University of Michigan Journal of Law Reform

Volume 43

2010

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https://doi.org/10.36646/mjlr.43.4.inferiorizing

INFERIORIZING JUDICIAL REVIEW: POPULAR CONSTITUTIONALISM IN TRIAL COURTS

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The ongoing debates over the legitimacy of judicial review—the power of courts to strike down unconstitutional statutes—as well as the evolving school of thought called "popular constitutionalism," are characterized by a preoccupation with the Supreme Court as the embodiment of judicial power. This is a striking shortcoming in prevailing constitutional theory, given the fact that in the United States, inferior courts engage in constitutional adjudication and in acts of judicial review on a daily basis, in ways that are importantly different from the familiar practices of the Supreme Court. The Article breaks down this monolithic concept of "the courts" by shifting the focus to the lower levels of the judicial system. Trial court adjudication is revealed to hold a unique transformative potential for constitutionalism: the possible enhancement of civic participation, public deliberation, and value pluralism in the process of creating constitutional meanings.

The Article presents an argument for "inferiorizing" judicial review, i.e., relegating the power of judicial review to the federal district courts, and removing the Supreme Court from this practice. The inferiorizing model—a procedurally simple, though conceptually radical, jurisdictional shift—is shown to have a redeeming potential for judicial review as a democratically legitimate means of enforcing constitutional rights; while at the same time providing a robust institutional setting for the exercise of popular constitutionalism. Although it would be very difficult to bring about a full inferiorizing shift in constitutional adjudication, the Article exposes the possibilities for democracy-enhancing institutional innovation; these possibilities become available to constitutional actors once the institutional diversity of courts is recognized.

INTRODUCTION

For a variety of reasons, some better than others, the debate in U.S. legal scholarship over the legitimacy of judicial review—the power of courts to strike down legislation due to a violation of the Constitution—is alive and well. The debate takes on different forms and accommodates different kinds of arguments, but two central themes of normative critique emerge as the most salient: one seeks to undermine the power of courts to exercise judicial

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review altogether; the other questions the assumption of supremacy of judicial interpretations of the Constitution, an assumption that has been attached to the exercise of judicial review since at least half a century ago.[1]

At the same time, the intellectual project of popular constitutionalism has been gaining force and content in U.S. constitutional theory. By tracking the modes of popular engagement through which constitutional meanings have been and are being generated, popular constitutionalists offer a democratic vision of constitutionalism that occurs primarily away from the courts. While accounts of popular constitutionalism do not necessarily undermine the legitimacy of judicial review—both can be understood as complementary modes of generating constitutional meaning—they do deny the exclusivity of judicial interpretation as the only mechanism for making constitutional law (constitutional amendment notwithstanding), and in that sense contribute to fracturing the perceived reality of judicial supremacy, if not its formal sustainability.

One of the consistently common characteristics of these two bodies of scholarship—the judicial review debate and the popular constitutionalism literature—is their perception of judicial review and of the question of judicial supremacy as having to do solely with the nature and actions of the Supreme Court. Constitutional adjudication, which takes place on a daily basis in all levels of state and federal court systems, is reduced in most scholarly works to the sparse pronouncements of the nine justices of the Supreme Court during the Court's annual terms. While the prominence of the Supreme Court in any account of constitutional law is of course understandable, it is less justifiable in normative discussions of institutional design, which is the kind of discussion the judicial review debates and a lot of the popular constitutionalism literature is engaged in. Arguing about judicial power in constitutional systems while bearing a monolithic concept of "the courts" in mind, based on a strictly "Supreme-Courtian" paradigm of adjudication, misses the great variations that exist among different courts of different levels and functions within any given system.

Based on this insight, I offer in this Article an intervention in the debates over judicial review and the literature on popular constitutionalism, which is based on an institutional design framework:

1. As Morton Horwitz brackets it, following Larry Kramer, this is the supremacy assumption that was "expressly articulated in *Cooper v. Aaron* and acted upon in *Bush v. Gore*." Morton J. Horwitz, *A Historiography of the People Themselves and Popular Constitutionalism*, 81 CHI.-KENT L. REV. 813, 814 (2006) (citing Cooper v. Aaron, 358 U.S. 1 (1958); Bush v. Gore, 531 U.S. 98 (2000)).

I call for breaking down the concept of "the courts" into its varied components, and shifting the focus to the practices of lower (inferior) courts. The Article traces in trial court adjudication a transformative potential for constitutionalism—a potential that, if recognized and utilized, could lead to a re-substantiation of the practice of judicial review as a legitimate means for enforcing constitutional rights, and at the same time promote democratic values that are crucial for the thriving of constitutionalism in our time: civic participation, public deliberation, and value pluralism. This potential, which embraces both politics and adjudication as complimentary modes of generating constitutional meaning, can hardly be noticed, let alone put to use, under the prevailing Supreme-Courtian paradigm of judicial review.

In order to fulfill this institutional potential, the Article presents an argument for "inferiorizing" judicial review. That is, the Article proposes eliminating the power of high courts to exercise judicial review, while retaining it at the level of trial court adjudication. Under the inferiorizing model, district courts would be authorized—as they are today—to strike down statutes they deem unconstitutional, but this determination would be final and unappealable: the parties involved would be bound by the judicial determination, but it would not have a precedential effect on other similar cases. The trial court becomes a focal apparatus for constitutional deliberation, in which individual members of the constituency face the state (indeed, "the law") in repeated matches, arguing the meaning of constitutional provisions and generating a multitude of results—some diverse, some convergent—over time and space. These series of judicial iterations would provide the material—vocabulary, arguments, test cases, various outcomes—for popular deliberation on the meaning of the Constitution; while at the same time enforcing the Constitution on a (literally) case-by-case basis. For the purpose of this Article, the proposed shift would be limited to constitutional adjudication invoking the rights-provisions of the Constitution—I leave out, for now, constitutional challenges premised on the structural clauses of the Constitution, which raise distinct concerns.[2]

2. I also leave state courts out of the model. Like federal district courts, state courts are initially authorized to strike down statutes for (federal) constitutional reasons. State courts, however, invoke unique concerns, such as the prevalence of judicial elections, and extreme jurisdictional complexities. These characteristics complicate the institutional premises of the inferiorizing model, and require a separate assessment that is beyond the scope of this Article. The model, then, grants final constitutional discretion to federal district courts alone.

Taking judicial review away from the Supreme Court is of course a hard sell; too much power has to be given up by justices and appointers, and too much of the focus of scholars, interest groups, reporters, and politicians has to be divided between different courts and constituencies. The very power of tradition is also a significant barrier in itself. This Article may therefore be read not necessarily as a realistic call to eliminate the constitutional role of the Supreme Court, but rather as an invitation to consider how constitutionalism would look in an inferiorized system of one degree or another, and to reflect on judicial review and on popular constitutionalism with this vision in mind. Above all, this Article explores institutional possibilities for innovation. It does so by pointing to institutional structures and practices that already exist and are, at least in theory, available for designers to identify and utilize.

Part I of the Article surveys the central themes of the judicial review debate, and tracks the democratic values that could arguably animate the future of that debate. In Part II I discuss the literature's capture by the Supreme-Courtian paradigm, set against the background of the prolific constitutional adjudication exercised by trial courts in diffuse systems of judicial review, like that of the United States. I examine the effect of the Supreme-Courtian paradigm on the critiques of judicial review, as well as on the practice of constitutional litigation. In Part III the focus shifts fully to the trial courts. I explore three unique institutional characteristics of trial courts—their behavior as street-level bureaucracies, their relative institutional obscurity, and their structural multiplicity—and consider the transformative potential these characteristics have for constitutionalism. In Part IV I put the potential to practice by delineating the details of the inferiorizing model of judicial review. I present it as an institutional model of popular constitutionalism. Part V considers several strong objections to the inferiorizing model, and tries to respond to them. Part VI presents a set of challenges to implementing the inferiorizing model and explores its applicability to several complicated contingencies. Part VII is a conclusion.

I. THE JUDICIAL REVIEW DEBATE: PAST AND FUTURE

The legitimacy of judicial review—that is, for the purpose of this Article, the practice by courts of striking down legislative acts due to violations of the Constitution—is being continuously questioned in the United States. While this has been the case ever since the

practice of judicial review was introduced into the U.S. legal system,[3] the last several years have seen what seems to be a surge in the calls for reconsideration of this age-old practice.[4] When these various critiques are abstracted, four central arguments emerge in opposition to judicial review: (1) Judicial review is at odds with democratic rule; (2) The courts are not professionally adequate arbiters of morally-laden issues; (3) Judicial review impedes, numbs, and diverts political deliberation on constitutional issues; (4) Judicial review is an elitist mechanism for preserving the social structure. The core arguments for each of these concerns are presented below. Subsequently, the three central normative positions with regard to the future of judicial review are surveyed: these are the calls for eliminating judicial review altogether; altering its power structure; and maintaining the current practice unchanged.

A. Four Difficulties with Judicial Review

(1) *Anti-democratic.* The oldest critique in the "new wave" of critiques of judicial review is that which emerged anew with Alexander Bickel's *Least Dangerous Branch*,[5] namely, that judicial review is countermajoritarian, and thus in its very essence is at odds with democracy. The well-known argument is that allowing non-elected and unremoveable judges and justices to overrule procedurally valid decisions of periodically elected bodies (namely Congress) undermines the very bedrock of democratic rule—majoritarian decision-making by elected representatives who are institutionally accountable to popular will. This is a "difficulty" with any constitutional regime,[6] but it is most severe in constitutional regimes like that of the United States, in which the Constitution is relatively old and practically unamendable. Under a rule of judicial review, the will of current majorities—as exhibited through legislative acts of elected representatives—is being overruled by an unelected minority, which at best follows the dictates of past generations, and at worst applies its own set of beliefs and mores.

3. *See, e.g.*, LARRY D. KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW 93–144 (2004); Barry Friedman, *The History of the Countermajoritarian Difficulty, Part II: Reconstruction's Political Court*, 91 GEO. L.J. 1 (2002).

4. *See* Richard H. Fallon, Jr., *The Core of an Uneasy Case for Judicial Review*, 121 HARV. L. REV. 1693, 1694–95 (2008).

5. ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS (1962).

6. Arguably, one could conceive a constitutional regime in which constitutional judges are periodically elected by popular majorities. This is not the case in any jurisdiction in the world currently.

Democracy—understood as government through the aggregated will of current majorities—is therefore undermined by the combined will of current minorities and past generations.

(2) *Not professionally adequate.* A second difficulty with judicial review is that even if one supports a constitutional regime, in the sense that current majorities should be bound by the value and procedure determinations of past majorities (or, often, past supermajorities), then judges are not necessarily, and to some necessarily not, the best equipped agents of constitutional interpretation and application.[7] While judges, bound by their professional ethos, focus on interpreting texts, adhering to or distinguishing earlier precedents, and cloaking their ideological standpoints, legislators regularly drive to the heart of moral disagreements and openly engage with the policy implications of their determinations. Because constitutional interpretation calls for moral and political deliberation, legislatures may be more suited for the job, and therefore also more legitimate.[8]

(3) *Inhibits Deliberation.* A third theme of the attack on judicial review concerns the effects of judicial review on the strength of the democratic culture and on such values as participation, deliberation, and public engagement in the political process. According to this argument, leaving the final interpretation and application of the Constitution to the courts numbs the public forums that are both functionally and democratically more suited to conduct moral deliberation and to produce legitimate political determinations: most notably, elected legislatures and their originating processes—party politics and electoral campaigns.[9] Rather than "fight it out" in the forums of public deliberation, both constituents and representatives often defer to the stylized, alienated, paternalistic, and assumedly conclusive determinations of a professional judiciary in a wide variety of deeply contested issues of value. This loss of participation and public deliberation harms democratic legitimacy, erodes public attentiveness to injustices and rights-violations and to popular capabilities to address them, undermines the shared experience of a political community, marginalizes "have-nots," and

7. *See* Mark Tushnet, *Evaluating Congressional Constitutional Interpretation: Some Criteria and Two Informal Case Studies*, 50 DUKE L.J. 1395 (2001).

8. *See* Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 YALE L.J. 1346, 1376–95 (2006).

9. *See* Larry D. Kramer, *The Supreme Court, 2000 Term—Foreword: We the Court*, 115 HARV. L. REV. 4, 162–68 (2001).

empowers "haves" and legal repeat-players. For deliberative visions of democracy, judicial review may be an inhibiting force.[10]

(4) *Elitist.* A fourth kind of critique of judicial review aims at the socially elitist nature of the practice. Judicial review is typically practiced by usually affluent, usually white, usually male, judges who enjoy—at least since they were exempted from circuit duties and granted the power of certiorari—an institutionalized aloofness. Judges and, more so, justices, who normally belong to an elite class within their society, hold themselves capable of providing the national constituency with a definitive interpretation of their founding tenets. This practice legitimates and preserves an existing social order: it legitimates the political structure by wielding a rhetoric of rights.[11] While this critique is applicable to many judicial practices, it may be argued that judicial review is the most extreme case of judicial anti-populism. Judicial review lets judges have their way with the essentials that define the polity—the constitution—which is arguably the field where popular energy may be most obviously and directly exerted.[12]

B. Whereto Judicial Review? Three Normative Positions

(1) *Away with it.* The most radical consequence—relative to the status quo—emanating from the set of critiques mounted against the practice of judicial review is a call to abandon it altogether. According to this view, courts should eliminate the practice of invalidating statutes due to what they perceive as violations of the Constitution.[13] This can certainly be done by way of constitutional amendment; but it can presumably also be achieved by "mere" jurisdiction-stripping legislation, since judicial review is not explicitly included in the judicial power vested in the Supreme Court and lower courts by Article III of the Constitution.[14] In fact, as Mark Tushnet has suggested,[15] one could imagine the Supreme Court

10. *See* CHRISTOPHER F. ZURN, DELIBERATIVE DEMOCRACY AND THE INSTITUTIONS OF JUDICIAL REVIEW 141–49 (2007).

11. *See, e.g.*, Ran Hirschl, *The Political Origins of the New Constitutionalism*, 11 IND. J. GLOBAL LEGAL STUD. 71, 84–105 (2004).

12. *See* Frank I. Michelman, *Comment: Popular Law and the Doubtful Case Rule*, 81 CHI.-KENT L. REV. 1109, 1110–11 (2006); Allan C. Hutchinson, *A "Hard Core" Case Against Judicial Review*, 121 HARV. L. REV. F. 57, 63–64 (2008), http://www.harvardlawreview.org/media/pdf/hutchinson.pdf (on file with the University of Michigan Journal of Law Reform).

13. *See, e.g.*, MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS (1999); Waldron, *supra* note 8.

14. U.S. CONST. art. III.

15. TUSHNET, *supra* note 13, at 154.

itself declaring an end to the judicial review "experiment" it launched two centuries ago in *Marbury v. Madison*.[16]

The argument for giving up judicial review altogether asks to return the full force of constitutional deliberation to the explicitly-political branches of government. The fact that judicial review has led to some of the most cherished social and political achievements in the history of the nation, notably above all racial desegregation,[17] is countered by equally-egregious political outcomes engendered by the Supreme Court's constitutional jurisprudence, perhaps most notably the entrenchment of slavery[18] and the affirmation of segregation[19] and internment.[20] Similarly, by exhibiting a completely mixed record of progressive and conservative jurisprudence, the practice of judicial review defies consequential support from any ideological wing. Finally, even if judicial review could be a useful mechanism in correcting specific failures of democracy (notably, the disenfranchisement of discrete and insular minorities),[21] and even if courts managed to decide such cases correctly (according to one's choice of a theory of constitutional interpretation), there is no valid institutional or doctrinal way of limiting courts to use their power only in these unique (and arguably scarce) cases, and therefore the benefits of retaining judicial review are outweighed by the costs of the practice.

Taking the courts out of the constitutional playground, the argument goes, would "return all constitutional decision-making to the people acting politically,"[22] that is, in the contemporary model of democracy, to elected representatives deliberating, bargaining, and legislating by way of majority votes; to elected chief-executives; and to popular modes of public engagement.[23] This outcome, its supporters argue, is more democratic (in Bickel's sense), it is more professional (because legislatures are often better assessors of con-

16. 5 U.S. (1 Cranch) 137 (1803).

17. Brown v. Bd. of Educ., 347 U.S. 483 (1954). Even here, opinions famously diverge on the actual role of the Court's decision in *Brown* in bringing about the eventual racial desegregation of public schools. *See, e.g.*, MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY 344–442 (2004); GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? 39–169 (1991).

18. Scott v. Sandford, 60 U.S. (19 How.) 393 (1857).

19. Plessy v. Ferguson, 163 U.S. 537 (1896).

20. Korematsu v. United States, 323 U.S. 214 (1944).

21. JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 73–104 (1980).

22. TUSHNET, *supra* note 13, at 154; *see also* RICHARD D. PARKER, "HERE, THE PEOPLE RULE": A CONSTITUTIONAL POPULIST MANIFESTO 93–115 (1994) ("There are no supra-political *guarantees* of anything. All there is is politics." *Id.* at 114.).

23. *See* Hutchinson, *supra* note 12, at 61–64.

stitutional rights and values), it is more deliberative (because it directs constitutional discourse to the institution designed for deliberation), and it is more populist because it eliminates an elite-based avenue of constitutionalism.

(2) *Re-calibrate the scales.* Short of eliminating judicial review altogether, but still seeking to transform the power grid that it sustains, most prescriptive critiques of judicial review call for an elimination of its supremacy effect.[24] This view supports—or at least does not abhor—the continuation of the practice of judicial review through the courts. But it does deny the assumption—whose age and origin are in dispute—that a constitutional utterance by the Supreme Court is final, supreme, and unchallengeable by any other agent of government, except for the People themselves, acting as framers through the formal amendment process. When compared with other systems of judicial review, the supremacy effect of the U.S. system is often termed "strong-form" judicial review; the alternative being "weak-form" judicial review, in which some kind of institutional arrangement leaves the last word on constitutional matters to popularly-elected officials.[25]

The attack on judicial supremacy is probably the most common thread in the current wave of scholarship questioning the legitimacy of the U.S. model of judicial review, especially given its influence—and competition—in other constitutional democracies around the world, both young and old. Supremacy, it is argued, impedes vibrant constitutional discourse and departmental dialogue.[26] It stifles popular engagement and coerces popular will.[27] Courts, it is granted, may have a valuable role in a polity's continuing debate over the meaning of its Constitution, and the Supreme Court is an important agent of constitutional discourse among the branches of government. The Court offers a singular kind of constitutional argumentation (textually-embedded, precedent-based, case-sensitive), which is augmented by a unique institutional insularity (thanks to life appointments and benefit protections). But granting it the last word in the most foundational—indeed,

24. *See generally* KRAMER, *supra* note 3; ADRIAN VERMEULE, LAW AND THE LIMITS OF REASON 57-122 (2009).

25. *See* Mark Tushnet, *Alternative Forms of Judicial Review*, 101 MICH. L. REV. 2781 (2003); Mark Tushnet, *Weak-Form Judicial Review and "Core" Civil Liberties*, 41 HARV. C.R.-C.L. L. REV. 1 (2006).

26. *See, e.g.*, William N. Eskridge, Jr. & John Ferejohn, *Constitutional Horticulture: Deliberation-Respecting Judicial Review*, 87 TEX. L. REV. 1273, 1284–86 (2009) (discussing the "deliberation-ending" potential of judicial review).

27. KRAMER, *supra* note 3, at 233 (arguing that judicial supremacy "has fundamentally altered the meaning of republican citizenship by, as a conceptual matter, taking ordinary people out of the process of shaping constitutional law").

constitutive—issues that confront the nation throughout its generations, is to concede too much democratic power to an essentially non-democratic body of government.

The structural alternatives to judicial supremacy are varied, and weak-form judicial review can be performed in different ways. The British Human Rights Act authorizes courts to declare the incompatibility of a statute with Britain's obligations under the European human rights regime, and thus compel the legislature to rethink the legislation—but not to strike it down.[28] The Canadian Charter of Rights and Freedoms authorizes the legislature to enact statutes violating certain rights even in the face of judicial review, conditioned by an explicit "notwithstanding" provision.[29] And in the United States, various collisions have occurred between the Supreme Court and the political establishment which have, in effect, amounted to the overriding of judicial review by contrarian governmental action. The court-packing threat of President Roosevelt in 1937 is possibly the most well-known such instance;[30] and hints of Congressional action in this avenue were evident in the Religious Freedom Restoration Act of 1993,[31] which was enacted to override a Supreme Court's interpretation of the First Amendment (only later to be struck down by the Court).[32]

(3) *Stay the course.* The third group of responses to the amounting critiques of judicial review acknowledges the various difficulties associated with this practice, but maintains that all in all democracy is better served by keeping judicial review in its current form. Already Bickel, who coined the phrase "countermajoritarian difficulty," did so under the charitable title *The Least Dangerous Branch*—having been infused by the success of the Supreme Court in *Brown v. Board of Education*,[33] he concluded that when executed within the boundaries of the legitimate (as he tried to define them), judicial review is an institution of great potential and promise, mostly because it commands not much more than the moral power of its verbal utterances.[34] Various institutional justifications

28. Human Rights Act, 1998, c. 42, § 4 (U.K.); *see* Douglas W. Vick, *The Human Rights Act and the British Constitution*, 37 TEX. INT'L L.J. 329, 351–56 (2002).

29. Constitution Act, 1982, pt. I, § 33 (Can.); *see* Jean Leclair, *Judicial Review in Canadian Constitutional Law: A Brief Overview*, 36 GEO. WASH. INT'L L. REV. 543, 549 (2004). Israel duplicated this arrangement in a very specific context. *See* Basic Law: Freedom of Occupation § 8, 1994, S.H. 90 (Isr.).

30. *See* Barry Friedman, *The History of the Countermajoritarian Difficulty, Part Four: Law's Politics*, 148 U. PA. L. REV. 971, 988–96, 1022–46 (2000).

31. 42 U.S.C. §§ 2000bb to 2000bb-4 (2006).

32. City of Boerne v. Flores, 521 U.S. 507 (1997).

33. 347 U.S. 483 (1954).

34. BICKEL, *supra* note 5, at 204.

for the preservation of judicial review have been offered since. These have depicted the courts as uniquely insular from politics and therefore most suitable to police the abuses of the political process;[35] as a unique social locus for reason-based deliberation by participating citizens;[36] as best serving the social interest in settlement of second-order disagreements;[37] as an added valve of rights-protection that works with legislatures to engender the welcome potential of over-enforcement of rights;[38] and as singularly designed to accommodate the right of harmed individuals to argue their constitutional challenges.[39]

Implied defense of the practice of judicial review can also be inferred from historical and meta-historical narratives of U.S. constitutional law, which question the capability of the Supreme Court to actually bring about the detrimental effects described by the detractors of judicial review. Thus, Bruce Ackerman's Kuhnian[40] meta-narrative of constitutional revolutions allots a mere partial role to the Supreme Court in the process of codifying constitutional developments already formed and forged through a deliberative political process.[41] A more direct challenge to the countermajoritarian assumption is offered by the argument that the Supreme Court has in fact consistently aligned itself with public preferences in deciding contentious constitutional matters, with the result that judicial review has not proven to be an anti-populist or, indeed, a non-democratic institution.[42] An intriguing coalition in defense of judicial review therefore surfaces: between those who support a check on majoritarian abuse of power, and those who find in the courts a faithful reflection of majoritarian sensibilities.

Finally, in addition to the various arguments supporting the preservation of the current practice of judicial review one should restate the traditional justifications for judicial supremacy in matters of constitutionalism, which celebrates, rather than sidesteps, its

35. ELY, *supra* note 21.

36. Frank I. Michelman, *Brennan and Democracy*, 86 CAL. L. REV. 399, 425–26 (1998).

37. Larry Alexander & Frederick Schauer, *Defending Judicial Supremacy: A Reply*, 17 CONST. COMMENT. 455 (2000); Larry Alexander & Frederick Schauer, *On Extrajudicial Constitutional Interpretation*, 110 HARV. L. REV. 1359 (1997).

38. Fallon, *supra* note 4, at 1694.

39. Yuval Eylon & Alon Harel, *The Right to Judicial Review*, 92 VA. L. REV. 991 (2006).

40. Frank Michelman first identified the evident connection between Ackerman's historiographical project and Thomas Kuhn's *The Structure of Scientific Revolutions*. *See* Frank Michelman, *Law's Republic*, 97 YALE L.J. 1493, 1522–23 (1988).

41. 1 BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS (1991).

42. NEAL DEVINS & LOUIS FISHER, THE DEMOCRATIC CONSTITUTION (2004); Barry Friedman, *Dialogue and Judicial Review*, 91 MICH. L. REV. 577 (1993).

countermajoritarian effect. This is Marshall's premise in *Marbury*,[43] as reaffirmed in *Cooper*:[44] the notion that courts are the final interpreters of a nation's legal documents, including its constitution, which is the supreme law of the land. This is the pure separation of powers theory: super-majoritarian politics create the constitution, majoritarian politics make laws, and courts interpret both, enforcing the subjugation of the laws to the constitution: since legislators are also subject to the rule of law, they must abide by judicial application of the law to their actions, including acts of legislation.

C. New Functions for Judicial Review: Participation, Deliberation, Pluralism

The debate about the legitimacy of judicial review is primarily concerned with the effects of overruling majoritarian enactments on democratic theory, and with the judicial and political dynamics that arise out of these effects. Judicial review litigation, however, is also a unique forum for pressing claims, formulating arguments, and engaging in debate over constitutional meanings. In this regard, the institutional setting that is designed for the practice of judicial review may have significant implications for three procedural values that are essential for democracy to thrive: individual participation, public deliberation, and value pluralism.

(1) *Participation.* Participation is the opportunity for members of the polity to take active part in the political process and thus affect the content and meaning of legal norms—to effectively engage in jurisgenesis.[45] In contemporary representative democracies, democratic participation can and does take various forms—from voting in periodic elections to running for elected office to sharing an opinion on matters of social choice. Promoting participation in the processes of jurisgenesis is a way of enhancing the democratic ideal of self-government, because it multiplies the avenues through which individuals can affect the laws that govern them. At the same time, greater participation also provides greater legitimacy for the legal order, because the people subject to it share a stake in its creation and are aware of the capacity of their agency to promote further change in its existing modalities.

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43. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is.").

44. Cooper v. Aaron, 358 U.S. 1, 18 (1958) (stating "the basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution").

45. *See* Robert M. Cover, *The Supreme Court, 1982 Term—Foreword:* Nomos *and Narrative*, 97 HARV. L. REV. 4, 11–19 (1983).

Arguing any legal claim in court is an avenue of democratic participation: it enables individual litigants, attorneys, and social movements to engage with the government—judges, prosecutors, defenders—on what laws say and what they should say, and therefore to affect the content of the legal order. Arguing a *constitutional* claim in court, however, is democratic participation of a higher order, since it is an opportunity to affect the meaning of the norms that are at the foundation of the legal order. The institutional guarantee for this kind of participation is right of access: the protected opportunity to arrive at court, present an argument, and stand a chance for the argument to affect the outcome of the legal process.

(2) *Deliberation.* Deliberation is the process of reasoned decision-making through discussion. In the context of democratic governance, it requires those who make or affect social choices to take account of arguments presented to them, and to justify their decisions by resort to intelligible reasons. Models of deliberative democracy thus seek to foster open and accessible spheres of arguing about, and presenting reasons for, social action.[46] Institutionalized deliberation ensures that multiple relevant views on a given matter are meaningfully available both to policy-makers and to those subject to policy, and therefore that the interests of those who turn out "losers" in a given context were taken into account and have a chance of prevailing in future contests. Robust, dynamic, and inclusive modes of deliberative governance render government more accountable, more accommodating to critique and error-correction, and thus more democratically legitimate.[47]

(3) *Pluralism.* Value-pluralism is the accommodation of several, sometimes incompatible, conceptions of the good in the public spheres of law and politics.[48] As open societies abandon the fiction of moral uniformity, and accept the legitimate coexistence of divergent moral beliefs among their members,[49] democratic premises of equality, dignity, and free speech are promoted. Consequently, the institutions of normative ordering, including the practice of judicial review, realign accordingly, creating space in the process of constitutional decision-making for a variety of moral beliefs and

46. For a general definition and justification, see, for example, AMY GUTMANN & DENNIS THOMPSON, WHY DELIBERATIVE DEMOCRACY? 1-63 (2004); Jon Elster, *Introduction*, *in* DELIBERATIVE DEMOCRACY 1, 8-13 (Jon Elster ed., 1998).

47. *See* GUTMANN & THOMPSON, *supra* note 46, at 125-38.

48. *See* JOHN RAWLS, POLITICAL LIBERALISM 36 (expanded ed. 2005) (describing "reasonable pluralism"—"the diversity of reasonable comprehensive religious, philosophical, and moral doctrines"—as "a permanent feature of the public culture of democracy").

49. *See* Michelman, *supra* note 40, at 1506 ("If any social condition defines modern American politics, plurality does.").

understandings with respect to the constitutional foundations of the state.[50] This does not mean that constitutionalism is to be rendered incapable of generating clear normative decrees; rather pluralism aims to ensure that the process by which such results are generated takes genuine and respectful account of the existing multitude of moral beliefs.[51]

The values of participation, deliberation, and pluralism are cornerstones of liberal democracy, because they foster an engagement by individual constituents in multiple modes of self-government (i.e., more than just voting), while expressing, tolerating, and dignifying the variety of beliefs and understandings on moral and political issues that pervade heterogeneous societies. There is no sphere of a democratic society in which these goals are more pertinent than in constitutional discourse. And there is no era that is more demanding of novel institutional accommodations for these democratic premises than the present: as formerly-disenfranchised and formerly-unrecognized groups and classes are accepted into the political sphere, and as immigration trends continuously diversify societies, the design of constitutional adjudication that would promote these democratic values becomes more essential than ever.

This Article undertakes, then, a double project: by offering a novel institutional setting for constitutional adjudication, it attempts, *first*, to redeem judicial review as a worthy tool of constitutionalism in face of its various critiques;[52] and *second*, to redesign judicial review as a constitutional practice that is capable of facilitating the added functions of participation, deliberation, and pluralism.[53] The institutional setting where these two projects converge is in the framework of the trial courts of the judicial system—in the United States, the federal district courts. It is there where we must now shift our focus.

50. *See id.* at 1532 ("[The Court] challenges 'the people's' self-enclosing tendency to assume their own moral completion as they now are and thus to deny to themselves the plurality on which their capacity for transformative self-renewal depends.").

51. *See* Martha Minow, *The Supreme Court, 1986 Term—Foreword: Justice Engendered*, 101 HARV. L. REV. 10, 74–82 (1987).

52. *See supra* Part I.A.

53. *See supra* Part I.C.

II. STOP LOOKING AT THE CATHEDRAL: JUDICIAL REVIEW AND THE SUPREME COURT CAPTURE

Although active, diverse, and prolific, the debate concerning judicial review—the central arguments of which were surveyed above—is consistently premised on a single institutional unit as the perpetrator, or bearer, of the practice of judicial review: the Supreme Court. Thus, *all* major critiques, and *all* major normative responses to the critiques, focus almost solely on the acts and omissions of the Supreme Court in its capacity as a constitutional court.[54] The methods and positions of the Supreme Court are understood to embody the judiciary as a whole—"the courts" are, for all practical purposes, "the Court"—and therefore most scholarly and political focus is directed at the decisions and decision-making processes of "[n]ine [lawyers] in black robes,"[55] the processes of their nomination and appointment, and their judicial tenure. This is a striking reality, if one considers the fact that the vast majority of actual determinations of judicial review in the United States occur in courts other than the Supreme Court.[56]

In this Part, I begin by elaborating on the almost unnoticed but pervasive phenomenon of inferior court judicial review. Against this background, the persuasiveness of the central critiques of judicial review turns out to be strongly linked to the bounded conceptualization of judicial review as the monopoly of a single, small, centralized body that resides in a marble shrine in Washington, D.C. I argue that things look different if we understand judicial review to be a common practice of lower courts, as capture by the constitutional practices of the Supreme Court leads to a failure to recognize, and indeed to realize, the potential embedded in the structural diffusion of adjudication for a more reconciled form of judicial review, as well as for the fostering of democratic values of participation, deliberation, and pluralism. The following

54. *See* Seth F. Kreimer, *Exploring the Dark Matter of Judicial Review: A Constitutional Census of the 1990s*, 5 WM. & MARY BILL RTS. J. 427, 430 (1997); Sanford Levinson, *On Positivism and Potted Plants: "Inferior" Judges and the Task of Constitutional Interpretation*, 25 CONN. L. REV. 843, 843–44 (1993) (citing Frederick Schauer, *The Occasions of Constitutional Interpretation*, 72 B.U. L. REV. 729, 729 (1992)) (discussing Schauer's critique of the scholarly "preoccupation" with the Supreme Court's constitutional interpretation).

55. Barry Friedman, *The Birth of an Academic Obsession: The History of the Countermajoritarian Difficulty, Part Five*, 112 YALE L.J. 153, 196 & n.180 (2002) (quoting *Limitation of Appellate Jurisdiction of the United States Supreme Court: Hearings on S. 2646 Before the Subcomm. to Investigate the Administration of the Internal Security Act and Other Internal Security Laws*, 85th Cong. 287 (1958) (statement of R. Carter Pittman)); *see also* DREW PEARSON & ROBERT S. ALLEN, THE NINE OLD MEN (1936).

56. *See infra* notes 64–70 and accompanying text.

Part explores this potential by a detailed investigation of the unique attributes of lower-court adjudication.

A. The Diffuse System of Judicial Review

The U.S. system of constitutional adjudication upholds a diffuse rule of jurisdiction over constitutional matters and judicial review. This means that all courts within the system have the power to strike down legislation that is found to violate the Constitution.[57] This is a prevalent institutional characteristic of common law systems, which are accustomed to legal development through the continuous exchange between courts of varying hierarchical levels. But it is not a necessary arrangement: other systems, including ones heavily influenced by common law practice, have concentrated at least some of their constitutional adjudication in a single tribunal (e.g., South Africa,[58] France,[59] Israel[60]); and the constitutional structure in the United States actually envisages—and still maintains, to a very limited degree—the Supreme Court as a court of original jurisdiction for specific sorts of cases[61] (these are mostly disputes between states—however only very few such cases are in fact heard by the Supreme Court each term[62]).

A central implication of the diffuse structure of judicial review in the U.S. federal judiciary is that the system does entrust the lower courts with the power to strike down state and federal legislation; and that constitutional decisions entered by these courts are as binding as any other unreviewed court order—in the case of a district court decision, they bind the parties to the dispute, and in a court of appeals backed by the doctrine of *stare decisis*, they bind all

57. *See* ALLAN R. BREWER-CARÍAS, JUDICIAL REVIEW IN COMPARATIVE LAW 127–55 (1989); Aharon Barak, *Judicial Review of the Constitutionality of Statutes: Centralism v. Decentralism*, 8 MISHPAT UMIMSHAL 13 (2005) (Isr.); Alec Stone Sweet, *Why Europe Rejected American Judicial Review and Why It May Not Matter*, 101 MICH. L. REV. 2744, 2770–71 (2003); Robert F. Utter & David C. Lundsgaard, *Judicial Review in the New Nations of Central and Eastern Europe: Some Thoughts from a Comparative Perspective*, 54 OHIO ST. L.J. 559, 583–85 (1993).

58. *See* S. AFR. CONST. 1996, § 167(6); Lynn Berat, *The Constitutional Court of South Africa and Jurisdictional Questions: In the Interest of Justice?*, 3 INT'L J. CONST. L. 39 (2005).

59. *See* 1958 LA CONSTITUTION [CONST.] 61, 61-1 (FR.); Frederico Fabbrini, *Kelsen in Paris: France's Constitutional Reform and the Introduction of* A Posteriori *Constitutional Review of Legislation*, 9 GERMAN L.J. 1297 (2008).

60. *See* SUZIE NAVOT, THE CONSTITUTIONAL LAW OF ISRAEL 160–62 (2007).

61. *See* U.S. CONST. art. III, § 2.

62. In the 2007 term, a single case out of 71 was decided under the Supreme Court's original jurisdiction. AKIN GUMP STRAUSS HAUER & FELD LLP & SCOTUSBLOG.COM, END OF TERM STATISTICAL ANALYSIS—OCTOBER TERM 2007 16 (2008), http://www.scotusblog.com/wp/wp-content/uploads/2008/06/superstatpackot07.pdf (on file with the University of Michigan Journal of Law Reform).

district courts within the circuit.[63] In the absence of review by a higher court (because of failure to appeal, or to appeal in a timely fashion, or to win certiorari, or for many other reasons), these decisions are final. Thus, a single district court judge may hold a statute unconstitutional, and so may a majority of a panel of circuit judges sitting on a court of appeals, as may a majority of the nine justices of the Supreme Court. And judges of the "inferior" courts[64] do so fairly often.

It is, of course, extremely hard to count the number of judicial review decisions entered by inferior courts; let alone the number of assertions of the power of judicial review made in cases where statutes were eventually upheld. In the single most comprehensive study to date of the practice of judicial review by federal trial courts, Seth Kreimer managed to sample 431 cases involving constitutional claims which were decided by district courts in the course of the year 1994—a mere tenth of all such cases that year.[65] Given the steady growth of the federal caseload over the last two decades,[66] it is safe to assume that the current numbers of constitutional cases are much higher. That study found that 7.6% of trial court constitutional cases were concerned with judicial review of legislation.[67] Kreimer emphasizes this finding as evidence for the relatively minimal outright countermajoritarian effect of trial court litigation.[68] But what seems to me most remarkable about this finding is the quite large number—in absolute terms—of assertions of the power of judicial review by the district courts of the federal system: according to this statistic, in 1994 federal trial courts decided

63. *See* WALTER MURPHY, CONSTITUTIONAL DEMOCRACY: CREATING AND MAINTAINING A JUST POLITICAL ORDER 261–62 (2007); RICHARD A. POSNER, THE FEDERAL COURTS 380–82 (1996); Amanda Frost, *The Limits of Advocacy*, 59 DUKE L.J. 447, 511–12 (2009).

64. By constitutional language, all federal courts which are not the Supreme Court are "inferior Courts." U.S. CONST. art. III, § 1.

65. Kreimer, *supra* note 54, at 451.

66. During the 12 month period ending on September 30, 1992, 265,612 cases were filed with the federal district courts. THE FEDERAL JUDICIARY, FEDERAL COURT MANAGEMENT STATISTICS, http://www.uscourts.gov/cgi-bin/cms.pl (on file with the University of Michigan Journal of Law Reform). By the parallel period ending on September 30, 2007, the number was 335,655. THE FEDERAL JUDICIARY, FEDERAL COURT MANAGEMENT STATISTICS, http://www.uscourts.gov/cgi-bin/cmsd2007.pl (on file with the University of Michigan Journal of Law Reform).

67. Kreimer, *supra* note 54, at 452.

68. *Id.* at 466–67.

about 330 challenges to the constitutionality of statutes.[69] In the same year, the U.S. Supreme Court decided a *total* of 82 cases.[70]

The institutional reality in the United States, then, is of pervasive engagement by federal trial courts with the practice of judicial review—an engagement that takes place away from the scholarly and political limelight, and that demands a rethinking of existing conceptions about judicial review.

B. Critiques of Judicial Review and the Supreme Court Capture

Once the existence of a "Supreme Court capture" in the dominant discourse concerning judicial review has been recognized, let us revisit the arguments surveyed in Part I, in order to reassess their bite in the new context of prolific constitutional adjudication taking place in trial courts as well. While most of the central critiques of judicial review are often worded in general terms (as in "Taking the Constitution Away from *the Courts*"[71]), in essence they are mostly concerned with one court. That is, most of the central critiques of judicial review are in fact critiques of judicial review as it is practiced by the Supreme Court; or, more accurately, as it is perceived to be a practice of the Supreme Court alone.

The *professionalism* argument against judicial review maintains that judges are not equipped to deal with the tough moral issues implicated by the interpretation of constitutional rights, because they are so enmeshed in "the law"—in developing its doctrines, refining its procedures, following its precedents—that they become poor judges of moral arguments and social justice.[72] However, to the extent that this critique holds, it seems mostly applicable to high courts: such courts would be expected to be preoccupied with formulating doctrine and setting precedent. By entering supposedly authoritative decisions they judge for all judges, and in the name of all judges. Because of the visibility of their decisions and the lingering influence of their opinions, they are acutely concerned with the style, coherence (or, often, the semblance of coherence), and quality of argumentation. Having superior research resources, they dedicate efforts to historical and (rarely)

69. The calculation, based on Kreimer's numbers, goes as follows: 431 (one tenth of all constitutional cases) X 10 (the sum of all constitutional cases) X 7.6% (the share of judicial review cases) = 327.56.

70. ALLCOUNTRIES.COM, U.S. SUPREME COURT—CASES FILED AND DISPOSITION, http://www.allcountries.org/uscensus/356_u_s_supreme_court_cases_filed.html (on file with the University of Michigan Journal of Law Reform).

71. TUSHNET, *supra* note 13.

72. Waldron, *supra* note 8, at 1379–86; *see also* VERMEULE, *supra* note 24, at 82–90.

comparative exploration. And, on top of all this, high court judges, unlike their inferior counterparts, are indeed distant from the specifics of any individual case and therefore miss the institutional advantage courts are thought to have over legislatures in assessing the actual effects of legislation on real people.[73] These are all descriptions of appellate court adjudication; they have little to do with the realities of trial courts, with their docket overloads, their scarce resources, and their direct engagement with visible clients.

Similarly, the *deliberation* argument against judicial review—that it overrides better modes of social decision-making with regard to foundational issues[74]—seems to have in mind a concept of the practice of judicial review as a process which involves authoritative, finalized, top-down determinations by a centralized, minimally-deliberative institutional entity. While such a perception is often leveled at courts in general, it is questionable whether this is an accurate account even of Supreme Court adjudication.[75] At any rate, this is certainly not the case when one considers the important potential for deliberation through the institutional diffusion of trial courts—the multiple opportunities for interaction between judges, parties, attorneys, and social and political actors, and, as importantly, between judges of different courts. Parts III and IV of this Article elaborate on this potential.

Finally, the *elitism* argument derives heavily from the image of "nine men in black robes"[76]—a persistent metaphor of institutional elitism, simulating the U.S. process of constitutional decision-making to the workings of a restricted-access and smoke-filled men's club.[77] It is worth investigating to what degree this perception is affected by such entrenched procedural conventions as the Supreme Court's *en banc* panel, the promulgation of the Court's majority decisions as the collective "Opinion[s] of the Court," or even the justices' tendency of referring to previous holdings of the Court in a quasi-royal "We" (as in, "in case X we held Y"). At any rate, the institutional complexity, human diversity, and relative

73. It is worth quoting Jeremy Waldron, who when arguing this point basically concedes, without explanation, its underlying Supreme-Courtian assumptions: "By the time cases reach the high appellate levels we are mostly talking about in our disputes about judicial review, almost all trace of the original flesh-and-blood right-holders has vanished, and argument such as it is revolves around the abstract issue of the right in dispute." Waldron, *supra* note 8, at 1379–80.

74. *See, e.g.*, ZURN, *supra* note 10; Roderick M. Hills, Jr., *Are Judges Really More Principled than Voters?*, 37 U.S.F. L. REV. 37, 37–58 (2002).

75. *See, e.g.*, Michelman, *supra* note 36, at 425–26.

76. *See* Friedman, *supra* note 55, at 196 n.180.

77. *See* Michael J. Klarman, *What's So Great About Constitutionalism?*, 93 NW. U. L. REV. 145, 189–91 (1998).

accessibility of a nation-wide system of trial courts all serve to provide a relatively less elitist character to the exercise of judicial review.

Of the four major critiques of judicial review presented above in Part I, only three need be reexamined in the context of the scholarly "Supreme Court capture." The fourth—to some, the most salient—is the critique regarding the *democratic* deficit involved in the practice of judicial review. Indeed, whether exercised by trial or supreme courts, judicial review is a countermajoritarian measure. To the extent that democracy is understood as a mechanism for the effectuation of the will of current majorities through their representatives, a shift in intellectual attention from the Supreme Court to the district courts will not resolve the constitutionalist conflict. But if one accepts the broader and, I believe, more profound vision of democracy that encompasses mechanisms of deliberation and participation and an effective accommodation of value pluralism as essentials of dignified self-government,[78] then an institutional realignment of judicial review, from the Supreme Court to the trial courts, has everything to do with preserving and promoting democracy in a constitutional system.

The literature's capture by a Supreme-Courtian paradigm of constitutional adjudication seems to skew the debate over judicial review, and thus to miss important distinctions that could serve to legitimate at least some institutional variations of this practice. However, the preoccupation with the Supreme Court's constitutionalism bears more than discursive costs. Shifting our gaze to the trial courts would not only open up new institutional possibilities—it might also alleviate some of the costs borne by various players in the constitutional field, due to the preoccupation with the role of the Supreme Court. The following section tracks these costs.

C. Further Detrimental Effects of the Supreme Court Capture

Several important players are affected by the focus on Supreme Court adjudication as the single embodiment of judicial review: inferior court judges, constituents who are actual or potential users of the court system, and the institutions that are involved in designing the makeup of the courts, namely the President and the Senate that appoint and confirm federal judges and justices, and the media that vets them.

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78. *See* ROBERT C. POST, CONSTITUTIONAL DOMAINS: DEMOCRACY, COMMUNITY, MANAGEMENT 184–91 (1995); ZURN, *supra* note 10, at 68–84; Alon Harel, *Rights-Based Judicial Review: A Democratic Justification*, 22 L. & PHIL. 247 (2003).

(1) *Inferior courts.* Conscientious trial court judges, who practice within a system that conceives of the Supreme Court as the only legitimate source for constitutional meaning, are bound to submit to a jurisprudence of deference.[79] They seek to answer legal questions according to how the Supreme Court has said such questions should be answered. In the absence of clear Supreme Court instruction, they look for sources of analogy and application in indirectly related Supreme Court opinions. And, if the Supreme Court has not offered any helpful utterance on the matter at hand, they might engage in an exercise of prediction—attempting to foresee what the high court would say of their decision if and when the decision arrived before it on appeal.[80]

It is important to note the conscientiousness of the judges in question.[81] What makes them adjudicate legal questions under an assumption of deference is usually not the prospect of being either disciplined or overturned by superior review: reversals upon appeal are rare;[82] and the Supreme Court's dwindling discretionary docket generates very few opinions as it is.[83] It is, therefore, mostly the *consciousness* of hierarchy, rather than its actual frequent occurrence (possibly with the addition of judicial risk-aversion, given the uncertainty as to whether the Supreme Court would intervene), that seems to make what we usually perceive as good judges submit to a notion of Supreme Court supremacy: the idea that there is a single court[84] that calls the major shots, leaving for the rest of the agents within the system the job of conforming Supreme Court directives with the varying facts of the cases that arise.[85]

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79. What I call a "jurisprudence of deference" has been documented by several authors. *See, e.g.*, Ashutosh Bhagwat, *Separate but Equal?: The Supreme Court, the Lower Federal Courts, and the Nature of the "Judicial Power,"* 80 B.U. L. REV. 967, 973–92 (2000); Levinson, *supra* note 54, at 847–48.

80. A whole normative theory of judicial decision-making based on prediction of appellate results exists. *See* Evan H. Caminker, *Precedent and Prediction: The Forward-Looking Aspects of Inferior Court Decisionmaking*, 73 TEX. L. REV. 1 (1994). For a general critique, see Pauline T. Kim, *Lower Court Discretion*, 82 N.Y.U. L. REV. 383, 436–41 (2007).

81. *Cf.* TUSHNET, *supra* note 13, at 38–39.

82. *See* Chris Guthrie & Tracey E. George, *The Futility of Appeal: Disciplinary Insights into the "Affirmance Effect" on the United States Courts of Appeals*, 32 FLA. ST. U. L. REV. 357 (2005); Lynn M. LoPucki & Walter O. Weyrauch, *A Theory of Legal Strategy*, 49 DUKE L.J. 1405, 1437–68 (2000).

83. *See* Erwin Chemerinsky, *The Roberts Court at Age Three*, 54 WAYNE L. REV. 947, 948–53 (2008); Kenneth W. Starr, *The Supreme Court and Its Shrinking Docket: The Ghost of William Howard Taft*, 90 MINN. L. REV. 1363, 1366–68 (2006).

84. Indeed, sometimes that single Court may be reduced even to a single justice: this happens in the eras of the balance-tippers, such as Justice Kennedy on the current Court, and Justice O'Connor before him. *See generally* Lee Epstein & Tonja Jacobi, *Super Medians*, 61 STAN. L. REV. 37 (2008).

85. *See* Bhagwat, *supra* note 79, at 986 ("Because the possibility of review is, however, extremely limited, the true force of the [Supreme] Court's precedent must lie in the voluntary,

Of course, this kind of jurisprudence of deference is, by many accounts, a good thing. It is said to promote stability, coherence, and predictability in the legal order. It is understood to serve as a normalizing check on judicial deviance and a legitimating guarantee of accountability.[86] But even if one accepts the arguable force of these rationales in most fields of "regular" law, their consequence ought to be recognized when constitutional meanings are contested: a persistent consciousness of centralizing hierarchy among lower-level courts inhibits their transformative potential as vehicles for meaningful deliberation, argumentation, and reflection on the multiple meanings accommodated by constitutional language. In many cases the central question asked by the judge—and therefore by the attorneys pleading before the judge, and other social stakeholders that may be backing the litigants' causes—is how did, or how would, the Supreme Court resolve such an issue. The case therefore no longer concerns the question of how could the law be most productively developed in order to accommodate the social question presented (as it does, at least per the realist account, in the Supreme Court). The trial court—although it offers a uniquely institutionalized venue for fleshing out social concerns through recurrent, direct encounters between government and individual—is forced away from its potential by being regimented to think and act hierarchically.

(2) *Stakeholders.* By choosing to "go to court" in order to litigate the content or meaning of the Constitution, the relevant stakeholders opt for a certain institutional package, which includes the procedures, institutional culture, and outcome possibilities and probabilities offered by a court's practices. A trial court—where (almost) all litigations begin—which is embedded in a legal culture captured by the supremacy of a Supreme Court, will usually offer either adherence to its conception of what the Supreme Court dictates, or, alternatively, mere access to the long march toward the Supreme Court, where the constitutional issue in question will perhaps be authoritatively resolved at some point in the future.

Litigants, in turn, focus their efforts on persuading the court to follow one or another understanding of Supreme Court decrees or

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good faith efforts of the lower courts to follow it. And in most cases, there seems no doubt that federal judges do in fact make every effort to apply the Court's precedent . . . .").

86. A reading from Critical Legal Studies would probably add that these apparent virtues are in truth rhetorical tools for obscuring the ideological capture of lower-court judges, who follow high court instruction because they share similar ideological projects, not due to an independent professional ethos. *See, e.g.*, DUNCAN KENNEDY, A CRITIQUE OF ADJUDICATION [FIN DE SIÈCLE] 236–46 (1997). As I argue *infra*, one need not subscribe to this extreme critique of deference in order to question the value of hierarchy in constitutional adjudication.

work hard to convince the trial court that either the Supreme Court has yet to weigh in on the question at hand or that it has signaled its intention of shifting course on a question it has already considered. Inferior court litigation becomes a stage for parsing Supreme Court decisions and strategizing how to play the system governed by that Court.

(3) *Appointers, vetters, and confirmers.* Reducing the judicial power to the actions of the single Supreme Court affects the processes by which that Court, as well as the inferior courts, is comprised. As experience clearly shows, the nomination, confirmation, and appointment process of Supreme Court justices draws significantly more focus, interest, and effort from all parties involved, including the media, than the much more common confirmation process for inferior court judges. This is, of course, not surprising: Supreme Court justices are considered the most important and most powerful judges in the country. And in at least one sense they are: sitting on the court of last resort for federal and state appeals, they have the final word in any case or controversy that gets to be heard and decided by them. But in a more abstract sense, the design of the judicial appointment process seems to reflect and reaffirm the capture of the legal and political systems by a pyramidal concept of constitutionalism: since the only constitutional determinations that matter are made, or were made, or will be made, or could be made, by the single Supreme Court, it is there that most capital should be invested.

This is a misguided premise for two reasons. *First*, as a practical matter, inferior courts have the opportunity to interpret and apply the Constitution much more often that the Supreme Court does, and they affect real lives in real contexts each and every time they engage in constitutional adjudication. Given the residual degree of Supreme Court intervention, these judges reflect the legal order to most litigants most of the time. *Second*, as a matter of embedded potential, inferior courts offer much more room for popular deliberation on the content and meaning of the Constitution through a diffuse, diverse, localized, and pluralistic institutional setting. Lack of political interest in the appointment of inferior court judges means that despite these constitutionally crucial aspects of inferior court adjudication, the process enjoys less of the democratic accountability and deliberative dynamics that more visible appointment processes garner.[87]

87. *See generally* NANCY SCHERER, SCORING POINTS: POLITICIANS, ACTIVISTS, AND THE LOWER FEDERAL COURT APPOINTMENT PROCESS (2005) (exploring the increasing politicization of the appointment process).

III. THE TURN TO TRIAL COURTS: EVIDENCE OF INSTITUTIONAL POTENTIAL

The scholarly and professional preoccupation with the Supreme Court extends beyond the judicial review debate. It is a consequence of the general pyramid-shaped assumptions held in regard to the work of state power through legal institutions. However, there is a unique aspect to rethinking the structure and practices of *constitutional* adjudication in supreme and inferior courts. Making constitutional law implies defining the very fabric of social life in its national level; it involves the most fundamental questions with which a constituency grapples: the extent of governmental power, the meaning of rights. This is what judges and justices do when they interpret and apply the Constitution; they do this even if they are not always aware of it or willing to admit it. This is why the cost of reflecting on constitutional adjudication through a distorted institutional lens is so high. If indeed the practices and characteristics of inferior courts have the institutional potential for a new, perhaps more resolved, conceptualization of constitutional adjudication in general and judicial review in particular, then it is there that the focus should be directed. In this Part of the Article, I argue that indeed there does exist the potential for trial courts to become government-provided institutional anchors for the exercise of a popularly-minded, more deliberative, more participatory, more pluralistic—indeed, democratic—kind of constitutionalism.

Three special characteristics of inferior courts—compared to those of high courts—contribute to their potential as novel locations of constitutional deliberation; all three derive from their "inferiority."[88] The *first* characteristic is the unique structural combination of professional governmental discretion with a constant, direct contact with real-life constituents. In many respects this combination of discretion and interaction is a result of the institutional realities of the administrative state, and was essentialized by Michael Lipsky as the concept of "street-level bureaucracy":[89] government, redesigned as a pervasive regulator/service-provider, employs a multitude of individual officeholders for the repetitive determination of facts and discretionary application of rules and policies.[90] Courts, of course, preceded this (arguably) new vision of

88. *See generally* Susan S. Silbey, *Making Sense of the Lower Courts*, 6 JUST. SYS. J. 13 (1981).

89. MICHAEL LIPSKY, STREET-LEVEL BUREAUCRACY: DILEMMAS OF THE INDIVIDUAL IN PUBLIC SERVICES (1980).

90. *See id.* at 3–4.

the administrative state in their combination of governmental discretion and face-to-face interaction of state and individual.

The *second* characteristic is the relative obscurity of some trial court activities from general awareness. Because there are so many of them all across the country, because their adjudication processes are relatively long, complicated, and cumbersome, because they involve direct interaction with social pathologies (i.e., what we would usually rather not know about), and because appellate review for these and other reasons is in effect scarce—trial courts are, to some degree, free to act away from the discerning watch of national politics and thus can and do exercise more independence, experimentation, and local engagement.

The *third* characteristic is the structural diffusion of trial courts and trial judges: Trial courts maintain physical presence throughout the country. Following their diverse locations, they employ diverse judges and diverse staffs, and repeatedly engage in diverse kinds of disputes that involve diverse sorts of people. This renders lower adjudication—to varying degrees—more localized, contextual, and heterogeneous than appellate adjudication, which is structurally centralized and institutionally expected to exert a normalizing force on inferior deviations. Proliferation and redundancy foster pluralism, innovation, and dialogue.

These three "inferiority effects"—trial courts' behavior as street-level bureaucracies, their relative obscurity, and their structural diffusion—support a reassessment of the role of those courts in the constitutional process. I will now elaborate on each of these attributes and their applicability to constitutional adjudication.

A. Discretion Meets the Individual: Trial Courts as Street-Level Bureaucracies

The concept of street-level bureaucracy was introduced by Michael Lipsky in order to capture the unique social and political reality of a large class of public officials whose jobs combine discretionary application of policy with regular interactions with those subject to the policy—the group he termed "clients" (welfare recipients, school students, criminal suspects, patients, litigants).[91] What makes this group of bureaucrats special is their capacity for effectively making policy—sometimes in contrast to superior instructions, other times in accordance with principal plans.[92] This

91. *See id.* at 54–65.
92. *Id.* at 13–18, 23–25.

capacity for localized, individualized policymaking is revealed as a structural characteristic of the administrative state: discretion has to be used in order to distribute scarce public resources (funds, time, space, attention); upper echelon officials cannot track and control each and every decision made by street-level bureaucrats in this respect; and street-level bureaucrats face a matrix of interests and pressures that are not fully consistent with those of policymakers and supervisors (namely, a need to process many clients in conditions that do not allow for formal equity, while asserting authority, and sustaining sufficient levels of production and reputation to ensure promotion and avoid sanctions).[93]

Faced with the constant need to balance routine case-processing and individuated treatment of varying clients, street-level bureaucrats engage in a variety of strategies, most of which are structurally enabled by their granted discretion: they screen, interact, and decide on clients' matters in ways that often involve disparate treatment, submission to heuristics, withholding of information, and deference to non-accountable agents.[94] They exercise discretion without being directly trained in this practice, and they often are not required to stipulate the reasons for their numerous decisions, many of which seemingly do not implicate formal agency output.[95] This institutional reality amounts to street-level policy; and attention is so drawn to the design of modes of administrative discretion and bureaucrat-client interaction.

It is reasonably disputable whether trial courts fall squarely within the analytical category of "street-level bureaucracies," and, more notably, whether trial judges fully constitute "street-level bureaucrats." Lipsky himself considered courts at the heart of this category.[96] Subsequent opinions diverge from this viewpoint,[97] and both sides have a point. Indeed, trial courts are uniquely positioned by being both subject to higher ordering (like other street-level bureaucrats), and in charge of supervising the acts of other bureaucratic actors—mostly in public law and criminal law litigation, where they set policy through explicit judicial pronouncements as well as informal institutional practices. Trial judges, protected by the shield of judicial independence, are also subject to much fewer

93. *Id.* at 29–31, 45–48, 81–83.

94. *Id.* at 83–99, 105–11.

95. *Id.* at 15–16.

96. *See, e.g., id.* at 19–20, 30.

97. *Compare* JAMES Q. WILSON, BUREAUCRACY: WHAT GOVERNMENT AGENCIES DO AND WHY THEY DO IT 290–94 (1989) ("Judges and bureaucrats see the world differently . . . ." *Id.* at 290.), *with* Dave Cowan & Emma Hitchings, *"Pretty Boring Stuff": District Judges and Housing Possession Proceedings*, 16 SOC. & LEGAL STUD. 363, 365 (2007) ("[British District Judges] are a breed of street-level bureaucrat . . . .").

institutional sanctions than many other bureaucrats.[98] At the same time, contemporary trial court judges clearly face many of the challenges, and employ many of the strategies, that are known to be prevalent in the work of street-level bureaucrats.[99] Trial judges manage vast amounts of cases, all involving a considerable degree of interaction with litigants and attorneys, as well as other state bureaucrats (public defenders, parole officers, marshals, law clerks, bailiffs). They regularly distribute time slots, attention spans, and degrees of interest and involvement among the various clients, in an attempt to resolve professional, psychological, and resource-scarcity constraints: consider, for example, the varying degrees of formality in the interaction between judge and attorneys, the involvement of the judge in witness examination, or the judge's engagement in settlement initiatives. And although judicial systems are designed in a uniquely disciplining structure—the principal levels, i.e., appellate courts, supposedly exist for the single purpose of correcting lower-level errors—the trial procedure leaves judges with great swaths of practically unreviewed discretion (read: power) of the kind depicted by Lipsky.

Several normative implications may be drawn from this illustration of bureaucratic discretion. One plausible response emphasizes its democratic deficits: street-level bureaucracy is understood as a latent mechanism of policymaking by unaccountable officials. Policy choices reached through majoritarian politics are thwarted by the free-ranging discretion of end-point officials. Democratic will is not executed, equality in treatment is skewed, and administrative coherence and consistency are undermined.[100] Without laboring the strength of this critique—suffice to recall that institutional design, and not only "substantive" policy, is also the result of democratic decision-making—another response to the phenomenon of street-level bureaucracy in the lower courts would focus on the constitutionally transformative *potential* revealed in these institutional realities. Courts offer a unique version of the encounter

98. This claim is of course complicated in those states that elect their judicial officers. Electoral scrutiny brings into play a whole new set of incentives and strategies—with both politicizing and insulating effects. *See* Steven P. Croley, *The Majoritarian Difficulty: Elective Judiciaries and the Rule of Law*, 62 U. CHI. L. REV. 689 (1995); Jed Handelsman Shugerman, *Fear, Filters, and Fidelity: Judicial Elections and the Making of American Tort Law* (Harvard Law Sch. Program on Risk Regulation Research Paper Series, Paper No. 08-13, 2008) (on file with the University of Michigan Journal of Law Reform), *available at* http://ssrn.com/abstract=998625. At any rate, the institutional model envisioned in the Article concerns appointed judiciaries.

99. For a foundational piece tracking this development in the judicial role, see Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374 (1982).

100. *See, e.g.*, 3 FREIDRICH A. HAYEK, LAW, LEGISLATION AND LIBERTY: THE POLITICAL ORDER OF A FREE PEOPLE 144–45 (1979).

between discretion (power) and the individual (agency): the matter that is negotiated or fought over is the very substance of the prevailing "rule of law"—what legal rules mean and how they are to be applied. Thus, as street-level bureaucrats in the welfare system produce welfare policy by employing "bureaucratic" strategies in the face of recipients, street-level bureaucrats in the judiciary produce "the law" through their varied interactions with constituents.

Trial judges, then, have at their disposal, and in fact often employ, a wide range of unique strategies that form a distinct mode of governmental power and give an independent and very real meaning to the institutional effects of the legal regime. This recognition can and should lead to utilizing the trial courts' unique sphere of legal discourse in the advancement of constitutional deliberation. Trial courts are revealed as not merely submissive units in an authoritative, top-down, error-fixing system applying a unitary "law," but rather as an institutionally distinct class of courts, that by its combination of judicial discretion and civil interaction offers the potential for popular constitutional discourse. If this "street-level potential" is conducive to democratic vitality and constitutional development, as I think it is, then the challenge to the institutional designer is to realize this potential within a system that tends to think in highly hierarchical terms. This Article offers one such way, by conceiving of constitutional adjudication as a practice of lower courts alone.

B. Judging in the Shadow of the Law: The Benefits of Institutional Invisibility

Once in a while the written press discovers, and in turn reveals to the reading public, the unnoticed existence and often prolific work of various court units. The public interest in such reports rests on their revelatory nature—here are courts doing something we did not think courts usually do. [101] The structured, proceduralized, adversarial, case-or-controversy-based notion of "the court" is shown to only partially convey what is really going on in the nation's courtrooms and what it really means to be a judge. This often happens when the focus turns to the practices of specialized trial court units, created to tackle specific social concerns by way of

101. *See, e.g.*, Leslie Eaton & Leslie Kaufman, *Judges Turn Therapist in Problem-Solving Court*, N.Y. TIMES, Apr. 26, 2005, at A1 (domestic violence courts); Erik Eckholm, *Innovative Courts Give Some Addicts a Chance to Straighten Out*, N.Y. TIMES, Oct. 15, 2008, at A1 (drug courts); Susan Saulny, *A Dignitary Examines Community Court*, N.Y. TIMES, Dec. 16, 2003, at B3 (community courts).

jurisdictional individuation. These are sometimes tellingly called "problem-solving courts," whose missions are evident from their titles: drug courts, domestic violence courts, juvenile courts, mental health courts, gun courts, and in the inner-city setting, community and neighborhood courts.[102]

These trial courts are located at the bottom of most formal court hierarchies; being of limited jurisdiction, often providing entry points for junior judges, usually commanding the least funds, physical resources, and prestige within the system, and regularly adjudicating the most mundane social and economic pathologies, they enjoy a relative obscurity from the public eye, as well as from scholarly studies of "the courts." Because they are usually highly fact-specific and not concerned with explicit legal interpretation, their judicial decisions are rarely appealed, and are almost never reviewed by the jurisdiction's highest courts.[103] Their jurisprudence, which often consists of more action than words, is not regularly registered as part of the common law process of developing legal doctrine. Their punitive sanctions are more varied than the typical prison/fine options of other courts, often involving therapeutic processes, community work, and court-monitored arrangements. In many instances they seem closer to ADR methods than to those of the typical court. Still, these *are* courts, to be sure: their judges wield the authority to mobilize state power in order to effectuate their decisions.[104] But they are courts that, through their relative invisibility, enjoy a certain level of institutional independence that enables them to mold different modes of adjudication in order to suit varying matter-specific demands.[105]

Thus, procedures in problem-solving courts often turn into collaborative efforts to resolve the issues underlying the case at hand. These efforts rely on personal networks that evolve around the judge, and that connect attorneys (mostly prosecutors and public defenders), law enforcers, parole officers, social workers, local activists, and other therapeutic agents, and in turn the parties

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102. Michael Dorf has cast these courts as experimentalist institutions. *See* Michael C. Dorf, *Problem-Solving Courts and the Judicial Accountability Deficit*, *in* PUBLIC ACCOUNTABILITY: DESIGNS, DILEMMAS AND EXPERIENCES 301, 305–09 (Michael W. Dowdle ed., 2006).

103. In some problem-solving courts, such as many drug courts, admittance into the therapeutic programs conducted by the court requires a waiver by the defendant of her right to appeal. *Id.* at 315.

104. *See* Robert M. Cover, *Violence and the Word*, 95 YALE L.J. 1601 (1986).

105. *See generally* PAMELA M. CASEY & DAVID B. ROTTMAN, NAT'L CTR. FOR STATE COURTS, PROBLEM-SOLVING COURTS: MODELS AND TRENDS (2003) (on file with the University of Michigan Journal of Law Reform), *available at* http://www.ncsconline.org/WC/Publications/COMM_ProSolProbSolvCtsPub.pdf; James L. Nolan, Jr., *Redefining Criminal Courts: Problem-Solving and the Meaning of Justice*, 40 AM. CRIM. L. REV. 1541 (2003).

(mostly defendants) involved in the disputes. Remedies and sanctions are designed with attention to case-specific circumstances. In place of the formalized adversarial structure that is preserved in visible courts (including popularly visible: consider the paradigmatic television movie scene), judging in the shadow of the law—in the areas where hierarchical supervision and political interest are scarce—allows for participation, discussion, and cooperation between the various stakeholders.

These courts are not, however, invisible to their respective constituencies. Successful neighborhood courts become centers of community action and mobilization through the involvement of local leaders and the accommodation of community-particular circumstances in the dispensation of justice. Active drug courts are capable of affecting local abuse trends through continuous tracking of offenders and adoption of intra-community treatment methods as part of the sanctioning system.[106] Community courts can become centers for local rejuvenation and social engagement.[107]

Can federal district courts employ the invisibility strategies of "problem-solving courts"? It is true that there are fewer such courts and that they typically adjudicate cases that bear a greater chance of attracting the attention of the media, the public, and the appellate courts—notably, issues concerning the enforcement, interpretation, and application of the Constitution. The system that operates them is relatively wealthy and they garner a considerable amount of interest by Congressional oversight committees.[108] And still, once in a while revelatory accounts emerge of what it is that district courts actually do. Perhaps the best-known such account in the last several decades was Abram Chayes' recognition of the evolving mode of federal adjudication that he termed Public

106. *See* Michael C. Dorf & Charles F. Sabel, *Drug Treatment Courts and Emergent Experimentalist Government*, 53 VAND. L. REV. 831 (2000).

107. *See, e.g.*, Jeffrey Fagan & Victoria Malkin, *Theorizing Community Justice Through Community Courts*, 30 FORDHAM URB. L.J. 897, 924–26 (2003). Of course, such modes of "soft" justice are exposed to a substantial set of critiques: it is feared that they entail giving up the protections of due process; that they are bases for judicial unaccountability, tyranny, and discrimination; and that they render democratically-prescribed laws as mere starting points for problem-solving dynamics. *See* Timothy Casey, *When Good Intentions Are Not Enough: Problem-Solving Courts and the Impending Crisis of Legitimacy*, 57 S.M.U. L. REV. 1459, 1489–502 (2004); Eric Lane, *Due Process and Problem-Solving Courts*, 30 FORDHAM URB. L.J. 955 (2003). But the force of these critiques is diminished in the present context, which is concerned with federal courts and with a very limited slice of cases—those invoking claims of judicial review.

108. *See* Judith Resnik, *Uncovering, Disclosing, and Discovering How the Public Dimensions of Court-Based Processes Are at Risk*, 81 CHI.-KENT L. REV. 521, 540–41 (2006).

Law Litigation[109]—a redefinition of federal adjudication as a continuous, collaborative, forward-looking, injunction-based, justice-driven, process of judicial negotiation through such social minefields as school desegregation and prison reform. A subsequent contribution by Judith Resnik moved the focus to the partial but significant role of the federal judge as a case-manager, whose responsibilities have been gradually expanding to pre-trial and post-trial procedures that often involve different modes of party-interaction and decision-making than those employed while presiding over an actual trial.[110]

Even federal district courts, then, seem to retain the possibility of developing institutional innovations that go unnoticed unless directly heeded by a close, aggregating inspection of their practices. Although they are fewer and relatively more salient than their state court counterparts, there are still too many district courts, with too many cases on their dockets, for any central tracking system to be capable of negating the benefits of (relative) invisibility.[111] The federal district courts are comprehensively dispersed across the country, and like other localized institutions, are embedded—to varying degrees, to be sure—in the issues, professional cultures, and social and political sensibilities of the regions in which they reside; in this respect they also resemble the invisible state trial courts.

When it comes to the adjudication of claims for judicial review, the relative invisibility of district court adjudication can serve as a basis for locally-negotiated, contextually-tailored resolutions to constitutional questions. Acting away from "center stage," as do the various problem-solving courts in state systems, allows for more experimentation in constitutional law, since innovation and deviation take longer to be detected and disciplined by the normalizing forces of centralized politics (judicial and other); thus enabling new ideas and variations to evolve and be tested. The dynamics of

109. Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976). Building on Chayes, the continuing study of public law litigation keeps generating more refined insights into this yet-evolving judicial practice. *See, e.g.*, Charles F. Sabel & William H. Simon, *Destabilization Rights: How Public Law Litigation Succeeds*, 117 HARV. L. REV. 1015 (2004); Susan P. Sturm, *A Normative Theory of Public Law Remedies*, 79 GEO. L.J. 1355 (1991).

110. Resnik, *supra* note 99.

111. The ninety-four federal districts are only the initial break-down of the federal court system. Most federal districts operate from more than one court, each located in a different hub within the district. And, of course, most such courts inhabit more than one judge. Because practically all district trials are currently presided over by a single judge, the institutional production of federal district courts is actually the accumulation of the work of 655 separate judgeships. Federal Judicial Center, The U.S. District Courts and the Federal Judiciary, http://www.fjc.gov/history/courts_district.html (on file with the University of Michigan Journal of Law Reform).

constitutional litigation may also benefit from institutional obscurity: local networks could form, and less formalized interactions could ensue, between attorneys, judges, rights-activists, and regional social actors who are directly affected by the judicial result (these would substitute for the national pretension of amicus briefs filed with the Supreme Court by public organizations—the high court's version of interest-group lobbyists).

Supreme Trial Courts? The Possible Benefits of Hyper-Visibility

The previous section considered institutional invisibility—that is, the capacity of lower-level units to shy away from the normalizing effects of superior oversight—as a potential basis for enhancing decisional power and promoting experimentalism in the lower courts. At the same time, it was emphasized that in order to produce beneficial results, institutional invisibility in the trial court level has to be complemented by local visibility to the courts' varying constituents. However, a very different institutional mechanism may also promote values of participation, deliberation, and pluralism that are at the core of the current exploration: some systems establish their highest constitutional court as a court of both first and last resort—in essence creating a "supreme trial court."

Examples of such courts—to varying extents—are Israel's High Court of Justice,[112] Germany's Federal Constitutional Court,[113] and South Africa's Constitutional Court.[114] These are supreme courts, in the sense that their iterations bind all lower courts[115] as well as all other bodies of government. But they are also trial courts, because they regularly adjudicate considerable numbers of petitions filed

112. Israel's High Court of Justice is in truth a session rather than a separate court: the justices of the Supreme Court sit alternately as the country's highest court of appeals and as its single-instance court of constitutional affairs. *See* NAVOT, *supra* note 60, at 139–41; Gidi Sapir & Daniel Statman, *Religious Marriage in a Liberal State*, 30 CARDOZO L. REV. 2855, 2873 n.32 (2009).

113. GRUNDGESETZ [GG] [Constitution] art. 93(1), § 4a (F.R.G.); *see also* Alec Stone Sweet & Jud Mathews, *Proportionality Balancing and Global Constitutionalism*, 47 COLUM. J. TRANSNAT'L L. 72, 104 (2008).

114. *See* sources cited *supra* note 58. The U.S. Supreme Court also maintains this dual capacity when it exercises its exclusive jurisdiction over state-state litigation. However, these are very rare procedures, and as such have only negligible institutional significance. *See supra* notes 61–62 and accompanying text.

115. In systems such as those of Germany, South Africa, and Russia, conflict may arise as to the comparative supremacy of the constitutional court on the one hand and the highest court of appeals on the other. These are intriguing dynamics, and may indeed shed light on high-stakes competitions as an institutional tool for pluralizing constitutional adjudication. *See generally* WOJCIECH SADURSKI, RIGHTS BEFORE COURTS: A STUDY OF CONSTITUTIONAL COURTS IN POSTCOMMUNIST STATES OF CENTRAL AND EASTERN EUROPE 19–25 (2008).

and argued directly by the interested parties without the prior rendering of any judgment by any other court.[116] In the absence of the filtering effects of two or three lengthy and costly levels of appeal and (in some cases) the barrier of discretionary jurisdiction, supreme trial courts combine the public visibility of a high court with the accessibility, immediacy, and diversity that characterize inferior court adjudication: high court justices, usually housed in ominous shrines, recurrently encounter real-life people with real-life constitutional claims and literally decide "one case at a time."[117]

If the procedure in fact allows for very large numbers of cases to be processed by the high court,[118] there is usually an organizational arrangement that distributes adjudication among smaller panels of justices. Indeed, federal courts of appeals in the United States sit regularly in panels of three, unlike the familiar U.S. Supreme Court system of *en banc* adjudication. This in turn creates a discourse among panels that produce diverse opinions and outcomes in related cases. Of course, judicial dynamics within a single court present a large variety of coordination mechanisms—some institutional,[119] others psychological[120]—such that an institutionalized diversity within a supreme trial court will hardly resemble that of a diffuse grid of trial courts spread throughout a country. Still, supreme trial courts enjoy unique access to public awareness thanks to their hierarchical salience. Decisions therefore more easily become part of political discourse on constitutional matters.

This Article does not elaborate on the supreme trial court model. My focus, which tracks the U.S. structure of adjudication, is on "genuine" trial courts, with their unique hierarchical dynamics and institutional potential. Nonetheless, it is important to recognize the alternate concept of highly visible trial court adjudication.

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116. *See supra* notes 112-14.

117. *Cf.* CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT (1999) (depicting the Supreme Court's step-by-step jurisprudence of producing holdings with limited scope).

118. The annual docket of Israel's High Court of Justice numbers over 4000 petitions, each of which has to be reviewed by at least three justices in order to be disposed. THE ISRAEL COURT ADMINISTRATOR, THE ISRAEL COURT SYSTEM: A SEMI-ANNUAL REPORT 1.1.08–6.30.08, at 36 (2008), http://elyon1.court.gov.il/heb/haba/1-6_2008.pdf (on file with the University of Michigan Journal of Law Reform); *see also* Martha Minow, *Constituting Our Constitution, Constituting Ourselves: Comments on Reva Siegel's Constitutional Culture, Social Movement Conflict and Constitutional Change*, 94 CAL. L. REV. 1455, 1459 (2006).

119. For example, the option a panel holds to defer judgment until another panel disposes of a contemporaneous case. *See, e.g.*, United States v. McQuiston, 972 F.2d 349 (6th Cir. 1992) (unpublished table decision).

120. These are peer-pressure and panel-related strategizing effects. *See* Richard A. Posner, *Judicial Behavior and Performance: An Economic Approach*, 32 FLA. ST. U. L. REV. 1259, 1273 (2005).

It will be again useful in a later discussion, when the applicability of the inferiorizing model to non-U.S. constitutional regimes will be questioned.[121]

C. Many Voices: The Pluralist Effects of Redundancy

Perhaps the most striking characteristic of the modern administrative state is its sheer physical size: not merely the multitude of agencies and organizations maintained by the state, but even more so their spread throughout the country in units and departments, buildings and offices, inhabited by scores of employees. Many national agencies divide their scope of authority into regional and local chapters, which dispense agency policy locally. From an organizational expediency perspective, this compensates for the lack of physical capability to carry out administrative authority by a single central body—it is obviously more efficient and less burdensome to open Social Security offices or Veteran Administration hospitals in every urban center, than to have all of the clients of these organizations arrive at a single center somewhere in the country. Courts, of course, are no different, and even in its earliest days it was understood that Supreme Court Justices would have to "ride circuit" and bring federal law to its constituents, rather than having them come and get it.[122]

The diffuse structure of administrative agencies and court systems that emerges—many units employing local administrators throughout the country to apply the same policies and procedures to relevantly equal clients—raises various agency problems and concerns of coherence and parity. Some of these have already been touched upon, in the discussion of trial courts as street-level bureaucracies.[123] But institutional multiplicity and redundancy, the costs they generate notwithstanding, may also reveal themselves as sources of value pluralism and dialogue in the interpretation and application of public policy or, in the case at hand, constitutional norms.

The potential for creating new spaces of expression, exchange, and interaction between groups and individuals of differing interests or beliefs through an institutionalized proliferation of decisional authority has been tracked by various authors in differ-

121. *See infra* Part VI.D.

122. Compare, as Cover did, with the Jewish history of "the halcyon days before the destruction of Jerusalem, where the Great Sanhedrin sat and whence the Law went out to all Israel." Cover, *supra* note 45, at 41.

123. *See supra* Part III.A.

ent contexts. Consider Robert Cover's exploration of the functions of jurisdictional redundancy—state/state, state/federal—in the United States (explaining the multiplicity of venues as a design that preempts centralized capture by ideology or interest, and promotes innovation through experimentalism and dialogue),[124] or Ayelet Shachar's joint governance model for the adjudication of culturally-implicated matters in multicultural democracies (a networked division of adjudicatory power among various state and sub-state institutions, facilitating competing liberal demands of group and individual rights, but also fostering transformative processes within and among groups through exchange of normative visions).[125] These and similar accounts rely on purely institutional frameworks to identify, and in turn induce, the coexistence of diverse, multi-vocal normative worlds. If constitutionalism is meant to sustain this kind of value-pluralism, then its enforcement mechanism calls for the same kind of institutional diffusion.

IV. INFERIORIZING JUDICIAL REVIEW: POPULAR CONSTITUTIONALISM IN THE TRIAL COURTS

I have argued two central propositions: (1) The most prevalent critiques of the practice of judicial review are focused on a limited concept of this practice as the domain of the Supreme Court. When considering diffuse systems of judicial review, these critiques overlook the prolific constitutional work done by trial courts. Furthermore, judicial review in trial courts is susceptible to much fewer of the critiques presented with the Supreme Court in mind. (2) Due to their multitude of direct, recurrent encounters with litigants, their relative institutional independence in relation to higher courts, and their structural diffusion across regions and populations, trial courts have a unique institutional potential for enhancing democratic values of deliberation, participation, and pluralism.

These two propositions serve as a basis for the following normative argument: trial courts—for the purpose of the simple model

124. Robert M. Cover, *The Uses of Jurisdictional Redundancy: Interest, Ideology, and Innovation*, 22 WM. & MARY L. REV. 639 (1981); *see also* Rochelle Cooper Dreyfuss, *Specialized Adjudication*, 1990 BYU L. REV. 377, 379–80.

125. AYELET SHACHAR, MULTICULTURAL JURISDICTIONS: CULTURAL DIFFERENCES AND WOMEN'S RIGHTS 88–145 (2001); *see also* CAROL WEISBROD, EMBLEMS OF PLURALISM: CULTURAL DIFFERENCES AND THE STATE 149–56 (2002) (considering the proliferation of schooling variations as a state-managed exercise in pluralism).

explored here, these will be federal district courts[126]—should be reconstituted as the sole constitutional courts of the federal system. This means that the power of judicial review—as defined earlier, the power to overrule legislative acts for constitutional reasons—would be restricted to trial courts alone. The Supreme Court would have no power to review judicial review determinations made by lower courts. For the sake of simplicity, the model would also eliminate the power of federal appellate courts to review these determinations. Clearly, the political and procedural barriers to implementing such a (seemingly) radical shift in the decisional power of the federal judiciary would be immense. I bracket here these practical concerns and focus instead on the alternative institutional reality the model proposes.

This Part centers on the argument for inferiorizing judicial review. I hope to show how this idea manages to combine the contributions of popular/populist constitutionalists, who are typically suspect of judicial power, with a theory of democratic deliberation that utilizes the very institutional potential offered by courts.

A. Popular Constitutionalism in the Trial Courts

Many current constitutional thinkers—be they critics of (the Supreme-Courtian concept of) judicial review;[127] explorers of alternate, non-court-based modes of constitutional mobilization;[128] or scholars concerned with explicitly politicizing (supreme) courts, primarily through the judicial appointment process[129]—are sometimes considered to share a common theoretical category: "popular constitutionalism." What exactly constitutes a popular constitutionalist perspective, or theory, or argument, is not fully

126. State courts, with their complicating characteristics of judicial elections and jurisdictional complexities, are excluded from this model. *See supra* note 2.

127. Most notably, see KRAMER, *supra* note 3; PARKER, *supra* note 22; TUSHNET, *supra* note 13; Kramer, *supra* note 9.

128. *E.g.*, Robert Post & Reva Siegel, Roe *Rage: Democratic Constitutionalism and Backlash*, 42 HARV. C.R.-C.L. L. REV. 373 (2007); Reva B. Siegel, *Dead or Alive: Originalism as Popular Constitutionalism in* Heller, 122 HARV. L. REV. 191 (2008).

129. *E.g.*, Jack M. Balkin & Sanford Levinson, *The Processes of Constitutional Change: From Partisan Entrenchment to the National Surveillance State*, 75 FORDHAM L. REV. 489 (2006); Steven G. Calabresi & James Lindgren, *Term Limits for the Supreme Court: Life Tenure Reconsidered*, 29 HARV. J.L. & PUB. POL'Y 769 (2006); Robert Post & Reva Siegel, *Questioning Justice: Law and Politics in Judicial Confirmation Hearings*, YALE L.J. POCKET PART 38 (2006), http://yalelawjournal.org/images/pdfs/27.pdf (on file with the University of Michigan Journal of Law Reform).

defined,[130] but it seems that what is essentially common to these various points of view is the idea that constitutionalism—giving substance and meaning to the Constitution—should not only be effected in courts and by courts, but should also involve the meaningful participation of other political spheres. The general theme is thus to re-orientate the gaze away from "the courts," and to focus—in both descriptive and normative terms—on the constitutional effects of non-court actors.[131]

The popular constitutionalist message is, of course, conflicted. On the one hand, it is profoundly democratic, and not merely because it seems to give more weight than other constitutionalist theories to the choices of present majorities. Popular constitutionalism is democratic because it is concerned with assuring that the Constitution remains more than a formal blueprint to be handled, interpreted, and applied only by professional experts who are often called judges; rather, it considers the Constitution as a source for continuous self-assessment and self-determination of the constituency as a whole. This is why popular constitutionalism is wary of "courts" monopolizing the Constitution, and is encouraged by the prospects of competing modes of public deliberation over the meaning of the Constitution—in governmental politics, in social movements, in elections, indeed in the proverbial city square.

On the other hand, popular constitutionalists are still constitutionalists. They recognize the unique subject matter relevant to defining the institutions of the democratic state and the relations and interactions between political groups within the state, including majorities and minorities; and thus they focus their inquiries on the processes and conditions that would allow for constitutionalism to occur, but without the inhibiting effects of court supremacy, or court "overhang."[132]

The importance of the popular constitutionalist literature lies in its direct engagement with the conflict between the democratic

130. *See* Mark Tushnet, *Popular Constitutionalism as Political Law*, 81 CHI.-KENT L. REV. 991, 999–1001 (2006) (embracing the recognition that "popular constitutionalism does not offer crisp analytic categories" for predicting how its dynamics would play out in varying contexts); *cf.* Erwin Chemerinsky, *In Defense of Judicial Review: The Perils of Popular Constitutionalism*, 2004 U. ILL. L. REV. 673, 675–77 (criticizing the lack of "precise definition of the concept" of popular constitutionalism).

131. This reading differs from that of Barry Friedman, who defined the common characteristic of popular constitutionalist agendas as "a notion that—at least in specified circumstances—judicial review should mirror popular views about constitutional meaning." Barry Friedman, *Mediated Popular Constitutionalism*, 101 MICH. L. REV. 2596, 2598 (2003). I understand the central thrust of popular constitutionalism to be concerned not so much with how the Supreme Court should act, but rather with the political processes that precede, follow, or altogether substitute judicial review.

132. *See* TUSHNET, *supra* note 13, at 57–65.

vision of popular deliberation and the traditional understanding of constitutionalism. Unlike other invocations of the democratic difficulty of judicial review, which could presumably be resolved by merely relaxing the demands of the amendment procedure of Article V,[133] popular constitutionalism—as I read it—attaches a separate and central value to the ongoing constitutional discourse that takes place away from the courts, whether affecting, resisting, or wholly ignoring judicial power. The "pure" case of popular constitutionalism is of course a constitutional amendment, which requires the mobilization of political action in many local and national spheres. But the interesting—and more frequent—occurrences of popular constitutionalism take various other shapes such as political actors who defy judicial interpretations on constitutional grounds, institutional maneuvers that aim at affecting judicial outcomes, and social movements that seek to affect the public meaning of constitutional norms.

The model of judicial review I offer here—the inferiorizing model—relies on these contributions of popular constitutionalism. At the same time, by breaking down the over-simplified notion of "the courts" into the diverse segments that constitute the judiciary, I try to show that there could be an important role for at least some courts in a popular vision of constitutionalism. A judicial system that is designed, and even more so perceived, as an institutional "build-up" towards conclusive settlements of all constitutional questions by "one supreme Court" is indeed a basis for inhibiting public participation in the constitutional debate, and thus limiting the effect of popular engagement in self-determination. In some social contexts, these costs to democracy may outweigh the potential benefits of judicial enforcement of the Constitution. But a judicial system reconstituted as a polycentric institutional grid, with as many points of entry (cases) as points of departure (decisions) in constitutional matters, might resolve these conflicting values.

The idea, then, as mentioned before, is to "take the Constitution away from the Supreme Court." In the U.S. diffuse system of judicial review, this would mean that district courts would keep reviewing the constitutionality of legislation and retain their power to strike down statutory provisions that are found to violate the Constitution. These determinations of judicial review however would not be appealable, and the Supreme Court (and, for pur-

133. Bickel's countermajoritarian difficulty seems to me to fall in this category. *See* BICKEL, *supra* note 5. In many ways, Bruce Ackerman's constitutional moments are also narratives of "Article V-like" mechanisms of persuading the Supreme Court that a formal constitutional change has happened. *See* 1 ACKERMAN, *supra* note 41.

poses of simplicity, the courts of appeals) would not have a role in the practice of judicial review. For the purpose of this Article, the proposed shift would be limited to constitutional adjudication invoking the rights-provisions of the Constitution. Let me now explain in more detail some of the aspects of the inferiorizing model, and what I perceive as its beneficial qualities.

B. The Inferiorizing Model: Contents and Effects

(1) *Leaving things decided.* Perhaps the most important point to state at the outset is that the inferiorizing model maintains a judicial role in enforcing the Constitution against majoritarian abuses, and keeps generating judicial resolutions to constitutional disputes. Each trial court, confronted with a constitutional challenge to the validity of a piece of legislation, is authorized, as it is today, to strike down that provision or to abstain from doing so. Exempt from hierarchical supervision, the conscientious judge[134] is assumed to substitute high court interpretation with the *Constitution itself* as his or her source of authority. The effects of a judicial review decision would be the same as the effects of a determination of unconstitutionality by a district court under the current regime: applicable to the parties to the dispute (*inter partes*). The trial court's decision is final and enforceable—e.g., a defendant who successfully challenges a criminal statute gets acquitted—but it does not have the imposing force of precedent to be followed by other courts in similar cases. The trial court's decision is also supreme, in the sense that the legislature cannot re-legislate the statute to apply to the prevailing party: the countermajoritarian effects of judicial review are sustained, on a case-by-case basis. However this is a weak kind of supremacy: the statute remains in force throughout the jurisdiction, with the exception of the prevailing party in the specific case.

(2) *Post-decision dynamics.* The trial court's judicial review determination is conclusive (to the parties involved); it will not be reviewed by other courts. This means that in the judicial review context, appeal-related strategizing is eliminated. The endowments allotted by the trial court are the final judicial intervention in the constitutional aspect of the dispute—the parties are free to use them for negotiation or persuasion purposes, away from the courts. In the absence of prospects for future reversal, the debate over the general propriety of the statute in question, and over how other courts should resolve it, can begin immediately. And indeed, other

134. *See supra* Part II.C.1.

judges, while not obligated to follow the dictates of a fellow trial judge, may take notice of the result reached in a similar case, as is the habit of most judges when confronted with new or complicated questions: they take intellectual guidance from prior resolutions of such questions, and pose their own solutions in relation to previous ones. Without the prospect of appellate intervention, inferior courts engage, over time, in a multi-member conversation about the meanings of the Constitution—a conversation repeatedly resumed by responsive litigants.

At the same time, political actors take notice of the courts' decisions in real time: with no need to await further review by higher courts, political action can resume swiftly. Legislators may decide to revise a statute tainted by judicial invalidations—either mending the apparent constitutional flaw or, just as plausibly, stressing the majority's insistence that the act is nonetheless constitutional. Interest groups can engage in lobbying with the legislature to act one way or another. Government officials will need to decide whether to keep enforcing such a statute. At the same time, legal activists may pursue additional litigations in order to get a more comprehensive sense of judicial understandings of the constitutional question, and either reinforce or redirect the trajectory initiated by previous decisions.

(3) *Distributive consequences.* Eliminating the possibility of appeal from judicial review determinations is expected to generate an added distributive effect of enhanced parity between the parties. Appellate strategies are usually more available to "haves"—that is, to litigants of financial or institutional means; and to repeat players. In the constitutional context that would normally be the state.[135] In the context of judicial review, where the protection of weakened, vulnerable, and under-organized groups is often at stake, a fair allocation of strategic chips seems all the more important.

Perhaps more profoundly, by turning trial courts into the constitutional courts of the system, multiple points of access are provided to various claimants for arguing their constitutional challenges and generating enforceable judicial results. Because access to a trial court is an individual right, in the public law context it approximates direct democracy and facilitates individual participation more than any other kind of governmental procedure, including

135. *See* Linda R. Cohen & Matthew L. Spitzer, *The Government Litigant Advantage: Implications for the Law*, 28 FLA. ST. U. L. REV. 391 (2000). The seminal framing of this insight is Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y. REV. 95 (1974).

popular elections.[136] Members of silenced, disenfranchised, or under-represented groups have, at least formally, equal access to trial court adjudication as those of social, economic, and political elites. Generating constitutional discourse at the trial court level would ensure, at least to some degree, that members of weak groups effectively participate in generating constitutional meanings and in accumulating lasting court victories. This is an important distinction from the departmentalist school of popular constitutionalism (Larry Kramer being its notable figure[137]) that seeks to rely on the existing, highly structuralized institutions of political government—President, Congress (and parties), Supreme Court—for the sustenance of constitutional discourse. These are profoundly elitist, remote, and quite arcane, social venues.[138] The work of trial courts, on the other hand, is to hear practically anyone who comes before them with a valid legal claim, and to do so in a relatively accessible manner such that procedural expertise is not a necessary condition for success.

(4) *Framing.* The court process makes stakeholders state their concerns in terms of claim and answer, law and fact, right and duty, power and privilege. It requires them to work out a narrative, and to form legal arguments that are based in text, reason, policy, and history. Judges are expected to determine and delineate the legal questions that are invoked by the dispute, to distinguish them from matters of fact, and to apply specifically relevant bodies of law. All of these are often, and rightly, perceived as the limitations of the legal process: its imposed binary nature, its distorted sense of truth, its methodological and political shortcomings as narrative-producer, its stiffening formality. But these characteristics are also what makes the trial court such a potent vehicle of normative discussion and such a popularly attractive medium for the staging of moral and political dilemmas. The court process frames the harshest constitutional disputes in socially "usable" terms: it provides both narrative form and clearly defined questions. Of course, courts may err in generating both narratives and questions. But when many courts do this in many cases over time, diversity and redundancy serve as checks on erroneously deviant framings. These checks will be further explored in points 8–10.

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136. *See* Eylon & Harel, *supra* note 39, at 1017–21 (judicial review as a mechanism of participatory democracy).

137. *See* Kramer, *supra* note 9, at 83; Larry Kramer, *Response*, 81 CHI.-KENT L. REV. 1173, 1175–76 (2006) [hereinafter Kramer, *Response*].

138. For a similar critique, see Christopher Tomlins, *Politics, Police, Past and Present: Larry Kramer's* The People Themselves, 81 CHI.-KENT L. REV. 1007, 1015–16 (2006).

(5) *Reasoning.* Judicial decisions not only frame legal issues, but also reason about ways to resolve those issues. They explain how and why a conclusion was reached. The two accepted explanations as to why courts attach reasons to decisions are appealability and accountability: as a practical matter, inferior courts need to explain their decisions so that appellate courts are able to rationally review them; and as a more profound democratic notion, there is a sense that people—both the specific litigants and the general constituency—have a right to know why the court decided the way it did, to ensure that government is acting rationally and consistently and to allow for further deliberation on the basis of its stipulated reasons.[139] Of course, in a Supreme-Courtian regime of judicial review, very few people, with the exception of appellate judges, are interested in the reasons given by district judges to their constitutional decisions. We are all concerned with the at-most nine opinions produced by the justices of the Supreme Court. Under the inferiorizing model, more reasons, generated by more judges, will have to occupy the stage when a constitutional matter comes under popular consideration. These reasons will no longer serve the appealability rationale but they will keep providing accountability. More importantly, however, the various reasons offered by trial judges for constitutional determinations will serve as a resource for constitutional deliberation away from the courts. Just as judges are competent framers, so they are fairly proficient reason-givers. They are also persistent and versed readers of the Constitution. Popular constitutionalism can use their contributions to enrich deliberation with "ready-made" arguments and counter-arguments.

(6) *Localism.* In the settler society of the early United States, courts emerged locally, in a diffuse and scattered manner, as part of the efforts of the various communities to organize, enforce order, and govern. As colonies became states, the local nature of the courts' jurisdictional limits took on permanent form: the rules that evolved regarding personal jurisdiction and venue attached a court's power over a person to the locale from which he or she came or in which he or she engaged in significant activities. The persistence of the jury system in the United States grants the legal process an added aspect of localism, as does the practical fact that the presiding judge, the attorneys, and other court officers are usually also members of the local community. All of these institutional realities are shared to this day by federal district courts as well. While the legal subject matter applied in all districts in consti-

139. *See* Frederick Schauer, *Giving Reasons*, 47 STAN. L. REV. 633 (1995) (on the notion of giving reasons as committing).

tutional matters (under federal question jurisdiction) is supposedly the same, the cases that raise constitutional issues, the people that invoke constitutional claims, and the juries and judges that decide them, are all as diverse as the various regions and areas of the country. This means that trial judges are generally understood to be cognizant of, and often expected to be responsive to, local sensibilities.

Of course, localism raises various challenges to a unitary concept of "rule of law" (some of these challenges will be discussed in more detail in the next Part), and accordingly one of the purposes of appellate review is to tame the local forces that impact adjudication. Similarly, one of the basic functions of a federal law system, superimposed on the several state systems, is to sustain a centrally-guided, coherent normative framework that would transcend state idiosyncrasies and give essence to the United States as a unitary republic. But in the constitutional context of judicial review, localism—reinstated by the denial of appellate review—plays an important role in providing a variety of positions of equal initial legitimacy to the national political debate on the meaning of the Constitution. And, importantly, this multiplicity of positions is not only a result of an intellectual exercise, but rather it carries a democratic significance in its representation of the constitutional tendencies of different communities. At the same time, normative uniformity is sustained across the country in all "regular law" cases decided by the hierarchical federal judiciary.

(7) *Multiplicity of outcomes.* Under the inferiorizing model, the court system would produce many more judicial review determinations than it currently does: any such determination by a trial court would become a final judicial utterance on the constitutional question at hand, without the condensing and chilling effect of conclusive Supreme Court resolution. Over time, important constitutional questions would garner a series of outcomes from different judges and different courts, each deciding the question with the varying specifics of the various cases in mind. Political deliberation that follows would therefore have at its disposal not only framed questions and explicated reasons, but also an array of possible outcomes resulting from various constitutional positions and factual contingencies. We see a little of this even under the current system, which allows for provisional circuit splits. But these are few in number and especially susceptible to Supreme Court resolution.

This vision of "the courts" as speaking in more than one voice is central to the inferiorizing model, because this is what makes the courts a plausible vehicle for popular constitutionalism in a

pluralist democracy. This is an important difference from Kramer's or Friedman's accounts of popular constitutionalism, or indeed from Bickel's Court as reflector and prophet, or from Ackerman's structure of constitutional revolutions—all of which track responsiveness modes between popular politics and the extremely sparse utterances offered by the Supreme Court over time on any given controversy. The vision of the inferiorizing model is of a continuing political discussion on the meanings of the Constitution, which is infused with gradually accumulating judicial opinions, composed in trial courts across the country. A multiplicity of outcomes on similar questions can be exhibited in diversity, contradiction, or convergence. The next three points explore these different pluralizing effects.

(8) *Diversity.* Perhaps the most interesting and important effect of the inferiorizing model is the potential it opens for different interpretations of the Constitution to coexist as fully applicable, final and enforceable judicial decisions. These need not necessarily contradict each other in any given case; they may instead represent different visions of the Constitution, of a constitutional provision, or of how the Constitution should be interpreted. Of course, judicial interpretations of the Constitution are already diverse today—they are the basis for the unthreatening notion of "percolation," in which the Supreme Court lets an unresolved issue be repeatedly contested over time in the district and appellate courts before granting certiorari in a representative case and attempting to resolve the dispute once and for all.[140] But the diversity of judicial opinions under the inferiorizing model is of course different: here the diverse decisions of the inferior courts in the field of judicial review remain the final outputs of the judicial system.

This is a core aspect of the inferiorizing model. It reflects a view that that there is no single, static "correct" interpretation to many constitutional provisions—in the absence of an available constitutional instruction by the People, there is no externally valid criterion to choose between an originalist interpretation and a purposive interpretation, nor between views that regard privacy as inherent to liberty or as a wholly distinct right, enumerated or otherwise.[141] While courts would keep investigating these questions and enforcing constitutional rights through the responses they give to these questions, they would no longer retain the institutional

140. *See* Bhagwat, *supra* note 79, at 979–81 & nn.67–72.

141. This does not mean that *any* interpretation is necessarily valid: even under the inferiorizing model, logic, rationality, and Article V remain powerful measures of legitimacy. *See infra* Part V.C.

power to limit the number of available answers to only a single one. The inferiorizing model diversifies the appearances of the Constitution, because the Constitution has diverse meanings. In that sense it remains truer to the nature of any constitutional regime.[142] Diversity, however, does not *preclude* settlement of contentious constitutional questions; it just limits the role of the courts in reaching such a settlement. That power is left with the political processes of deliberation and decision-making, animated by either conscious agreement or indeed the dynamics of path dependency.[143]

(9) *Contradictions.* A special case of diversity is judicial opinions that flatly contradict each other. One court strikes down a statute, another court upholds it; one court identifies an unenumerated right, another court denies its existence. This of course happens regularly under the current regime, but today there is the possibility of unifying appellate review: the Supreme Court will tell us eventually which answer prevails. The normalizing effect of Supreme Court resolution seems to promote interests of fairness and predictability in the administration of constitutional claims that are implicated by diverse trial court adjudication (more on these later). But it also helps to conceal possibly important tensions, uncertainties, and indeed contradictions in the very statutory or constitutional matter that is under review. Contradictions in judicial opinions are a useful signal to political actors that the statute under review is "problematic," that it needs more work in order to achieve greater clarity or to embody a more effective bargain. And an absence of a normalizing appellate prospect means that the revealed problems are here to stay, unless the agents of popular constitutionalism engage in re-defining action.

(10) *Convergence.* Of the multitude of (final) results that the inferiorizing model generates, some would obviously be the same. While today trial and appellate courts may also—and often do—decide similar cases similarly over time, inferior courts have the option of deferring decision until a pending appeal is decided by a court of appeals or the Supreme Court. The inferiorizing model eliminates this option in judicial review determinations. Instead, it seeks to utilize the redundant effect of trial-court adjudication as a resource that informs political deliberation. Thus, for example, a large number of courts from various regions deciding similar cases similarly should be understood as signaling to political actors a widespread agreement among judges on the given constitutional

142. *See* Amanda Frost, *Overvaluing Uniformity*, 94 VA. L. REV. 1567 (2008).

143. *See infra* Part V.A.

question.[144] This does not mean that the political actors need necessarily follow apparent agreements among courts; but, as in other systems of weak-form judicial review, the political burden of persuasion would shift to those political or judicial actors who keep objecting to the evolving constitutional consensus.

C. The Inferiorizing Model: A Summary

The vision of the inferiorizing model looks, therefore, like this: free from the prospects of the normalizing effects of appellate review, constitutional adjudication in trial courts becomes but one of several social modes of deliberation, persuasion, and decision-making concerning the content and meaning of the Constitution. While the courts keep deciding specific claims for judicial review, thus enforcing constitutional rights on a (literally) case-by-case basis, they no longer conclusively settle all constitutional disagreements; rather they take part—employing their unique political insularity and institutional expertise in framing and reasoning—in the process of identifying and formulating constitutional questions, and their possible answers, for the benefit of further deliberation and resolution through the political mechanisms of popular constitutionalism.

The model signals to judges that experimentalism will not be penalized and to litigants that the stakes at trial are as high as they go (no more, no less), and therefore encourages experimentation in litigation strategy, as well as continuing public engagement even after a court has spoken. It promotes mobilization and participation, in and out of court, because local action can engender local change, either by harnessing the power of local courts, or by opposing it. Over time, if judicial outcomes aggregate consistently, or if political actors are mobilized to resolve judicial contradictions, local movements can also effect more-than-local change.

The constitutional game will no longer be mainly concerned with how to reach the Supreme Court (or whom to appoint to the Court) and make it decide "correctly." Instead, it becomes a series of consecutive battles that generate social and political effects—constitutional meanings—through recurrent judicial determinations, the responses they evoke in the political sphere, and, in turn, further decisions by responsive courts. In a sense, this is a populist version of constitutional dialogue models: not between Supreme

144. A notable convergence of inferior courts materialized around the scope of the Second Amendment to keep and bear arms, until the Supreme Court reversed course. *See* District of Columbia v. Heller, 128 S. Ct. 2783, 2823 & n.2 (2008) (Stevens, J., dissenting).

Courts, legislatures, and Presidents; but between localized courts and varied political constituencies. The trial court, as a universal point of access for individuals with grievances, ensures that popular constitutionalism remains genuinely *popular*, and not captured wholly by the distancing (and historically often disenfranchising) constitutional politics of governmental departments.[145]

The model of judicial review by trial courts renders the Constitution more local, accessible, and malleable. It accepts redundancy, conflict, and pluralism as essentials of moral argument, which is the kind of argument we engage in when trying to give meaning to most rights clauses. It embraces diversity and contradictions—the possibility of indeterminacy—in the meanings of constitutional provisions over space and time, locations and contexts. It allows for more than one meaning to hold simultaneous effect, because in a pluralist democracy there is no objectively (i.e., supra-political) single, static, "correct" meaning of such standards as "freedom of speech," "due process," "cruel and unusual," or "equal protection."[146] And, more importantly, a fractured normative reality is the basis for more deliberatively democratic processes of arguing about values.

Do We Already Have an Inferiorized System?

Although inferiorizing judicial review sounds like a radical shift from current conditions, it is arguable that the Supreme Court of the last two decades has, in effect, exercised an "inferiorizing" case-management policy: with its dwindling docket of published opinions and the evolving doctrine of percolation, the Supreme Court can be understood to be effectively deferring—at least for certain periods of time, and at least with regard to certain kinds of cases—to diffuse inferior court adjudication. Thus, some issues are regularly revisited by the Supreme Court, signaling a continuing interest in centralizing their judicial treatment: consider the Court's assiduous investment in the regulation of punitive damages, Fourth Amendment protections, or even (though to a lesser degree) abortion rights. At the same time, other topics are treated with Thayerian deference, being consistently denied access to the Supreme Court (by way of denial of certiorari), in effect leaving the normative field open for diverse inferior court regulation.

145. *See* Tomlins, *supra* note 138, at 1014–21 (surveying the popular deficits of institutionalized politics, which complicate visions of departmentalist popular constitutionalism).

146. *See* Hutchinson, *supra* note 12, at 58–61.

A timely example here is the question of the people's right to keep and bear arms under the Second Amendment. In this case, the Supreme Court had for decades shied away from providing a conclusive instruction as to the scope of the right—individual or collective—allowing district and circuit courts to diffusely grapple with the issue,[147] until it famously re-engaged with the matter in the October 2007 term by striking down a D.C. gun-control statute.[148] Whatever the reason for the Supreme Court's persistent inaction—it had ample opportunity to weigh in on the question earlier[149]—for a while it did generate the sort of ground-level political dynamics envisioned by the inferiorizing model: example cases challenging various gun-control acts attracted local, and gradually national, attention; federal judges with diverse political affiliations, presiding over federal courts in different regions of the country, developed various doctrinal tools to deal with the enigmatic language of the Second Amendment and with its application to the changing realities of firearm production and use (notably, most courts converged in upholding most gun-control statutes[150]); and these legal and extra-legal dynamics defined and enlivened the social movements that have been waging the gun rights/gun control culture war. Indeed, one way to explain the decades-long pause in the Supreme Court's Second Amendment jurisprudence, is that the Court had been "waiting" for the hermeneutic resources it required to evolve through the politics of gun rights, in order for the Court to finally interject and rediscover an "original" meaning to the Second Amendment that suits its political makeup.[151]

There are a few interesting points worth noting about the gun-control inferiorizing experiment:

The skies did not fall. For more than 60 years the Supreme Court refrained from offering guidance on a constitutional matter that is

147. For a brief account, see MARK V. TUSHNET, OUT OF RANGE: WHY THE CONSTITUTION CAN'T END THE BATTLE OVER GUNS 57–67 (2007). *See also* ROBERT J. SPITZER, THE RIGHT TO BEAR ARMS: RIGHTS AND LIBERTIES UNDER THE LAW 35–41 (2001).

148. *Heller*, 128 S. Ct. 2783. A similar challenge to a non-federal statute, the Chicago gun control law, was heard by the Court on March 2, 2010, and is pending decision. Nat'l Rifle Ass'n of Am., Inc. v. City of Chi., 567 F.3d 856 (7th Cir. 2009), *cert. granted sub nom.* McDonald v. City of Chi., 130 S. Ct. 48 (2009).

149. *See, e.g.*, Silveira v. Lockyer, 312 F.3d 1052 (9th Cir. 2002), *cert. denied*, 540 U.S. 1046 (2003); Quilici v. Vill. of Morton Grove, 695 F.2d 261 (7th Cir. 1982), *cert. denied*, 464 U.S. 863 (1983).

150. *See* SPITZER, *supra* note 147, at 38–40.

151. This explanation derives from Siegel, *supra* note 128. *See also* Sanford Levinson, *The Embarrassing Second Amendment*, 99 YALE L.J. 637, 642 (1989) (exploring "what is sometimes called the 'politics of interpretation,' that is, the factors that explain why one or another approach will appeal to certain analysts at certain times, while other analysts, or times, will favor quite different approaches").

of considerable importance to many people, and yet the Constitution, and the Court, and organized society, are all still here, pretty much intact. Instead of Supreme Court action, what we got was a long and lively debate in the various avenues of political action about what it means for a nation to invoke a constitutional right to keep and bear arms. This will be worth remembering when we assess more closely some of the objections to the inferiorizing model, in the next Part.

Still, overhang persists. While the Second Amendment story provides us with a useful, and quite promising, experience of the effects of inferiorizing judicial review, it also exemplifies the drawbacks of leaving the Supreme Court in the picture, even in the minimal—and minimalist, as the *Heller* opinion turned out to be[152]—capacity of a scarce arbiter of protracted disagreements: although the Supreme Court did not intervene in the discussion for a long while, the *possibility* that it would intervene was always there, and indeed eventually materialized. Because there is no way of knowing if and when the Supreme Court might decide to intervene in an ongoing debate, the various agents involved (lower-court judges, parties, social movements, and political actors) must always act on at least two registers: they need to wage the various local battles (in and out of court), while at the same time strategizing for the possibility of Supreme Court review, which in a single decision could divert the discussion in a whole new direction. To use Mark Tushnet's terminology, this is an intra-judicial case of high-court "overhang,"[153] which is exacerbated by the element of uncertainty. Not knowing whether, when, and how the Supreme Court might intervene leads to wasteful costs, both material and political, in preparing for various contingencies, in fighting over the Court's makeup, and in diverting resources from the political battlegrounds, where an issue such as the right to bear arms should be deliberated.

No dwindling in the Court's judicial review docket. Finally, judicial review is one of the fields in which the Supreme Court has increased its involvement over the past two decades. The Rehnquist Court is famous for striking down more federal statutes than any previous Court—it is responsible for about a quarter of all such acts in the history of the Supreme Court;[154] and the Roberts Court seems to be

152. *See* Cass R. Sunstein, *Second Amendment Minimalism:* Heller *as* Griswold, 122 HARV. L. REV. 246, 267–69 (2008).

153. TUSHNET, *supra* note 13, at 57–65.

154. *See* Jed Handelsman Shugerman, *A Six-Three Rule: Reviving Consensus and Deference on the Supreme Court*, 37 GA. L. REV. 893, 893 (2003).

following suit.[155] The Court's intensifying practice of judicial review is conspicuous in contrast to its overall dwindling docket of published opinions. Thus, to the extent that the Supreme Court's diminishing docket might serve to foster inferiorizing experiments, it seems that judicial review—the field in which I argue inferiorizing is most pertinent—is an area where such experiments are less likely.

Therefore, although we might already encounter instances of the inferiorizing effect in various constitutional contexts, the call for a full institutional shift still stands. And, like most other populist visions of constitutionalism, the inferiorizing model of judicial review is bound to raise several forceful objections. In the next Part, I present the strongest of these objections and try to respond.

V. THE CENTRAL OBJECTIONS TO THE INFERIORIZING MODEL

I see three central kinds of objections that could be raised against the call for relegating judicial review to trial courts alone, which in the United States means to the federal district courts. These objections concern the risks that arise out of a disruption of the constitutional norm; the added costs and diminished efficiency that could arise out of strategizing and forum-shopping; and the inequity that could result from treating similar cases differently. I agree that some aspects of all three objections have certain merit. But I will try to show that the inferiorizing model is superior to the model of judicial review as currently practiced in the United States, even given these objections. Let us consider each in detail.

A. Rule of Law: Disruption of the Constitutional Norm

1. Anarchy

The fairly obscure, though not uncommon, argument here is that giving up central control over the interpretation and application of the Constitution in judicial review cases would lead to social and moral anarchy. "The courts" would no longer serve as settlers of the normative order, and fractured constitutional meaning

155. *See, e.g.*, Citizens United v. Fed. Election Comm'n, 130 S. Ct. 876 (2010) (striking down a provision of the McCain-Feingold Act); District of Columbia v. Heller, 128 S. Ct. 2783 (2008) (striking down a D.C. gun control statute); Boumediene v. Bush, 553 U.S. 723 (2008) (striking down a provision of the Military Commissions Act of 2006).

would be handed (according to some accounts, handed back[156]) to the control of violent mobs enforcing a "might is right" kind of constitutionalism.

Previous authors of popular constitutionalist visions have faced this kind of objection and offered what seem to me persuasive answers. The gist of the reply being, as Mark Tushnet put it, that "[p]eople in organized societies tolerate a fair amount of uncertainty on some questions as long as there is sufficient stability on other matters."[157] While constitutional meaning may be expected to lose some of its potential certainty in some areas, it is still a mechanism of *constitutionalism*, with all that this concept bears in terms of modes of reasoning, forms of social engagement, and dynamics of path-dependency.[158] At the same time it is *merely* a mechanism of constitutionalism. It gives institutional effect to the normative reality of pluralist democracies: the absence of a-priori and/or consensual meanings to the moral standards set by the Constitution. The model does not intervene in the modes of "regular" lawmaking[159] and law-applying, which normally provide the grounds for social order in a democracy.

In addition, it is important to remember that the inferiorizing model sustains a highly institutionalized process of constitutional deliberation—courts, with their formalizing procedures and organizational culture, keep a central role in generating constitutional meanings. This should reassure those wary of popular energy as a driving force of constitutionalism.

2. Loss of Legal Certainty

By eliminating the prospect of conclusive Supreme Court settlement to a generalizable constitutional question, the inferiorizing model does allow for an added loss of predictability and certainty in the content of constitutional norms. Simply put, the fact that one court finds a statute unconstitutional would not mean that another court would do the same, and so greater uncertainty is injected into the system of norms: individuals cannot be fully

156. *See* KRAMER, *supra* note 3, at 27–28, 168; *see also* Larry Alexander & Lawrence B. Solum, *Popular? Constitutionalism?*, 118 HARV. L. REV. 1594, 1636–37 (2005) (book review) (critiquing Kramer).

157. Tushnet, *supra* note 130, at 1001.

158. I agree with Larry Kramer: "Few of us can break completely free from the intellectual framework we've inherited for determining what is or isn't constitutional; even if a handful or prophets can do so, arguments that are too far outside the box will not persuade others." Kramer, *Response*, *supra* note 137, at 1181.

159. *See* 1 ACKERMAN, *supra* note 41, at 6.

certain of the legality or illegality of their acts, since a future court may happen to resolve these questions in an unexpected way, without the prospect of normalizing appellate review. Similarly, a state official cannot know for sure, simply by following the available judicial signals, whether a statute he or she is applying or enforcing will be upheld in court the next time it is challenged there. Diverse judicial pronouncements on constitutional issues across jurisdictions may also generate a chilling effect: consider two states with similar regulations of on-line speech, in cases where state A's statute is struck down by its relevant district court and state B's statute is upheld by another court. Lacking the capacity to direct different kinds of content to the different states, a website is likely to submit to the restrictive regime upheld in state B, in essence foregoing the benefits of the constitutional result achieved in state A.

I agree that loss of legal certainty and predictability is a cost to be reckoned with. I believe it is worth accepting this cost for the other benefits of the inferiorizing model. But I would like to question the force of the certainty objection, on two grounds:

(1) *Less certainty?* The first thing to note is that the Supreme-Courtian model of judicial review frequently leaves many issues unresolved and therefore unaccommodating of concerns of uniformity and certainty. There is no need here to state a general claim about the indeterminacy of legal rules—although it is usually true, and most of all in constitutional rules (consider the vast amounts of uncertainty left for future deliberation after the Supreme Court has supposedly resolved such core questions as the constitutionality of racial segregation or the scope of the right to bear arms). Suffice to cite such accounts as Cass Sunstein's descriptive model of the Supreme Court's judicial minimalism, by which it decides one case at a time while avoiding general pronouncements;[160] or indeed the fact that under the certiorari rule, the Court decides a mere fraction of the cases brought before it, and not all of the denied petitions lack the potential to settle some aspect of a constitutional dispute.

(2) *Possibility of resolution.* More importantly, the inferiorizing model does not necessarily undermine the possibility of a clear resolution to a constitutional question. Rather, like other visions of popular constitutionalism, it merely questions the centralized model of judicial review as the sole and supreme way for a democracy like the United States to arrive at such a resolution. Popular constitutionalism is about identifying and designing deliberative

160. *See* Cass R. Sunstein, *The Supreme Court, 1995 Term—Foreword: Leaving Things Undecided*, 110 HARV. L. REV. 4 (1996).

mechanisms that could generate constitutional meanings without the inhibiting force of centralized judicial supremacy. Thus, clear resolution can occur, for example, when all trial courts reach a solid and lasting consensus on a constitutional question; or when the government chooses to revise its position on a given matter as a response to signals of unconstitutionality from various district courts; or when the government consistently defies such judicial signals, eventually getting the courts to back down and stop pursuing an issue; or when a political movement manages to persuade parties to cease litigating a certain kind of constitutional issue in the courts. The existing "decision-making" mechanisms of popular constitutionalism are still being explored, and new ones are sure to evolve; the important point is that centralized adjudication is not a necessary condition for the achievement of resolution.

Under the inferiorizing model some constitutional questions will remain unresolved. While certainty and predictability are arguably important virtues of legal norms, it is worth giving them up in some measure for the benefits that accrue from openly deliberating our disagreements on the most profound aspects of social life.

3. Loss of Judicial Coherence and Consistency

The inferiorizing model introduces a fractured image of "the law" in the field of judicial review of legislative acts. It substitutes the highly-centralized image of court hierarchy with a diffuse, redundant, and varied concept of judicial output. Losing the power to say definitively "what the law is" may affect the way constituents perceive "the courts," possibly inducing a decline in respect for courts, judges, and their decisions, and thus in the democratizing notion of "rule-of-law."

I doubt whether revealing the inconsistencies of judicial interpretation would harm the social stature of courts: exhibiting the reality of irreconcilable understandings of moral standards could and should be a respect-worthy venture; and it is practiced daily with the inclusion of dissenting opinions in the decisions of the Supreme Court and the Courts of Appeals. But the more important point made here is to remind us that the inferiorizing model concerns only judicial review determinations. It does not destroy the core pyramidal functions of courts systems, which are concerned with all other sorts of legal questions. What is special about countermajoritarian constitutional claims, however, is that these are issues that go to the very essence of the social order, and as such should be

provided with a more robust institutional setting. A central aspect of any such institutional setting should include, I argue, a multitude of localized arguments and determinations, aggregated over time and in democratic fashion, towards a conclusive meaning of the Constitution. The inferiorizing model, limited to matters of constitutional review, is thus an elevating mode of judicial engagement: it calls for a multiplicity of courts rather than a single court, with engagement ongoing over time rather than in a single episode, to substantively weigh in on a polity's defining questions.

4. Disruption of National Cohesion

According to many accounts of constitutionalism, constitutions are not only documents of normative effect; they are also vehicles of national self-determination and sources of public identification. This has been termed the "symbolic" function of constitutions,[161] or their "expressive" effect.[162] These are of course debatable premises: one may question the assertion that constitutions in fact reflect national identity and serve as binders of national cohesion,[163] and possibly more importantly, one could doubt whether constitutions ought to serve these purposes. Still, there are good reasons to accept these views, and assuming one does, they can invoke an objection to the inferiorizing model from the perspective of national cohesion: if the meanings of various constitutional norms are up for tender through diverse judicial iterations and constant political debate, then the Constitution will lose its force as a source of moral identification for members of the polity.

Again, inferiorizing judicial review is bound to have some fragmentary effect on the cohesiveness of constitutional norms and this might impair the unitary symbolic function of the Constitution. But a unitary, centralized conception of the Constitution—a formal text susceptible to conclusive interpretation by a single institution—offers a very thin version of how constitutionalism can play a role in defining and embodying the national ethos. In a pluralist democracy that is to sustain various visions of the good, an institutionalized diffraction of the Constitution—through the inferiorizing model, for example—provides diverse constituents with a foundational body of norms on which all can reasonably *dis*agree,

161. *See* Dieter Grimm, *Integration by Constitution*, 3 INT'L J. CONST. L. 193, 194–98 (2005).

162. *See* Mark Tushnet, *The Possibilities of Comparative Constitutional Law*, 108 YALE L.J. 1225, 1228 (1999).

163. For a comparative-based skepticism of this point, see *id.* at 1269–74.

and even garner (some) effective judicial support for their diverging positions. Institutionalized heterogeneity, rather than homogeneity, is the ethos depicted by the constitutional system, and this is certainly a truer image of most contemporary democracies.

There are two more points to be made on the national cohesion argument: *First*, the inferiorizing model makes no argument against the preservation of the existing constitutional text—the Constitution is still out there, with its timeless pronouncement "We the People," its solemn guarantees of liberty, freedom of speech, equal treatment, abolition of slavery, and broad enfranchisement. Inasmuch as the constitutional text in itself bears a symbolic effect, then that effect remains. *Second*, the inferiorizing model perceives individual participation and local mobilization as cornerstones of popular constitutionalism—these are enabled through the relatively easy access to constitutional litigation in the trial courts. At the same time, participation—the power to affect the meaning of the Constitution through legal engagement—is also a mode of engaging in a shared project. Constitutional meaning becomes the result of multiple civic engagements in moral and political discourse, and the Constitution becomes an apparatus that more closely "belongs" to the various constituents that took part in bringing it to court.

B. Forum Shopping, Abuse, and Other Costs

A different set of objections to the inferiorizing model invokes the familiar concerns about strategizing and forum shopping: once one allows for diverse judicial results, one is bound to confront sophisticated parties who would plot their litigation strategies so as to reach specific judges or certain districts where a favorable outcome might be expected. This, arguably, would contravene the model's purposes of fostering deliberative and participatory constitutional politics through multiple localized litigations; would expose courts, districts, and judges to exogenous incentives; and would produce wasteful costs to parties and to courts. Let us explore in more detail these projections; I consider most of them to be resolvable.

1. Subverting Diversity

Forum shopping can play out in various ways: (1) Claimants, who initiate civil procedures challenging the constitutionality of a certain act, may try to direct their actions or draft their claims in

ways that would lead them to supposedly favorable courts, through the use of personal jurisdiction or venue rules. (2) In criminal, immigration, and some administrative cases, the government is the instigator of the proceeding, and it could work to get the case to a court that tends to uphold the constitutionality of a controversial statute.[164] (3) The legislature that produces the law in the first place can include a jurisdictional determination, limiting all litigation over the act to a jurisdiction that is expected to support the act more often than not.[165]

As has been recognized by many other authors, forum shopping in itself is not necessarily a bad thing. It is bad only if it leads to socially bad results.[166] What constitutes "socially bad results" depends on the stakes and interests one seeks to protect or promote. In the context of the inferiorizing model of judicial review, forum shopping is not a bad thing, as long as it does not preclude the potential of diverse judicial outcomes over time and across locales. When it comes to judicial review of state legislation, these risks are inherently reduced because state statutes are reviewed by the district courts that reside in the various states, with little possibility of avoiding the cumulative localized effect of inferiorized constitutional adjudication: different courts will review similar statutes in different states (consider, for example, the multiple statutes concerning gun control, abortion, or the death penalty). Challenges to the constitutionality of federal legislation, on the other hand, can be strategically invoked—or avoided—because federal statutes normally have national effect and may be litigated in different areas of the country. The risk in the present context, therefore, is of "strategic centralization": litigants may override the risks and benefits of diversity by channeling all judicial review of a certain piece of legislation to a certain court or a bundle of ideologically similar courts.

Let me offer three rejoinders to this objection:

(1) *Not all litigants want the same outcome.* Forum shopping generates a centralizing risk only if most litigants in fact "shop" for the

164. *See, e.g.*, Nita Ghei & Francesco Parisi, *Adverse Selection and Moral Hazard in Forum Shopping: Conflicts Law as Spontaneous Order*, 25 CARDOZO L. REV. 1367, 1367–68 & n.2 (2004).

165. Legislative choice of forum is common in the United States. *See, e.g.*, 12 U.S.C. § 2278a-3(b) (2006) (District Court for the District of Columbia); 20 U.S.C. § 80q-2 (2006) (District Court for the Southern District of New York).

166. *See, e.g.*, Mary Garvey Algero, *In Defense of Forum Shopping: A Realistic Look at Selecting a Venue*, 78 NEB. L. REV. 79 (1999); Note, *Forum Shopping Reconsidered*, 103 HARV. L. REV. 1677 (1990).

same forum. But in morally and ideologically contentious issues—the kinds of issues we usually fight about when invoking judicial review—there are usually bound to be various stakeholders and interest groups pulling in different ways. Different groups have different views on how much religion government is allowed to endorse without violating the First Amendment, or on which kind of procedure revokes the privacy-based right to have an abortion. If different forums are understood to promote these varying visions of the Constitution, then the diversity of outcomes will exist notwithstanding forum shopping.

(2) *Worst case: de facto centralization.* In those cases in which litigants would manage to strategically centralize a constitutional litigation by means of forum shopping, what we would get is something that is very similar to the presently existing arrangement of adjudication: an institutional design that leads to centralized resolution of constitutional questions by a single court. The only difference would be that rather than a supreme court, it would be a district court deciding the question. A central premise of this Article is that Supreme Court justices are not, and in any case should not be, better adjudicators of constitutional norms than district court judges. Assuming both groups go through rigorous selection, nomination, and confirmation processes—as they could and should—there is no self-evident reason for us to prefer the constitutional interpretations of justices over those of judges. One obvious institutional difference—justices adjudicate in panels of nine while judges usually adjudicate on their own—is remediable to some extent, since district courts can also sit in panels, if they so choose.[167] The central point here is that we already have a centralizing system of judicial review, with its varying ideological idiosyncrasies, and so centralization by way of forum shopping would, at worst, bring us to familiar ground, no more.

(3) *We have some good ways of preventing most forum shopping.* Consider the three forum shopping scenarios presented above. The first two, which are the most paradigmatic—forum shopping by individual civil claimants and by individual law enforcers—can be effectively dealt with through vigorous enforcement of the available doctrines of personal jurisdiction and, even more so, venue.[168]

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167. This was actually standard practice in judicial review cases until the 1970s. *See, e.g.*, Abele v. Markle, 351 F. Supp. 224 (D. Conn. 1972) (striking down, by a 2-1 majority, Connecticut's anti-abortion statute). In addition, in a Supreme Court that is controlled, for many practical purposes, by a single swing-vote justice, the advantages of a multi-member panel are often limited. *See supra* note 84.

168. *See* Kevin M. Clermont & Theodore Eisenberg, *Exorcising the Evil of Forum-Shopping*, 80 CORNELL L. REV. 1507 (1995).

Courts will have to learn to determine more clearly and more consistently which cases they should decide and which belong to other courts. And the Supreme Court will be able to coherently instruct them in this endeavor: determinations of jurisdiction or venue, unlike those of judicial review, are not inferiorized in this model. Indeed, the Court's historic insistence that personal jurisdiction is a matter of constitutional import may receive a new and invigorated meaning: it is important where you litigate your case not merely because the other party has due process-related convenience and reliance interests; but because we—the polity of this constitutional democracy—have an interest in an institutionalized diversity of constitutional adjudications.

The real concern, then, is with ex-ante preclusion of jurisdictional diversity by the lawmaker: a Congressional statute that either chooses an exclusive forum, or leaves the choice of forum to a governmental body other than the courts. Thus, for example, a statute instituting some sort of religion-related obligation could limit any ensuing litigation to a jurisdiction that is expected, more often than not, to uphold the statute in face of First Amendment challenges. This is a serious concern. Its resolution lies with the practical mechanisms that would need to be instituted in order to put the inferiorizing model into effect, and the degree of oversight they would provide over legislative abuse. The inferiorizing model, as a pure argument for institutional design, does not provide an answer.

2. Efficiency Deficit

A more generic forum shopping argument highlights the excess costs incurred by litigants in the process of strategizing and by jurisdictions in self-aggrandizing attempts to attract the most litigation: in the absence of the prospect of centralizing appellate review, parties would exert wasteful expenses in seeking the most favorable trial court and in getting their cases to that court; and the jurisprudence of courts would evolve through a political popularity context rather than by way of methodical reasoning. Both are reasonable risks (although in the federal judiciary, which would still be a unified institutional entity, competition between district courts seems less likely—or at least likely to be less intense—than the competition between state legal systems over certain kinds of litigation, e.g., corporate governance). But, as explained above, both can be significantly moderated by the meaningful enforcement of the rules of personal jurisdiction and venue. And it is here

that the capacity of the Supreme Court to provide centralized oversight is clearly valuable: by making trial courts follow these rules, the Supreme Court can assure that the practice of judicial review by district courts does not involve too many forum-shopping-related social costs.

3. Abuse of Localism

A different concern related to strategizing focuses on the incentives of trial judges, who would be handed the conclusive power to interpret the Constitution under the inferiorizing model. The concern here is that district judges are too closely associated—politically, socially, financially—with the political elites in the region of their jurisdiction, and therefore would be overly reluctant to strike down legislation passed by their peers. This objection assumes, then, that Supreme Court justices are more insulated from parochial pressures than district court judges, and are therefore more likely to enforce the Constitution vigorously, regardless of the localized interests involved. This applies only to judicial review of state legislation, as federal laws originate in Washington, D.C., that is, from the very circle of elites to which the Supreme Court justices clearly belong.

The risk of abuse of localism by under-insulated district judges in judicial review of state laws does exist; although it is surely less pronounced than in the case of state judges, especially those that are elected to office.[169] This risk can be ameliorated, to some extent at least, by robust judicial selection and appointment mechanisms. The current federal judicial appointment process already combines local and national politics, each checking and balancing the abuses of the other.[170] Given the enhanced stakes of judicial appointments under the inferiorizing model, these procedures may need to be revamped to ensure the political and social independence of the judges. And following suggestions made with respect to the Supreme Court, the very laws of judicial appointment and tenure should possibly be rethought—limited terms, staggered appointments, super-majority confirmation requirements—in order to institutionally diversify the political profile of district judiciaries.

169. *See* further discussion *infra* Part VI.C.

170. *See* Sarah Wilson, *Appellate Judicial Appointments During the Clinton Presidency: An Inside Perspective*, 5 J. APP. PRAC. & PROCESS 29, 31 (2003) ("Consultation with home-state senators was a critical part of the pre-nomination stage of the [Clinton Administration judicial] appointment process.").

4. Costs of Added Litigation

By eliminating *stare decisis* effects in judicial review cases, one can plausibly expect an increase in the quantity of such claims brought before district courts: if the fact that Judge A decided someone else's claims in a certain way does not affect my chances of getting a different result from Judge B, I might as well give it a shot. The argument therefore is that aggregating a constitutional position from multiple lower-court iterations would entail greater expenses from more litigants, as well as an increase in the constitutional docket of trial courts. These are all wasteful costs, compared to the fairly economizing system of centralizing appeal.

This point may be correct; though, as with other "floodgates" arguments, it is difficult to assess, and more so to quantify.[171] One simple rejoinder is that the inferiorizing model saves parties and the judiciary the costs of litigating claims of judicial review on appeal and in the Supreme Court. This should counterbalance some of the direct costs involved in the proliferation of final judicial review determinations. Further, and more profoundly, this Article is concerned with the challenge of conceiving institutional avenues for the exercise of popular constitutionalism. By shifting the gaze to the trial courts, it aims to show that such avenues already exist and are already functioning in ways that are accommodating to visions of popular constitutionalists. The utilization of the existing court system, even with an increased constitutional caseload, would save the unknown costs of devising, establishing, and inculcating novel institutional modes for this purpose.[172]

C. Fairness

The objection here is straightforward: under the inferiorizing model, similar cases get treated differently, without the prospect of equalizing redress by a higher court, and this is not fair or just. For a simple example, consider two drivers apprehended on a highway in violation of the statutory speed limit. One manages to persuade a judge that the speed limit is an unconstitutional intervention into his or her personal liberty, and is acquitted. The other tries to

171. *See* Toby J. Stern, *Federal Judges and Fearing the "Floodgates of Litigation,"* 6 U. PA. J. CONST. L. 377, 402–03 (2003).

172. Consider, for example, such explicitly expensive models as Ackerman and Fishkin's *Deliberation Day*, which proposes substantial quadrennial cash payments to all participating Americans of voting age. Bruce Ackerman & James S. Fishkin, *Deliberation Day*, *in* DEBATING DELIBERATIVE DEMOCRACY 7 (James S. Fishkin & Peter Laslett eds., 2003).

make the same argument to another judge—maybe in the same district, maybe in another—but the constitutional claim is flatly rejected, and the driver is convicted. Because the state cannot appeal the constitutional determination in the first case, and the driver cannot appeal the denial of her constitutional claim in the second case, the result is a lingering disparity in judicial treatment with no clear justification.

I have three responses to the fairness-based objection. I hope that, at least when combined, they will clarify why this concern is not sufficient to defeat the inferiorizing model.

(1) *Disparity is all around us.* Although the speed limit example is a correct depiction of how the inferiorizing model works, I think it is pretty clear that such lingering disparity in judicial outcomes is a common, indeed institutionally inherent, characteristic of any legal system. Undocumented and unappealable judicial idiosyncrasies often decide cases one way or another. A jury may nullify charges with no rational reason. A party may choose not to appeal a decision, or fail to appeal it in time, or to produce the required fees. An appellate court may, correctly or erroneously, treat what seems to be a legal determination as a factual one, or vice versa. The Supreme Court may decide not to grant certiorari, for good or bad reason. And even if a question does receive conclusive treatment by the Supreme Court, the Court's decision would not always apply to previous cases that were decided otherwise.

Disparity in judicial outcomes is the inevitable result of a system that employs multiple judges, whose discretionary acts are too plentiful to be constantly checked by a centralized review function: this is the core realization of the literature on street-level bureaucracies. People are not the same, and when one gives a large group of people the power to discretionarily decide individual cases (cases which are, in addition, often initiated and withdrawn according to the independent discretion of the clients), a variety of results will ensue. In this respect, it is not clear that the fairness costs of the inferiorizing model would be greater than those incurred today.

(2) *Making judges responsive.* Perhaps the more important point to make is this: the inferiorizing model is not about letting district judges loose. It is not an argument for substituting nine justices with 800 justices.[173] It perceives a constitutional dynamic that does not end with judicial iteration, but rather exists in a continuing deliberation among constituents, among courts, and among

173. The federal judiciary currently consists of 179 appellate judgeships, 28 U.S.C. § 44(a) (2006), and 655 district court judgeships, 28 U.S.C. § 133(a) (2006).

constituents and courts, over issues of constitutional meaning. It is about developing more sophisticated and more deliberatively democratic modes of communicating constitutional understandings and expectations to judges, and among judges themselves. If over time some judicial outcomes on a certain topic become clearly inconsistent with prevalent popular constitutional understandings (exhibited, for example, in recurring, explicitly contrarian legislative acts), then conscientious judges are expected to internalize these signals and refine their decision-making accordingly: there is a limit to the amount of drivers who could bail themselves out of a speeding ticket on a constitutional liberty-based challenge (at most, that limit is the Article V amendment procedure). Even the Supreme Court, Barry Friedman tells us, seems quite responsive to popular constitutionalist signals.[174] District judges, who decide many more cases and face actual litigants on a daily basis, seem even better located to assess popular sentiments (albeit on a local level) and to apply the Constitution responsively.

(3) *Disciplining judges.* Finally, popular mobilization and deliberation are not the only ways to induce responsiveness among judges. Popular constitutionalism perceives politics as a central mode of forming constitutional arguments and opinions and conveying them to courts. Familiar historical examples abound: impeachment, budgetary parsimony, court-packing, and appointment strategies are all available mechanisms—each with its different implications and complications—for reciprocating judicial deviance. All of these should of course not be used lightly, and it is worth noting that in the United States, so far, they have not.[175] But they are available for dealing with judges who would refuse to participate in the deliberative process that is essential to the inferiorizing move. And it makes sense that these tools are even better suited to deal with clearly deviant district judges—a few out of hundreds—than with a group of nine singularly prominent Supreme Court justices.

VI. COMPLICATIONS TO THE INFERIORIZING MODEL

In this Part, I consider the force and the extent of the inferiorizing model when faced with four paradigmatic kinds of complicating circumstances. I ask whether and how the model of judicial review by trial courts can meaningfully deal with blatantly

174. Friedman, *supra* note 131.

175. *See* Kramer, *Response*, *supra* note 137, at 1180.

immoral statutes, with conditions of emergency, with the unique institutional background of a federal system, and with the realities of constitutional democracies that lack the institutional and/or political traditions that sustain the democratic potential of inferiorizing judicial review. These complications may require more elaborate institutional design as part of the inferiorizing model.

A. Evil Laws

The challenge here is whether the constitutional system has robust and efficient means of dealing with blatantly immoral majoritarian acts: what if Congress made a law eliminating the right of all non-white Americans to existing health and welfare services? Or eliminating the right of all women to vote? Such acts—of more or less clear unconstitutionality—seem to beg for immediate and sweeping countermajoritarian action. A single, centralized, and supreme court offers just this kind of possibility. An inferiorized, diffuse system of judicial review arguably does not: it requires multiple petitions to multiple courts with a diverse array of judges that may come out one way or another. The blatant immorality may linger, at least in some regions.

It is true that localism has not always fared well in the just fight against discrimination and abuse of power. However, centralization has produced its own set of reprehensible results. *Dred Scott*,[176] *Plessy*,[177] and *Korematsu*[178] stand as solid evidence for that. The opinions of the Supreme Court in all three cases may have been legally sound according to one measure or another, but few would argue today that they came out on the right side of (currently) prevalent moral sensibilities in liberal democracies, even given the constitutional texts they were interpreting.

If I am correct in my suspicion that Supreme Court justices are just as morally fallible as district court judges, the question then becomes what kind of risk those who fight immorality by legal means are willing to take: the risk of the Supreme Court getting it wrong once and for all, or the risk of some district courts getting it wrong while others get it right. Going for the Supreme Court option means, of course, that in some cases we will get a conclusive correct answer—*Brown*[179] being a prominent example—and this is the lure of the centralized model. The inferiorized model means

176. Scott v. Sandford, 60 U.S. (19 How.) 393 (1857).
177. Plessy v. Ferguson, 163 U.S. 537 (1896).
178. Korematsu v. United States, 323 U.S. 214 (1944).
179. Brown v. Bd. of Educ., 347 U.S. 483 (1954).

we will have many correct answers in each and every case, but also possibly many bad outcomes. Which risk is better? Naturally, we would like to answer this question based on what we know about the courts in question: is this a Warren Court or a Fuller Court? Were most district judges appointed by President George W. Bush or by President Clinton? This sort of information, though, cannot be considered in the stage of institutional design, which takes place behind a "veil of ignorance." The question for the institutional designer is which risk is preferable, without knowing how the courts will look or act.

This is by no means an easy choice. For example, a plausible argument in support of the centralized risk is the disparity cost involved in the diffuse system: it might be both morally and strategically better for a group to suffer immoral treatment (e.g., discrimination) en masse, rather than be fractured into sub-groups of the lucky and the unlucky, the privileged and the unprivileged. Still, I think it would be better to take the risks involved in disparate adjudication of immoral acts than the risk of conclusive, colossal moral failure by a single Supreme Court decision. Recall what we get with the diffuse model of judicial review: a series of decisions, some good, some bad, that involve local actors and invite further legal and political action. In the absence of precedential effect, challenges can keep being brought, and successes in one court or one district can affect policies and strategies in others. The inferiorized model is dynamic—it leaves room for change and revision and allows for an ongoing cumulative effect. It took the Supreme Court almost sixty years to switch from *Plessy* to *Brown*. Sixty years of district court adjudication is an eternity—in the number of cases, in the chances for dialogue and responsiveness, in repeated challenges, and in personnel shifts.

B. Emergencies

What if a constitutional question arises that requires immediate social resolution, such that there is not enough time to spin the wheels of political deliberation, an essential component of the inferiorizing model? Imagine, for instance, Congress (or a state legislature) passing in July a statute exercising eminent domain over all private water supplies in preparation for a possibly exceptionally hot and dry August. How can the citizenry meaningfully weigh in on the constitutionality of such an act in a matter of weeks? The inferiorizing model, the argument goes, is not set to

deal with pressing constitutional questions. Let me make two points.

The first thing to remember about the model of popular constitutionalism in trial courts—in contrast, for example, to Mark Tushnet's extreme model of constitutionalism without judicial review at all[180]—is that the inferiorizing model guarantees that every constitutional challenge will receive a judicial decision. If the concern is merely about immediate availability of judicial redress, then the inferiorizing model accounts for that: district courts will decide constitutional challenges and generate outcomes even in conditions of emergency, as they do today.

But the concern clearly is about more than having an applicable judicial decision. It is about generating salient constitutional deliberation in a short period of time. The Supreme Court is relatively good in providing this service—consider *Bush v. Gore*,[181] or last-minute death penalty petitions.[182] It draws the focus of the nation on a specific question, and expresses the importance of the issue by ceremonial measures. Thus, what is usually a debilitating effect on the popular forces of constitutionalism may become useful when popular constitutionalism, and the collective action dynamics it entails, is debilitated by the pressures of emergency. The inferiorizing model could, therefore, include some sort of a "fast track" mechanism that would enable specific constitutional challenges, under special conditions of emergency, to be decided by a higher court. This would require a mechanism for determining which cases get to switch to the fast track—leaving that to the Supreme Court or to any single district court would create an option of defeating the pluralizing effects of the inferiorizing model whenever that court sees fit. So here too there would be a need for a diffuse, while efficient, procedure: consider, for example, polling judges from various districts, or convening a judicial session similar to the federal Multi-District Panels that adjudicate complex cases culled into a single litigation from various districts.[183]

180. TUSHNET, *supra* note 13, at 154.

181. 531 U.S. 98 (2000).

182. *See* Austin Sarat, *The Cultural Life of Capital Punishment: Responsibility and Representation in* Dead Man Walking *and* Last Dance, 11 YALE J.L. & HUMAN. 153, 182 (1999) ("[I]t is the stay, the drama of the possibility of the stay, that renders the execution constitutional violence . . . ." (quoting Cover, *supra* note 104, at 1624)); *see also* Stephen Reinhardt, *The Supreme Court, the Death Penalty, and the* Harris *Case*, 102 YALE L.J. 205 (1992).

183. *See* 28 U.S.C.A. § 1407(d) (West 2006); Daniel A. Richards, *An Analysis of the Judicial Panel on Multidistrict Litigation's Selection of Transferee District and Judge*, 78 FORDHAM L. REV. 311, 314–17 (2009).

C. Federalism

Isn't federalism the best inferiorizing option? One can argue that the simplest, most established, and possibly most genuinely reflective apparatus for promoting localism and diversity in constitutional adjudication is by relegating the power of judicial review to state judicial systems. Institutionally this would mean making state courts the sole enforcers of the Federal Constitution in judicial review cases. This is a broad and complicated issue that goes to the foundations of the federal structure—indeed to the need for and functions of a federal government—and the relationship between the states and the union. The inferiorizing model presented in this Article, however, retains the federal structure of adjudication in judicial review cases and is limited to a reallocation of decisional power from Supreme to inferior courts.[184] It does so for several reasons, both methodological and substantive:

First, this Article is meant primarily to provide a model for rethinking the institutional conventions of judicial review. As a first step in this direction, it is useful to apply it to a fairly simple institutional grid, such as that of the federal judiciary. This allows us to consider the effects of decentralizing judicial review before augmenting the model with the additional potential of federalized jurisdictions.

Second, to the extent that popular modes of robust constitutional deliberation are available in other democracies, then the inferiorizing model could hopefully serve as a frame of thought for comparative constitutionalists as well, and not only as an intervention in U.S. constitutional thought. In this context federalism is but one of several institutional variations through which the inferiorizing model could play out.

Third, with regard to the substance of the matter, keeping lower federal courts in the business of judicial review seems to alleviate some of the concerns raised by those opposed to popular constitutionalism in general, and by some of the objections to the inferiorizing model presented above. Federal trial courts are a combination of localism and centralization: they are spread throughout the country and serve local constituencies, but they also belong to a single institutional body (the federal judiciary), and thus share the same trial procedures, administrative organizations, appointment mechanisms (including, importantly, no

184. In addition, as stated at the outset, the inferiorizing model presented in this Article is limited to rights-related constitutional claims. This excludes questions of the applicability of the model to judicial review in federalism issues (for example, Commerce Clause litigation), that raise distinct concerns of uniformity and coordination.

judicial elections), and whatever else falls under the concept of institutional culture—federal judges meet regularly, sit on committees, and share a commitment to a single hierarchical structure. These are all guarantees of partial independence from local politics, and they complement the independence from centralized control of constitutionalism that is achieved through the inferiorizing move. Indeed, federal district courts present a unique combination of diffusion and localism on the one hand, and professionalism and insularity on the other hand—a combination that serves as a novel legitimating basis for judicial review.

D. Fragile Democracies[185]

A challenging complication to the inferiorizing model of judicial review is the question of its applicability to other constitutional democracies, and more specifically to democracies that are still in the process of defining their constitutional order and forming the social and political institutions that would uphold it. The concerns may be diverse: The process of entrenchment of a constitutional and democratic discourse among both judges and laypeople is at different stages in different countries. Societies may have different levels of commitment to, and different degrees of experience with, open and informed political discussion. Systems of mediation and responsiveness between courts and society may be at different levels of development and may face various barriers. The robustness of judicial appointment mechanisms may diverge, in a way that would affect judicial independence and enhance the risks of invisible adjudication over its posited benefits. Finally, some countries and some judiciaries may be too small to warrant or to sustain an active practice of judicial review by trial courts.

These are all genuine concerns that call for a contextualized design of the institutions of judicial review: what seems right for the United States may not be right for Argentina, or Hungary, or Iraq. However, while most emerging constitutional democracies in the past several decades have opted for highly centralized models of constitutional adjudication,[186] it would be wrong to disregard the potential for trial courts to serve as vehicles of constitutional deliberation even in conditions of transition and self-definition. If one accepts the importance of popular participation and deliberation in defining constitutional meanings as

185. *See* Samuel Issacharoff, *Fragile Democracies*, 120 HARV. L. REV. 1405 (2007).

186. *See, e.g.*, SADURSKI, *supra* note 115, at 65–85.

essentials of a robust constitutional democracy, then trial courts—which (along with schools?) are possibly the most continuously stable governmental bureaucracies—should be considered as primary vehicles for these purposes, including their capacity to exercise judicial review.

But intermediate institutional possibilities are also available. Even a limited maneuver such as splitting high court benches into panels, rather than hearing cases *en banc*, would provide the constitutional system with multiple judicial results, with some (if limited) diversity. Consider the German Constitutional Court, which is institutionally divided into two panels of eight justices,[187] or indeed the Supreme Court of India, which employs 26 justices who sit in panels of two or three.[188] A more significant institutional variation was mentioned above: the idea of the "supreme trial court"—a high court that hears as a court of first instance a multitude of constitutional challenges. Such a court would hear and decide many constitutional cases, while facilitating the direct engagement between individual and government that is the participatory core of the inferiorizing model. A notable example is Israel, which still lacks a fully framed constitution and therefore also the textual matter for trial judges to expound, where the Supreme Court (sitting as the High Court of Justice) has fostered a constitutional discourse through repetitive adjudication over time of scores of first-instance cases.[189]

VII. CONCLUSION

In an often cited admonition, Sanford Levinson has already called upon legal scholars to face their preoccupation with Supreme Court practices and to embrace a more inclusive perspective, one cognizant of the vastly more prolific and accessible work of inferior courts:

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187. *See* Sarang Vijay Damle, Note, *Specialize the Judge, Not the Court: A Lesson from the German Constitutional Court*, 91 VA. L. REV. 1267, 1297–98 (2005).

188. *See* Supreme Court of India, Law, Courts and the Constitution, http://www.supremecourtofindia.nic.in/new_s/constitution.htm (on file with the University of Michigan Journal of Law Reform).

189. Israel is actually a curious case, since it combines centralized and diffuse systems of judicial review: when it sits as the High Court of Justice, the Supreme Court hears constitutional (and some administrative) cases as a court of first instance, admitting (mostly written) evidence, and deciding thousands of petitions every year; however constitutional claims may also be brought through the regular course of litigation, beginning at a lower trial court and eventually reaching the Supreme Court sitting as the High Court of Appeals (the same justices occupy both roles). *See* NAVOT, *supra* note 60.

> I want to focus on the obvious fact that the Supreme Court is only one relatively small aspect of our overall judicial system. If one stays only at the federal level, . . . we see twelve circuit courts and ninety district courts. Not only are they far more numerous than the Supreme Court, they also, as a matter of empirical fact, play a far more important role in the actual lives of citizens than does the Supreme Court.[190]

This insight is of course correct; and it applies all the more so to those courts that even Professor Levinson chose (albeit consciously) to bracket: state trial courts, which process about 98% of the cases managed by courts in this country,[191] and are thus the actual face of "the law" to most people, much more than any or all of the federal courts. However, the shift in focus from the constitutional practices of the Supreme Court to those of the inferior courts that I propose in this Article is not based on the mere empirical fact that most adjudication (constitutional and other) takes place in the latter. Rather, it is based on the recognition that inferior courts offer something *else*, a potential for deliberation-inducing and pluralist constitutional adjudication that cannot happen in "one supreme Court," and that is inhibited by the structural possibility of Supreme Court review. The inferior courts are not only the place where constituents most frequently "meet the law," they are also the place where constituents can participate in a meaningful way in making and remaking the law.

This is an argument about institutional capacities and their optimal utilization. It is not about who is better or more important and therefore deserves more attention or respect or power. I do not seek to discredit supreme courts or their justices—these are courts like most other courts, and justices, title aside, are judges like most other judges. But a supreme court's capacity to provoke effective deliberation through popular modes of constitutionalism is limited by its institutional singularity, its national saliency, and the meager amount of opinions it is capable of producing. In contrast, when left alone—by the unreviewable realities of individualized discretion, by invisibility-rendering design, and by

190. Levinson, *supra* note 54, at 844; *see also* Kreimer, *supra* note 54, at 430 ("The voice in which the judiciary speaks the Constitution to most of the population is not the sonorous pronouncements of the Supreme Court's explications, but the somewhat terse and often hurried tones of the trial judge denying or granting motions for summary judgment or suppression of evidence.").

191. *See* Marc Galanter, *A World Without Trials?*, 2006 J. DISP. RESOL. 7, 9; Stratos Pahis, Note, *Corruption in Our Courts: What It Looks Like and Where It Is Hidden*, 118 YALE L.J. 1900, 1922 & n.47 (2009).

systematic multiplication—inferior courts can become responsive innovators of diverse and pluralistic understandings of the Constitution. While resolving scores of constitutional disputes (thus enforcing the Constitution against majoritarian abuse on a case-by-case basis), they can also provide the discursive ground for popular constitutionalist moves in and out of the courts, and thus foster the democratic ideals of participation, deliberation, and pluralism. Rather than precluding popular constitutionalism, the courts (in place of "the Court") become its facilitators.

Although in diffuse systems of constitutional adjudication the institutional capacity to inferiorize judicial review actually already exists,[192] it is of course difficult to fathom such an extreme change happening in the near future. In the United States and elsewhere, supreme courts have lately become even more prominent players in the constitutional field; they do not seem intent on giving up their power of judicial review. Politicians, litigants, and jurists follow suit, partially by default to the intellectual benefits of custom and habit, and partially due to what seems like an optimism bias, grounded in a magnified appreciation of certain morally successful high court cases. But the Supreme Court can and does come out in different ways on different topics of constitutional interpretation, sometimes splitting according to what seems to be the mere political fortuity embedded in the judicial appointment process.

Pluralizing judicial review by relegating it to trial courts would probably guarantee that all sides to a dispute get to win some and to lose some. This would mean that the judicial record on any constitutional question would always be imperfect, from any moral standpoint. But at the same time it would provide us with a vast and newly recognized resource for arguing about constitutional questions through the popular modes of deliberation, that is, through politics: an aggregation of many judicial pronouncements, producing various forms of reasoning and outcomes in a multitude of test cases. Some issues would ignite continuing popular debate, with signals running back and forth between legislators, litigants, juries, and judges, until a trajectory is plotted. Some issues would reveal themselves as straightforward, evoking a clear judicial con-

192. Various procedural mechanisms for effecting an inferiorized model come to mind. Congress could legislate jurisdiction-shifting laws; appellate courts could exercise Bickelian "passive virtues" by setting deferential standards of review of trial courts' constitutional determinations; litigants could be educated away from the tendency to appeal an unfavorable constitutional result, instead encouraged (or incentivized) to pursue non-judicial avenues for fighting an adverse decision. While an exploration of the practical mechanisms for inferiorizing judicial review is beyond the scope of this Article, it is important to realize that they do exist.

sensus; others as minute or uninteresting, leaving politics unengaged even in the face of inter-judicial dissention.

Doing popular constitutionalism through the trial courts takes away some of the movement's liberating force: it calls us back into courts, just as we were starting to seriously explore what is happening—and what could happen—away from courts. But I think that the benefit for the conceptual robustness of popular constitutionalism is considerable: by realigning relatively few jurisdictional demarcations, the model of inferiorized judicial review turns an established, long-standing, familiar social event—the trial—into an institutional backbone for truly popular (in the sense of participatory and pluralist) deliberation on the meaning of the Constitution, in and out of courts.

Commenting in 2006 on the future of the intellectual project he had a central role in forming, Larry Kramer concluded:

> If there is an agenda for constitutionalism today, its first concern is not substantive. It is institutional. We should not say "popular constitutionalism can't work, so turn the Constitution over to the Court." We should, rather, be asking what kind of institutions we can construct to make popular constitutionalism work, because we need new ones. We need to start rethinking and building institutions that can make democratic constitutionalism possible. And we need to start doing so now.[193]

I agree fully; I only wonder whether at least some of the new institutions of which we are in need are actually already up and running, just waiting for us to take notice and put to use.

193. Kramer, *Response*, *supra* note 137, at 1182.