institutions and constitutional amendment processes in the hopes that citizens will choose to conjure a constitution that does not withhold from those who share their territory reasoned justifications for limits on their freedoms.

C. Senate Reform in Canada: Deliberative Democratic Possibilities

If the Swiss case presents a constitutional order in which the people, through mechanisms of direct democracy, have the constituent power to alter the constitution at will and with relatively few barriers, the Canadian

94. See David M Estlund, "Who's Afraid of Deliberative Democracy? On the Strategic/Deliberative Dichotomy in Recent Constitutional Jurisprudence" (1993) 71:7 Tex L Rev 1437. See also Kong, "Election Law", *supra* note 8.

95. See e.g. Besson, *supra* note 93 (what she calls a "soft form of proceduralism or substantively legitimate proceduralism" at 223). This entails "the belief among participants as to the substantive justification of the procedure on which there is the most practical convergence and coordination". *Ibid* at 222. Deliberation under conditions of reasonable disagreement is guided by the idea that reasonable agreement is *possible*, not by the expectation that reasonable agreement will actually result from any specific instance of deliberation. *Ibid* at 232.

context is quite otherwise. Since the introduction of the *Constitution Act, 1982*,[96] constitutional amendments in Canada have to pass through a specific and hierarchically structured amending formula. Richard Albert has argued that this hierarchy serves an expressive function: The more difficult a provision is to amend, the greater significance the matter it regulates has in the constitutional order.[97] In this section, I will discuss the question of whether an amendment procedure in Canada that requires the agreement of 7/10 of the provinces, making up at least fifty percent of the population of the country, applied in a specific case.[98] This degree of consensus is significant and serves deliberative ends that "promote careful consideration of the issue . . . by forcing those in favour of a particular proposition to persuade a larger segment of the population".[99] In what follows, I examine a specific instance of proposed constitutional reform that aimed to alter the Senate and was the object of a reference to the Supreme Court of Canada.

D. The Question and the Stakes

In *Reference re Senate Reform*,[100] the Governor in Council referred several questions to the Supreme Court. This article will address one question in particular, as it raises issues that resonate with our discussion of the nature of constitutional amendment processes. That question asked:

> Is it within the legislative authority of the Parliament of Canada, acting pursuant to section 91 of the *Constitution Act, 1867*, or section 44 of the *Constitution Act, 1982*, to establish a framework setting out a basis for provincial and territorial legislatures to enact legislation to consult their population as to their preferences for potential nominees for appointment to the Senate as set out in the schedule to Bill C-7, the *Senate Reform Act*?[101]

Through the frame of the definitional issue raised at the very outset of this article, one might ask whether the proposed consultation framework

96. Being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

97. Richard Albert, "The Expressive Function of Constitutional Amendment Rules" (2013) 59:2 McGill LJ 225 at 229.

98. *Constitution Act, 1982*, *supra* note 96.

99. Raymond Ku, "Consensus of the Governed: The Legitimacy of Constitutional Change" (1995) 64:2 Fordham L Rev 535 at 571.

100. 2014 SCC 32, [2014] 1 SCR 704 [*Senate Reference*].

101. *Ibid* at para 3.

should be understood as an amendment or an act of constitutional interpretation. The issue presents itself in the context of this reference question because the Attorney General of Canada claimed in one line of argument that it was not amending the Constitution. Because the only express language addressing the "method of selecting Senators" in the *Constitution Act, 1867* and *1982*[102] refers to the formal appointment of senators by the Governor General of Canada, the Attorney General argued that the Government of Canada could institute an advisory process that would leave that formal power undisturbed and therefore that Parliament would not need to undertake a constitutional amendment.[103] This example is interesting because it raises issues bearing on debates about deliberative democracy and the appropriate allocation of institutional authority within a constitutional order.

To begin, the argument relies on a textualist interpretation of the constitution.[104] In general, one might adopt such a stance if one thought that constitutional texts are fundamentally political bargains that courts are required to interpret so as to conserve the original balance of political forces.[105] Adopting such a stance would have the consequence of leaving political actors free to act prudentially within the political space given to them by the constitution without the threat of judicial interference. This implication might suggest that the interpretation lines up with the aggregative view of democracy that we discussed in Part I: The focus is on permitting representative institutions to act on the basis of political will, rather than in accordance with principles that require conformity with the dictates of (judicially defined) public reason. Yet, such a conclusion would be premature. As the Attorney General of Canada noted in its factum, the institution at issue—an appointed Senate—has been criticized as an undemocratic and unaccountable body from the very beginnings of Confederation.[106] Furthermore, the process by which the government sought to appoint senators—consultative elections—was

102. *Ibid* at para 39.

103. *Ibid* at para 51.

104. For a classic statement of textualism, see Richard A Posner, "Legal Formalism, Legal Realism, and the Interpretation of Statutes and the Constitution" (1986) 37:2 Case W Res L Rev 179 at 191.

105. See e.g. Landes & Posner, *supra* note 7 at 878–79.

106. *Senate Reference*, *supra* note 100 (Factum of the Attorney General of Canada at para 129).

a more transparent and open process than the current method of cabinet appointment. Finally, the flexibility that this interpretive stance gives to governments of the day would counter what we saw above to be one of the most recurring criticisms of constitutional amending formulae, namely that they are anti-democratic because they bind present majorities to the preferences of past majorities.

The opposing position, ultimately adopted by the Court, presents a mirror image argument. A purposive interpretation would construct the constitutional text in light of the underlying principles and "architecture" of the constitutional order.[107] One might argue that the reason for such an approach is to make governments answerable to the public reasons or purposes that are embedded in the Constitution.[108] The relevant reasons in this example are those related to the institutional structure of the Senate as a body of sober second thought that is immune from electoral pressures.[109] Moreover, if the purpose of burdensome constitutional amending formulae is to induce widespread deliberation, in part *through* the institutions of provincial legislatures, then it would be anti-deliberative to permit Parliament to unilaterally bypass this procedure. However, such an interpretive stance forecloses recourse to an open democratic process—consultative elections—and a democratically elected parliament is blocked from responding to long-standing frustration with an institution that does not enjoy public confidence.

E. Constitutional Architecture: Constitutional Deliberation in Context?

When faced with this impasse and level of disagreement, a theorist of deliberative democracy might begin by recalling the reasons for adopting a presumption in favour of a deliberative democratic interpretation: It offers resources for a normative justification of constitutions and amendment procedures that aggregative accounts lack. By holding to this position, one can rule out aggregative arguments. With the focus so narrowed, one can carefully examine the constitutional context to determine what reforms might allow the amendment process to hew more closely to deliberative democratic ideals.

107. *Senate Reference*, *supra* note 100 at para 54.
108. *Ibid* at para 36.
109. *Ibid* at paras 56–59.

First, unlike in the Swiss case, we have a constitutional order in which there is both a strong tradition of judicial review and deeply entrenched constitutional provisions. Moreover, the judiciary has directly addressed questions of constitutional amendment in the past, and so there is no reason to be concerned, as a presumptive matter, about judicial intervention in this context. Second, although the Senate may be an institution that, by design, lacks democratic pedigree, it creates a specific form of justification and deliberative procedure. As the Court notes, the Constitution, on its face, provides the Senate and the House of Commons equal powers, and there is no formal mechanism in place for resolving deadlocks. The Senate's lack of democratic pedigree is meant to motivate its members to compel the House of Commons to reconsider its legislative choices, but not to block them.[110] And as we have seen above, this lack of democratic accountability aims to ensure that the Senate can take a long-term perspective, unfettered by immediate electoral considerations.[111] In a sense, the Senate is a forum for democratic deliberation in much the same way that a constitutional court is: It is empowered to hold government accountable to constitutional principles—or in Rawlsian terms, public reason.[112] Finally, just as the double majority in the Swiss case aims to ensure that minority populations concentrated in certain cantons have weight in the constitutional amendment process, the 7/10 formula aims to ensure that no single province has a veto power, and thereby ensures a nationwide debate about potential changes to central institutions of the Canadian state, including the Senate.[113] To permit unilateral federal action in this context would be to undermine a specific deliberative democratic architecture.

110. *Ibid.*

111. *Ibid.*

112. For this defence of upper houses, see generally William H Riker, "The Justification of Bicameralism" (1992) 13:1 Intl Political Science Rev 101 at 101–02.

113. For a discussion of the equality-affirming effects of the formula, see Patrick J Monahan, *Constitutional Law*, 3rd ed (Toronto: Irwin Law, 2006) at 189. For the scope of the application of section 42, see *ibid* at 192–97.

F. Stasis and Reform Proposals

After the Court's decision in the *Senate Reference*, the consensus in Canada is that constitutional reform of the Senate through the amending formula is a remote possibility.[114] Nonetheless, the above-mentioned dissatisfaction with the unrepresentative and undemocratic nature of the Senate remains. In the face of this constitutional stasis and dissatisfaction, what might be done? I will explore two possibilities in the remainder of this article. First, one might propose a constitutional reform process that, instead of directly aiming at amendment, would instigate a deliberative practice that generated ideas about potential amendments. Alternatively, one might propose changes to how the Senate functions in order to render its operations more democratic in the deliberative sense. I will consider these options in turn and I hope to reveal the promise of deliberative democratic reform.

(i) Reforming the Amendment Process: Optimizing Deliberation

The history of formal constitutional reform in Canada has been told many times. Instead of going over familiar ground, I will tie an aspect of the scholarly consensus about constitutional reform to a feature of deliberative democratic theory. Scholars have argued that one of the highest profile constitutional reform failures over the last generation—the Meech Lake Accord—was perceived by citizens to be the result of an elite-dominated process.[115] Astute observers have further noted that the round of constitutional talks that followed the Meech Lake Accord sought to address this failure. The Charlottetown Accord process involved broad public consultations, negotiations that—while conducted in private—were the subject of continuous press releases and a non-binding national referendum.[116] Despite these efforts at openness, the constitutional

114. See Aaron Wherry, "Senate Reform: Stephen Harper Decides it's Not Worth the Effort", *Maclean's* (25 April 2014), online: <www.macleans.ca>; Tonda MacCharles, "Prime Minister Stephen Harper Calls Courts the Enemy of Senate Reform", *The Toronto Star* (1 November 2013), online: <www.thestar.com>.

115. See e.g. Bryan Schwartz, *Fathoming Meech Lake* (Winnipeg: Legal Research Institute of the University of Manitoba, 1987) at 4; Kathy L Brock, "Learning from Failure: Lessons from Charlottetown" (1992) 4:1 Const Forum Const 29.

116. See *ibid* at 29–30.

proposals were rejected in the national referendum. Among the reasons for the failure was the fact that the public perceived the proposals to be backed by "elite and moneyed interests",[117] and the legal texts and explanatory materials were too complicated and confusing for the general public.[118]

These concerns about elite domination and accessibility are also expressed by authors skeptical of deliberative democracy[119] and by scholars critical of the idea that a referendum could be a deliberative exercise.[120] There are several ways of addressing these concerns, including charging an independent commission with overseeing referendum processes and introducing public information campaigns aimed at making the options available to voters clear and accessible.[121] Making the referendum issue the object of a citizens' assembly would be another possibility. Perhaps the most famous example of a citizens' assembly was held in British Columbia in 2004. Its objective was reforming the provincial electoral system. Ordinary citizens—one man and one woman from each electoral district—were chosen by lot from a subset of randomly selected voters who attended a selection meeting and expressed interest in participating in the assembly. The assembly members went through a "learning phase" and a "deliberation phase". In the learning phase, which went through several cycles, assembly members listened to and discussed presentations from academics and authorities, and attended public hearings. In the deliberation phase, the members narrowed down the options for electoral systems and engaged in informed debate about them. Those options were then voted on and the winning option was presented to the population at large in a referendum. The chosen option received majority support, but not the super-majority level that was required for the government to put it into effect.[122]

117. *Ibid* at 30.

118. See *ibid*.

119. See e.g. Lynn M Sanders, "Against Deliberation" (1997) 25:3 Pol Theory 347.

120. See Tierney, *Constitutional Referendums*, *supra* note 32; Stephen Tierney, "Using Electoral Law to Construct a Deliberative Referendum: Moving Beyond the Democratic Paradox" (2013) 12:4 ELJ 508 [Tierney, "Using Electoral Law"].

121. *Ibid*.

122. See F Leslie Seidle, "Citizens Speaking for Themselves: New Avenues for Public Involvement" in Hans J Michelmann, Donald C Story & Jeffrey S Steeves, eds, *Political Leadership and Representation in Canada* (Toronto: University of Toronto Press, 2007) 80 at 93–99.

One could imagine incorporating a citizens' assembly into a constitutional amendment process involving the essential elements of the Senate. Such a change from historic practice would be promising from a deliberative democratic perspective. It is, of course, impossible to determine whether the result of the Charlottetown Accord process would have been different if it had involved a citizens' assembly, but the process itself would have been less susceptible to the charge of elite domination, and the resulting question could not have been criticized as being beyond the ken of the ordinary citizen. Indeed, both the process and the question would plausibly have been seen to be legitimate because they were informed by a deeply deliberative process that involved ordinary citizens coming to informed judgments.

If such a process were to be adopted for the reform of the Senate, and if after a national referendum, majorities in all of the provinces supported a single option, political actors would be placed under significant pressure to come to a consensus that meets the relevant constitutional threshold. There is a range of reasons why such a process might not succeed. Perhaps the most significant is the fact that although there is widespread dissatisfaction with the Senate, this may not translate into substantial public interest in actually changing it. In the absence of such interest, constitutional reform of any shape is unlikely to succeed.[123] However, if public interest were to pass a threshold, then a citizens' assembly may be the kind of deliberative democratic institution necessary to render legitimate a constitutional amendment affecting the essential functions of the Senate.

(ii) Reforming the Workings of the Senate

Scholars have noted that even though the Senate itself is held in low regard, its work product is not.[124] In undertaking the Senate's work of examining proposed legislation, Senate committees can hold public hearings, engage in fact finding and hear from witnesses. The Senate of Canada document "Fundamentals of Senate Committees" notes that: "On average, Senate committees hear from over 1,300 witnesses per

123. See Tierney, "Using Electoral Law", *supra* note 120 at 518; Brock, *supra* note 115 at 32.

124. David E Smith, *The Canadian Senate in Bicameral Perspective* (Toronto: University of Toronto Press, 2003) at 110.

year. In this way, committees provide a direct link between Parliament and the Canadian public."[125] I will suggest a mechanism by which closer links can be forged between the Senate and the Canadian public, which would lessen the sting of the charge that the Senate is undemocratic. While Senators are not elected by the people, and therefore are not democratically legitimate in an electoral sense, it does not follow that the Senate cannot be considered to be democratic in another deliberative sense. If the outputs of government are to be considered legitimate—not because they are tied to the preferences of voters, but because they are grounded in inclusive and reasonable deliberation that respects norms of citizen equality—then the Senate's work may be considered democratic if it is the result of a process that manifests, or is responsive to, this kind of deliberation.

One way of broaching this possibility is to consider, by analogy, the operations and outputs of administrative agencies. Scholars have long puzzled over the question of how agencies can be considered to be democratically legitimate.[126] From the point of view of electoral democracy, administrators suffer from defects similar to those that affect Canadian Senators: They are unelected and unaccountable. Some have argued that administrators can be considered democratically legitimate because they translate into action the will of the people, as expressed by the policy choices of democratic representatives. However, this view has been decisively criticized as presenting an unrealistic view of how agencies work.[127] Administrators exercise significant independent judgment, in part because legislators cannot legislate in ways that dictate the outcomes of such judgments, and in part because elected officials cannot exercise effective continuing oversight of administrators. Several prominent attempts have been made to respond to this perceived lack of legitimacy, but I will consider one that has been offered in the context of federal rule making in the United States. The experience of the Cornell eRulemaking

125. Canada, The Senate of Canada, "Fundamentals of Senate Committees", Committees Directorate (Ottawa: Senate of Canada, September 2012), online: <www.parl.gc.ca/Content/SEN/Committee/411/pub/fundamental-e.htm>.

126. See Steven P Croley, "Theories of Regulation: Incorporating the Administrative Process" (1998) 98:1 Colum L Rev 1.

127. See Richard B Stewart, "The Reformation of American Administrative Law" (1975) 88:8 Harv L Rev 1669 at 1675–676.

Initiative (CeRI), I shall claim, is relevant to debates about the democratic legitimacy of the Canadian Senate.

Federal rule making in US agencies involves a notice and comment requirement to ensure that parties affected by proposed regulations have the opportunity to provide input.[128] Moreover, agencies are required to offer a considered response to the comments that they receive. At first glance then, the federal rule-making process seems to meet the normative requirements of deliberative democratic theory: Regulations are the result of a process of public reasoning and agencies provide reasoned justifications to those who are affected by the resulting regulations. One problem with the process is that although all interested parties are invited to comment, not all do—and of those who do, not all do so effectively. Industry actors and organized special interest groups have the capacity to master the relevant—often complex—background information involved in rule making, and have the expertise to frame effective responses to calls for comment, whereas the average citizen typically has neither the will nor the requisite expertise.

CeRI is a research partnership between researchers at Cornell University and federal agencies, which maintains an accessible online platform that provides ordinary citizens with relevant information about the makings of specific rules in comprehensible formats and language. Moreover, they are invited to comment online and moderators guide their contributions by prompting them to make pertinent contributions. Those comments are then summarized, categorized and presented to federal rule makers who respond to them in the process of bringing regulations into force. Federal rule making—supplemented by CeRI's contributions—would seem to be justifiable in deliberative democratic terms, as it involves deliberation among equals and provides reasoned justifications for state action. This deliberative democratic innovation in rule making fills the gap created by the absence of an electoral basis for justifying agency action in this context.

I suggest that a similar initiative could be introduced into the Senate's deliberations. Committees already seek out witnesses and hold hearings when examining legislation. An accessible platform that included carefully moderated discussion forums about proposed legislation and was designed to ensure thoughtful participation on the part of any interested citizen would enhance the legitimacy of the Senate's work. In particular,

128. The following paragraphs draw from Farina et al, *supra* note 86 at 1548–552.

if Committee reports included responses to the considered opinions of average citizens, as well as academics and other experts, then the status of the Senate as forum for sober second thought would be heightened. Indeed, this activity of responsive reason giving might make a virtue of what is currently considered to be a vice. The senator, unfettered by the need for electoral approval—which itself can express little more than unconsidered preferences—or for scoring partisan points (which are often expressions of a mere will to power), would engage in serious deliberation, and would be judged on the extent to which she offered to the Canadian public thoughtful, considered reasons for the views expressed in Committee reports, and ultimately in Senate votes.

Conclusion

This article has pursued theoretical and comparative law aims. In particular, it has attempted to undertake an exercise in comparative constitutional law that does justice to the normative underpinnings of constitutions generally, while remaining sensitive to the specificities of the constitutional orders examined. In pursuing these ends, it has assessed the amendment processes of two constitutional regimes against the ideals of deliberative democracy and offered reform proposals that are consistent with the express and latent deliberative democratic aspirations of those regimes.

The analysis of the Swiss case revealed that although an aggregative characterization of the constitutional amendment process was prima facie compelling, the process could better be understood in deliberative democratic terms. Reforms focused on changes to the process, rather than on judicial doctrine, were deemed to be most appropriate given the institutional features of the Swiss constitutional order. The theoretical framework of deliberative democracy was also subject to scrutiny, as the Swiss case brought to light a tension in the theory between procedural and substantive conceptions of deliberative democracy.

The analysis of the Canadian case characterized, in deliberative democratic terms, the Supreme Court's interpretation of the constitutional amending formula in question and weighed that characterization against an aggregative alternative. This discussion was itself an interrogation of deliberative democratic theory, as it probed a too-easy alignment of

textualist interpretations with aggregative constitutional theories. We also saw that in light of the Court's deliberative democratic interpretation, constitutional amendment was foreclosed. Because of this blockage, process changes tailored to the Canadian context were proposed. The case studies highlighted the essential characteristics of the mid-level theoretical approach to comparative constitutional law. First, they exemplified the reciprocal influence of the theoretical and comparative law analyses, as the theory framed and brought to the foreground significant elements of the constitutional orders under analysis, while the comparative analyses brought to light tensions and assumptions in deliberative democratic theory. Second, the case study analyses manifested the prescriptive cast of the methodology, as they offered contextually sensitive proposals to bring the constitutional regimes under consideration more closely into alignment with deliberative democratic ideals.

I close my analysis by answering two possible objections in order to further explain the features of the mid-level theoretical approach to comparative constitutional law. One objection might state that I have selected case studies without any evident rationale for the choices made. A second objection might claim that I have adopted, once again without justification, a state-centric approach to constitutions and constitutional amendment. Let me respond to each in turn.

The issue of case study selection is a perennial one in comparative constitutional law. Some express concern in terms of the barriers to understanding another constitutional system well enough, such that one can become fluently "bilegal".[129] I acknowledge the concern, but I do not think it fatal to the project of engaging in comparative constitutional analysis if one adopts the mid-level theoretical approach. It is perhaps helpful to flesh out in a little more detail what I understand to be the purpose of this kind of analysis. In my view, it is pragmatic in orientation—and by pragmatism I mean the tradition of thought inherited from Charles

129. Jackson, *supra* note 13 notes,

> [h]owever difficult it is to become *bilingual*, *bilegalism* is even harder to achieve. Not only is it necessary to understand foreign languages, or find reliable translations of foreign legal materials, but in order to understand one doctrine or institution of another legal system it is necessary to have at least some understanding of the broader canvas on which it exists.

Ibid at 70 [emphasis in original].

Peirce and John Dewey.[130] In particular, I draw from that tradition an understanding of the relationship between theory and practice. In this understanding, ideas that are currently held, and objectives that are currently aspired to, are inevitably recast and reshaped as individuals and groups implement means to give them effect.[131] In turn, the means chosen and put into practice will be reconceived and altered as the ideas and ends are recast.[132] The analysis undertaken in this article is pragmatic in the sense that I have analyzed specific sets of governance institutions and problems in light of deliberative democratic theory, and in the process I have aimed to advance: (1) the theoretical discussion by demonstrating ways in which the theory's aspirations can be given effect and (2) the institutional debates in the relevant jurisdictions by proposing novel avenues for reform in light of an application of deliberative democratic ideals that is tailored to the specific contexts under consideration. The analyses are meant to be iterative, and I understand them to be part of ongoing discussions in both of the jurisdictions in question. The analyses' utility and appropriateness will be revealed in that ongoing debate, and therefore, the question of whether or not the selection can be justified will be revealed *ex post*, in unfolding conversations about constitutional amendments in Switzerland and Canada.

I turn now to some thoughts about my decision to restrict the analyses to artifacts and processes of state law. In the Canadian context, this choice might be seen as especially problematic. State constitutional law and non-state constitutional orders, and notably those of Indigenous traditions, are deeply intertwined. The fact that I have so limited the scope of my arguments does not mean that I believe that they are *necessarily* limited to state law. Indeed, I can anticipate taking up the invitations of Professors Val Napoleon and John Borrows—among others—to engage with the

130. See Charles Peirce, "How to Make Our Ideas Clear" in Louis Menand, ed, *Pragmatism: A Reader* (New York: Vintage Books, 1997) 26–48; John Dewey, *Democracy and Education: An Introduction to the Philosophy of Education* (New York: The Free Press, 1944). I also draw on legal authors whose work is deeply influenced by the pragmatist movement. See e.g. Lon L Fuller, "Means and Ends" in Kenneth Winston, ed, *The Principles of Social Order: Selected Essays of Lon L Fuller*, revised ed (Portland, Or: Hart Publishing, 2001) 61–78; Michael C Dorf & Charles F Sabel, "A Constitution of Democratic Experimentalism" (1998) 98:2 Colum L Rev 267.

131. Fuller, *supra* note 130.

132. *Ibid*.

constitutional law of Indigenous peoples.[133] I do not know specifically what such engagement would look like, but I can imagine its outlines. One might begin by finding common ground around the idea that law—whether it arises in Indigenous traditions or in the context of Western states—is grounded in deliberative practices and institutions. I might then bring this idea, and the arguments I have made about state-based practices in this article, into contact with the practices and debates of Indigenous traditions, and see what discussions about the ends and means, the principles and instruments, of constitutional law will reveal about our ideas and practices, our aspirations and our institutions.

133. See John Borrows, *Canada's Indigenous Constitution* (Toronto: University of Toronto Press, 2010); Val Napoleon, "Tsilqot'in Law of Consent" [unpublished].