Elgar

AGAINST THE NEW CONSTITUTIONALISM

Tamas Gyorfi

ELGAR MONOGRAPHS IN CONSTITUTIONAL AND ADMINISTRATIVE LAW

Series Editors: Rosalind Dixon, Susan Rose-Ackerman and Mark Tushnet

Against the New Constitutionalism

ELGAR MONOGRAPHS IN CONSTITUTIONAL AND ADMINISTRATIVE LAW

Series Editors: Rosalind Dixon, *University of New South Wales, Australia,* Susan Rose-Ackerman, *Yale University* and Mark Tushnet, *Harvard University, USA*

Constitutions are a country's most important legal document, laying the foundation not just for politics, but for all other areas of law. They allocate power among different levels and branches of government, record and promote a society's shared values, and protect the rights of citizens. Countries around the world are adopting written constitutions, though what defines a constitution is evolving to include a variety of sources beyond canonical texts, such as political conventions, statutes, judicial decisions and administrative law norms.

This cosmopolitan monograph series provides a forum for the best and most original scholarship in constitutional and administrative law, with each book offering an international, comparative or multi-jurisdictional approach to this complex and fascinating field of research.

Titles in the series include:

Political Technology and the Erosion of the Rule of Law
Normalizing the State of Exception
Günter Frankenberg

Constitutional Sunsets and Experimental Legislation
A Comparative Perspective
Sofia Ranchordás

Constitutionalism and Religion
Francois Venter

The Arab Spring
An Essay on Revolution and Constitutionalism
Antoni Abat i Ninet and Mark Tushnet

American Judicial Power
The State Court Perspective
Michael L. Buenger and Paul J. De Muniz

Citizen Journalists
Newer Media, Republican Moments and the Constitution
Ian Cram

Against the New Constitutionalism
Tamas Gyorfi

Against the New Constitutionalism

Tamas Gyorfi

University of Aberdeen, UK

ELGAR MONOGRAPHS IN CONSTITUTIONAL AND ADMINISTRATIVE LAW

Edward Elgar PUBLISHING

Cheltenham, UK • Northampton, MA, USA

Published by
Edward Elgar Publishing Limited
The Lypiatts
15 Lansdown Road
Cheltenham
Glos GL50 2JA
UK

Edward Elgar Publishing, Inc.
William Pratt House
9 Dewey Court
Northampton
Massachusetts 01060
USA

A catalogue record for this book
is available from the British Library

Library of Congress Control Number: 2016938587

This book is available electronically in the **Elgar**online
Law subject collection
DOI 10.4337/9781783473014

ISBN 978 1 78347 300 7 (cased)
ISBN 978 1 78347 301 4 (eBook)

Typeset by Columns Design XML Ltd, Reading

Contents

Preface and acknowledgments

Although by the middle of the twentieth century most Western democracies had written constitutions and many of them included a bill of rights, the power to determine the content of these rights belonged to the elected legislature. Since then this power has been transferred in most countries to courts. As Ran Hirschl says, 'Around the globe, in numerous countries and in several supranational entities, fundamental constitutional reform has transferred an unprecedented amount of power from representative institutions to judiciaries.'[1] This institutional transition has been accompanied by an intellectual change: today most legal scholars wholeheartedly embrace the aforementioned transfer of power. Although there has always been a couple of constitutional theorists who criticized the judicialization of politics, and some of them put forward sophisticated arguments, their works have had little effect on the general intellectual climate. In many places of the world the belief that majoritarian democracy has to give way to a more enlightened model of government has become so ingrained that conferring sweeping powers on constitutional courts no longer requires justification. The legitimacy of constitutional review, to use John Stuart Mill's words, is 'not fully, frequently, and fearlessly discussed', and, therefore, the belief in the justifiability of constitutional review is held 'as a dead dogma, not a living truth'.[2]

I myself was educated in such a country, namely Hungary, and wrote my PhD thesis on the jurisprudence of the Hungarian Constitutional Court.[3] Although I criticized many of the court's decisions – hopefully fully, frequently and fearlessly – I did not have a well-developed theory about the court's overall legitimacy and accepted it without giving sufficient thought to the issue. This book is the result of a long intellectual journey that led me to the camp of court-sceptics. Its central

[1] Ran Hirschl, 'The Political Origins of the New Constitutionalism' (2004) 11 *Indiana Journal of Global Legal Studies* 71, 71.

[2] John Stuart Mill, *On Liberty. With an Introduction by WL Courtney* (The Walter Scott Publishing Co., Ltd 1901) 64.

[3] Tamas Gyorfi, *Az Alkotmánybíráskodás Politikai Karaktere: Értekezés a Magyar Alkotmánybíróság Első Tíz Évéről* (Indok 2001).

thesis is that the reigning paradigm of constitutional thought has shaky foundations. The seeds of scepticism in my mind were sown by the works of political philosophers who have been grappling with the idea of moral disagreement. But it took years for me to link properly the abstract political principles I endorsed to questions of institutional design and constitutional doctrine. My journey has certainly become easier since I started to teach in the United Kingdom, where the sceptics have a much stronger stronghold than in continental Europe.

Although the conclusion of my argument is hardly unique, I hope that I manage to offer a distinctive combination of arguments for the sceptical position. In the United Kingdom, where the advocates of constitutional review are often associated with liberalism[4] and the sceptical position is dominated by republican,[5] conservative or left-leaning critics of the Human Rights Act (1998), my scepticism, which is not only compatible with but also rooted in a particular version of liberal political philosophy, fits somewhat uneasily with the existing positions in the 'legal versus political constitutionalism' debate.

My book also aims to contribute to the vibrant global discourse on the different forms of judicial review. The New Commonwealth model, associated with Canada, New Zealand and the United Kingdom, has duly attracted a lot of attention among comparative constitutional lawyers recently as a potential middle ground between the advocates and opponents of judicial review.[6] My book suggests that the constitutional systems of the Nordic countries also deserve more attention than they hitherto received. I also risk the claim that from the sceptical position that I defend in the book, they strike a more attractive balance between democracy and the effective protection of rights than the Commonwealth model.

* * *

This book makes claims primarily about constitutional models in general and not about particular legal systems. Since many contingent features of the legal systems I discuss in the book are irrelevant for my purposes,

---

[4] Thomas Poole, 'Dogmatic Liberalism: T.R.S. Allan and the Common Law Constitution' (2002) 65 *Modern Law Review* 463.

[5] Adam Tomkins, *Our Republican Constitution* (Hart Publishing 2005); Richard Bellamy, *Political Constitutionalism: A Republican Defence of the Constitutionality of Democracy* (Cambridge University Press 2007).

[6] Stephen Gardbaum, *The New Commonwealth Model of Constitutionalism: Theory and Practice* (Cambridge University Press 2013).

for sake of convenience, I use some legal terms in a less than precise, generic sense. For instance, in the terminology of this book, the term *constitution* also includes parliamentary bills of rights, like the United Kingdom's Human Rights Act 1998. Similarly, the term *constitutional court* refers not only to the specialized courts of the Kelsenian model, but to all courts with the power of constitutional review. Perhaps most importantly, I will use the term *constitutional review* and *judicial review* interchangeably, although the former is both wider and narrower than the latter: on the one hand, constitutional judicial review is a special case of judicial review, on the other hand, constitutional review is not necessarily judicial. If it is not indicated otherwise, I will also use the terms constitutional rights, human rights and fundamental rights interchangeably.

My book makes many empirical claims about the global spread of judicial review. Although I always indicate the sources of my data in the book, I have also created a website that collects and presents this information in a visual form.[7]

* * *

Among the many people who helped me along the way I would like to thank Paul Beaumont, Mátyás Bódig, Joel Colón-Ríos, Stephen Gardbaum, Gábor Halmai, András Jakab, Aileen Kavanagh, Robert Taylor and Kaarlo Tuori for commenting on parts of the manuscript. Many of the arguments advanced in the book were presented initially in seminars held at the Universities of Aberdeen, Debrecen, Edinburgh, Glasgow and Turku. I am grateful to the participants of all those seminars for their critical comments. Parts of Chapter 4 of this book appeared in an article entitled 'In Search of a First-Person Plural, Second-Best Theory of Constitutional Interpretation' in the *German Law Journal* (2013) 14(8). The main argument of the book was published in a rudimentary form in an article entitled 'Between Common Law Constitutionalism and Procedural Democracy' in the *Oxford Journal of Legal Studies* (2013) 33(2). I would like to thank the editors for allowing me to use material from these articles. I am also obliged to the Royal Society of Edinburgh for supporting and to Tuomas Ojanen for facilitating the research I carried out in Helsinki. I also want to thank Iain Cameron and Kaarlo Tuori for allowing me to use their unpublished manuscripts on judicial review in Sweden and Finland, respectively.

---

[7] <http://constitutions.silk.co>.

1. The New Constitutionalism

1.1 THE EMERGENCE OF THE NEW ORTHODOXY

1.1.1 The Orthodox Model of Parliamentary Supremacy

In 1688 seven English peers sent a letter of invitation to William of Orange, the Protestant king of Holland, and indicated to him that the country wanted political change. After William had landed in England and the reigning King, James II, had fled the country, the Convention of Lords and Commons declared that the throne was vacant and officially offered it to William and his wife, Mary. However, the Crown the Parliament offered to them was not the same as before: by adopting the Bill of Rights 1689, the Parliament imposed strong limits on the prerogative powers of the Crown. The conflict between the Crown and Parliament, which was at the centre of the political controversies in the seventeenth century, ended with the victory of the Parliament. The settlement between William and the Parliament transformed England into a limited constitutional monarchy.[1] Although the English (and later the British) constitution has undergone many changes since then, the 1688 settlement has laid down the foundations of a new, distinctive constitutional arrangement with the principle of parliamentary supremacy at its heart.

The doctrine of parliamentary supremacy received its most influential exposition in AV Dicey's treaty on constitutional law in the nineteenth century.[2] The Orthodox Model of Parliamentary Supremacy can be characterized by three main tenets:

1.1.1.1 Monistic constitutional architecture

Although in functional terms one can speak about constitutional laws, in legal terms there is no formal distinction between 'constitutional statutes'

[1] Elizabeth Wicks, *The Evolution of a Constitution: Eight Key Moments in British Constitutional History* (Hart Publishing 2006) 16.

[2] Albert Venn Dicey, *Introduction to the Study of the Law of the Constitution* (Liberty Classics 1982) 39–85.

and 'ordinary statutes'; all Acts of Parliament have equal legal status. In addition, the lack of formal hierarchy between constitutional statutes and ordinary statutes is also reflected in the legislative process: according to the orthodox model, all laws can be amended or repealed by the normal law-making process and the Parliament cannot bind its successors.

1.1.1.2 The lack of substantive constraints on legislation

Parliamentary supremacy also implies that the legislative power of the Parliament does not have legal limits. As Lord Reid summarized the core idea in *British Railways Board v Pickin*:

> In earlier times many learned lawyers seem to have believed that an Act of Parliament could be disregarded in so far as it was contrary to the law of God or the law of nature or natural justice, but since the supremacy of Parliament was finally demonstrated by the Revolution of 1688 any such idea has been obsolete.[3]

One might be tempted to think that the second thesis is entailed in the first one, but this is not the case. The European Communities Act 1972 (hereinafter ECA) or the Human Rights Act 1998 (hereinafter HRA) illustrate my point. Although the Parliament can repeal both acts by the ordinary process of legislation, and therefore their operation is consistent with the first thesis, until they are in force, they clearly impose substantive limits on the legislature and are incompatible with the orthodox view. The fact that a substantive limit on legislation is revocable does not make that constraint non-existent.

1.1.1.3 The lack of constitutional judicial review

Since the legislative power of Parliament is unlimited, there are no other institutions that may scrutinize the content of legislation or strike down the Acts of Parliament. Although the second thesis about the lack of substantive limits on legislative power entails the third one, it is worth analytically distinguishing these two claims: as we shall see very soon, one can imagine a system where legislation does have substantive limits, but no other institution can enforce those limits. The ECA and the HRA, which violate the second tenet of the orthodox model, are also inconsistent with the third thesis, since both acts authorize judges to scrutinize the content of legislation and the ECA also authorizes them to set aside an Act of Parliament if it violates the law of the European Union.

---

[3] [1974] AC 765, 782.

A couple of qualifications are needed to clarify the nature of my claims about the orthodox model. First, I do not claim that the orthodox view of parliamentary supremacy has remained unchallenged in British public law. In fact, all three tenets have been subjected to fierce criticism. The idea that certain laws cannot be repealed by mere implication is incompatible with the monistic structure of the constitution.[4] The proponents of the 'new view' of sovereignty have also challenged the first tenet of the orthodox approach and argued that supremacy only implies that the legislature has the power to make any laws *in the manner* required by the law. If supremacy were construed this way, it would also imply the power to change the manner and form of legislation.[5] Parliament could, in principle, entrench any laws and require, for instance, a two-thirds majority or a referendum for the enactment of valid laws. Common law constitutionalists have also challenged the second and third tenets of the orthodox view and argued that in exceptional circumstances judges may consider declaring an Act of Parliament legally void.[6] My claim is that notwithstanding these challenges, the orthodox view represented the dominant interpretation of the doctrine of parliamentary supremacy in the UK.

Second, I do not claim that the orthodox model is the most accurate representation of Dicey's authentic position.[7] Rather, my claim is that the orthodox position reflects accurately how the doctrine was generally understood by generations of public lawyers in the United Kingdom.

Finally, what I am claiming is that the orthodox model gives a fairly accurate picture of British public law prior to the enactment of the ECA. Although it is hotly debated among British public lawyers whether the present institutional set-up of the UK is still compatible with a broader understanding of parliamentary supremacy, I want to remain agnostic in this debate.[8] At this point suffice it to say that regardless whether the

---

[4] *Thoburn v Sunderland City Council* [2002] 4 All ER 15, QBD DC [60]–[67] (Laws LJ).

[5] William Ivor Jennings, *The Law and the Constitution* (5th edition, University of London Press 1960) 153.

[6] Lord Woolf, 'Droit Public: English Style' [1995] *Public Law* 57, 69; *Jackson v Attorney General* [2006] 1 AC 262, 302–3 (Lord Steyn).

[7] For the view that the model sketched here does not reflect Dicey's authentic position, see TRS Allan, *Constitutional Justice* (Oxford University Press 2003) 13–21.

[8] TRS Allan, 'Parliamentary Sovereignty: Lord Denning's Dexterous Revolution' (1983) 3 *Oxford Journal of Legal Studies* 22; Aileen Kavanagh, *Constitutional Review under the UK Human Rights Act* (Cambridge University Press 2009); HWR Wade, 'Sovereignty: Revolution or Evolution?' (1996) 112 *Law*

present institutional arrangement satisfies a more permissive definition of parliamentary supremacy, it certainly does not satisfy the demanding criteria of the orthodox model for the reasons given above.

1.1.2 The Birth of Strong Judicial Review in the USA

The revolutionary constitutions of the late eighteenth century, and especially the American political experience, opened up the possibility of a new constitutional arrangement that breaks with the fundamental tenets of the Orthodox Model of Parliamentary Supremacy. For the purposes of my analysis, four features of this constitutional arrangement are of special significance. In this section I will sketch how the essential features of the new model emerged in the United States, and in the next section I will show how the new model has spread all over the world and become the dominant paradigm of constitutional law.

1.1.2.1 Dualist constitutional architecture

The revolutionary constitutions of the late eighteenth century, to borrow Dieter Grimm's useful distinction, have been *foundational* and not *modifying* constitutions: they did not simply impose limits on existing institutions, like the settlement of 1688 in England, but created new political communities from scratch or fundamentally reconfigured the existing ones.[9] According to the logic of foundational constitutions, all institutions exercising public function derive their authority from the constitution. In this framework, there is no logical space for institutions whose authority is prior to or independent of the newly enacted constitution. Although in the UK the constitutional developments of more than three centuries have shrunk the power of the monarch considerably, the very idea of the royal prerogative as *residual power* reminds us that the constitutional settlement of 1688 was not meant to be the source of all public authority, since the power of the monarch was prior to and independent of the 1688 settlement.

One implication of this foundational character was the dualist architecture of these constitutions. The American constitution exemplifies this

---

Quarterly Review 568; Alison L Young, *Parliamentary Sovereignty and the Human Rights Act* (Hart Publishing 2009).

[9] Dieter Grimm, 'Types of Constitutions' in Michel Rosenfeld and András Sajó (eds), *The Oxford Handbook of Comparative Constitutional Law* (Oxford University Press 2012) 103–4, 108.

dualist structure very clearly.[10] To start with, the constitution distinguishes the constituent power of the people and the constituted powers of the legislative, executive and judicial bodies.[11] While the powers of the latter derive from the constitution, the legitimacy of the constitution itself derives from the constituent power, that is, 'We the People' (*popular sovereignty*). Second, since every public body derives its powers from the constitution, they are all bound by the very same law that confers authority on them. The constitution is therefore rightly considered more fundamental than ordinary laws created by the legislative body, and rightly stands above them (*constitutional supremacy*). Third, if the constitution has higher status than ordinary laws, it is also natural to separate the constitutional amendment process from ordinary legislation and make it more burdensome (*entrenchment)*. To sum up, the dualist architecture of the American constitution is manifested in distinctions between institutions (constituent power – constituted powers), processes (constitutional amendment – ordinary legislative process) and in the hierarchy between legal rules (the constitution – ordinary statutes) and it is also reflected in the doctrines of popular sovereignty, constitutional supremacy and entrenchment.

1.1.2.2 A codified Bill of Rights

Unlike the power of the UK Parliament before 1972, the legislative power of the US Congress is constitutionally limited. Some of these limits originate from the organizational provisions of the constitution, most notably from the federal structure of the state. The limited nature of legislative power, however, is further accentuated by the Bill of Rights.

1.1.2.3 Judicial supremacy

In the landmark case of *Marbury v Madison*, the US Supreme Court vindicated the right to review and to strike down legislation contrary to the constitution. At the heart of John Marshall's argument for judicial review lay the dualist structure of the constitution. The argument suggests that judicial review is almost a necessary corollary of constitutional

---

[10] Bruce Ackerman, *We the People: Volume 1 – Foundations* (Belknap Press 1993) 3–33.

[11] For the conceptual history of the distinction, see Martin Loughlin, 'Constituent Power Subverted: From English Constitutional Argument to British Constitutional Practice' in Martin Loughlin and Neil Walker (eds), *The Paradox of Constitutionalism: Constituent Power and Constitutional Form* (Oxford University Press 2007).

supremacy, and under a dualist constitution judges do not have another possibility but to strike down unconstitutional legislation:

> Certainly all those who have framed written Constitutions contemplate them as forming the fundamental and paramount law of the nation, and consequently the theory of every such government must be, that an act of the Legislature repugnant to the Constitution is void. This theory is essentially attached to a written Constitution …[12]

According to the conventional interpretation, *Marbury* established not only judicial review, but also judicial supremacy. *Cooper v Aaron,* a case decided in 1958, already reflects this view by claiming that judicial supremacy 'has ever since [since *Marbury*] been respected by this Court and the Country as a permanent and indispensable feature of our constitutional system'.[13] Judicial supremacy means that the judiciary is not simply one of the three branches of the government that is authorized to interpret the constitution, but also that its interpretation is authoritative and legally binding on the other branches.

This interpretation of *Marbury,* however, has not been unchallenged. The advocates of *departmentalism* claim that since the three branches of government are coordinated, all of them have an equal right to interpret the constitution, and judicial interpretation is not binding upon the other branches. John Marshall's famous argument in *Marbury*, which emphasizes the supremacy of the constitution and the necessarily limited power of the constituted legislature, is as applicable to the legislature as to the other two branches.[14] Giving supreme and binding status to the unconstitutional interpretation of the judiciary would violate the supremacy of the constitution just as much and for the very same reason as giving binding and supreme status to the unconstitutional legislation of the Congress.[15] If the departmentalist interpretation of *Marbury* is correct, *Marbury*

---

[12] 5 U.S. 137, 177 (1803).

[13] 358 U.S. 1, 18 (1958).

[14] Michael Stokes Paulsen, 'The Irrepressible Myth of Marbury' (2003) 101 *Michigan Law Review* 2706, 2712–22.

[15] However, departmentalists disagree about the implications of this position. Michael Stokes Paulsen would go so far as permitting the president to decline to enforce judicial decrees. Michael Stokes Paulsen, 'The Most Dangerous Branch: Executive Power to Say What the Law Is' (1994) 83 *Georgetown Law Journal* 217, 276–84. Others claim that the president is required to enforce judicial decrees, but neither of the other branches is bound by the courts' constitutional interpretation in the future.

supports coordinated constitutional review (including judicial review), but not judicial supremacy.

But even if *Marbury* had claimed judicial supremacy, the court exercised its power of setting aside unconstitutional legislation rather sparingly in the nineteenth century and it was far from clear that the other branches will consider the court's interpretation of the law as binding.[16] The court therefore built up its power gradually and cautiously during the nineteenth century.[17] Although the twentieth century still witnessed some backlashes, the idea of judicial supremacy has slowly taken root in American constitutional thought and has become part of the constitutional orthodoxy. As Mark Tushnet remarks: 'I am unaware of a definitive history identifying with any precision the period when departmentalism substantially disappeared. The possibilities range, I think, from the late nineteenth century to the middle of the twentieth.'[18]

Even if the *Cooper* court in 1958 was wrong to claim that *Marbury* established judicial supremacy, it was right to claim that judicial supremacy became a generally respected principle by the middle of the twentieth century.

1.1.2.4 The robust exercise of judicial review

In comparing the Orthodox Model of Parliamentary Supremacy with the emerging new model, I have followed a narrative that is fairly common in comparative constitutional law.[19] However, I want to add an additional element to the defining features of the emerging model that is usually not considered crucial by the comparative accounts of judicial review: the robust exercise of the power of judicial review.

Scholars would be much less interested in constitutional adjudication, if courts usually deferred to the constitutional interpretation of other branches. The mere possibility of judicial review or even judicial supremacy would not have made courts major players in the political

---

[16] For examples of executive noncompliance, see Frank H Easterbrook, 'Presidential Review' (1989) 40 *Case Western Reserve Law Review* 905; Paulsen (n 14).

[17] Tom Ginsburg, *Judicial Review in New Democracies: Constitutional Courts in Asian Cases* (Cambridge University Press 2003) 91–6.

[18] Mark Tushnet, 'Alternative Forms of Judicial Review' (2003) 101 *Michigan Law Review* 2781, 2783, footnote 9.

[19] For a similar narrative, see Allan R Brewer-Carías, *Judicial Review in Comparative Law* (Cambridge University Press 1989); Stephen Gardbaum, 'The New Commonwealth Model of Constitutionalism' (2001) 49 *American Journal of Comparative Law* 707, 711–18.

arena, and without the robust exercise of judicial review no one would speak about the 'government of judges' or the 'judicialization of politics'. If we want to understand the distinctive features of the new model, we cannot ignore altogether how the power of judicial review is exercised.

Later in the book I will subject the idea of robust interpretation to more sustained analysis. At this stage, however, I do not want to overburden my historical narrative with a heavy analytical machinery. I will therefore only flag up and sketch the main idea here.

In a celebrated essay, James B Thayer has demonstrated that, in the early history of the court, judges were reluctant to declare a statute void, unless the violation of the constitution was manifest.[20] To put it otherwise, the early jurisprudence of the court was highly deferential. The Supreme Court did not invalidate a single federal law between 1803 and 1857.

The general acceptance of the Supreme Court as the final authority on constitutional meaning was only one aspect of the court's growing reputation and confidence. As the court gradually built up its power during the nineteenth century, it also began to exercise the power of judicial review more robustly. The number of unconstitutional federal laws was growing slightly, but remained under ten in each decade until the 1920s.[21] The number of unconstitutional state laws was under ten in each decade before the 1860s, it was between 30 and 50 per decade between the 1870s and 1910s and rose above 100 both in the 1910s and 1920s.[22]

Very roughly, by robust exercise of judicial review I mean that even where the language of the constitution allows many interpretations, and the legislature's reading remains within the boundaries of reasonable interpretations, judges are ready to override the legislature's view and substitute it with what they believe to be the best reading of the constitution. This reflected a subtle, but strikingly important change of emphasis in the self-understanding of the court. As Thayer explains, the early court did not conceive itself as the primary decision-maker for defining what the constitution really means; rather the court's role was to check whether the interpretation of the legislature remained within reasonable limits.

---

[20] James B Thayer, 'The Origin and Scope of the American Doctrine of Constitutional Law' (1893) 7 *Harvard Law Review* 129, 138–43.

[21] Lee Epstein, Jeffrey A Segal and Harold Spaeth, *The Supreme Court Compendium: Data, Decisions & Developments* (5th edition, Sage – CQ Press 2012) 188–92.

[22] ibid 193–223.

Although the frequency with which a court invalidates legislation does not necessarily reflect the robustness of the court's review, I will assume that it can be used as a rather reliable proxy. (The low number of invalidated statutes can be influenced by other factors, like the low caseload of the court, or the high quality of legislation.)

1.1.3 Judicial Review on the Global Stage

As Claude Klein and András Sajó note, 'making constitutions appears as a process that follows certain rules (and) or rites which have been progressively established'.[23] Perhaps no other constitutions have influenced 'the rules and rites' of constitution-making so thoroughly as the American and the French ones. These revolutionary constitutions from the late eighteenth century have shaped considerably what we mean by constitution and constitution-making. From 1787 to 1945, the period on which I am focusing first, many countries around the world, even countries that enacted only modifying constitutions usually copied the dualist structure of the American and the French constitutions.

Similarly, a written bill of rights was already a commonplace in this period. From the Venezuelan constitution of 1811 to the Irish constitution of 1937, many constitutions from these long historical periods included a codified bill of rights. Article 16 of the extremely influential French Declaration of the Rights of Man and Citizen from 1789 even declared that the safeguarding of rights is an indispensable hallmark of a proper constitution.

However, the primary function of the incorporation of those rights into the constitution was to orient rather than to bind the legislature. Without the effective judicial enforcement of substantive constitutional limits, the actual operation of these dualist political systems resembled much more the Orthodox Model of Parliamentary Supremacy than the American version of constitutionalism.

Although constitutional rights were meant primarily to orient the legislature, this does not mean that judicial review did not exist before 1945. Many Latin American countries were influenced by the American constitution and were aware of the practice of judicial review. As a matter of fact, most countries in Latin America had some forms of judicial review well before the twentieth century. Judicial review existed in the Dominican Republic (1844), Colombia (1850), Mexico (1857), Argentina

---

[23] Claude Klein and András Sajó, 'Constitution-Making: Process and Substance' in Michel Rosenfeld and András Sajó (eds), *The Oxford Handbook of Comparative Constitutional Law* (Oxford University Press 2012) 421.

(1860), Brazil (1890) and Venezuela (1897).[24] It was also introduced in some European countries, like Greece (1847), Norway,[25] Switzerland (1875) and Crete (1906) before the First World War. However, the way the courts of these countries exercised their power could not be compared to the robustness of American judicial review.

This short historical overview would be incomplete without mentioning the Austrian Constitutional Court, the archetype of the now utterly influential centralized or European model of judicial review. The main architects of the Austrian constitution, most notably, Karl Renner and Hans Kelsen, envisaged a form of judicial review that differed from the American model where each court can scrutinize the constitutionality of legal norms. They created a specialized constitutional court with the monopoly of constitutional judicial review. Even though the differences between the older decentralized or American model and the newer centralized model are not insignificant, and are discussed extensively by comparative constitutional lawyers, for the purposes of my book their similarities are far more important. I will therefore generally ignore the differences between the two models.[26] Although the establishment of a centralized form of review was a major institutional innovation, even the Austrian court operated rather differently from its present day descendants. The judicial review of legislation had only a subsidiary role in the jurisprudence of the Austrian Constitutional Court, since its activity focused mainly on the review of administrative actions and on resolving conflicts of competence. In addition, according to the dominant doctrinal approach, if a fundamental right was limited by an Act of Parliament, the limitation was automatically considered to be justified. In line with this doctrinal view, Kelsen emphasized that constitutional courts should not rely on very abstract, value-laden concepts, like justice, liberty, equality and fairness, and held that the content of these concepts should be

---

[24] Allan R Brewer-Carías, *Constitutional Protection of Human Rights in Latin America* (Cambridge University Press 2009) 89.

[25] According to Sand, the Supreme Court of Norway had already exercised the power of judicial review in the 1840s, and the idea was well established in doctrinal writings by 1866. Inger-Johanne Sand, 'Judicial Review in Norway under Recent Conditions of European Law and International Human Rights Law: A Comment' (2009) 27 *Nordic Journal of Human Rights* 160, 160–61.

[26] For the differences between the two models and the explanation of why new democracies preferred the centralized model, see Brewer-Carías (n 19); Mauro Cappelletti, *The Judicial Process in Comparative Perspective* (Clarendon Press 1989); Alec Stone Sweet, 'Why Europe Rejected American Judicial Review: And Why It May Not Matter' (2003) 101 *Michigan Law Review* 2744.

determined by the legislature and not the court.[27] In summary, before the Second World War, robust rights-based judicial review of legislation was foreign even to the most full-fledged European constitutional court.

This constitutional landscape, however, has changed dramatically since the end of the Second World War. The horrors of the war discredited the idea of unlimited parliamentary supremacy and the majoritarian conception of democracy. Samuel Huntington, an eminent American political theorist, called this post-war development the 'second wave of democratization'.[28] Although democratization does not necessarily imply the stronger protection or the judicial enforcement of human rights, there was a strong correlation between these two developments. The post-war intellectual climate gave strong impetus to the human rights movement both at the international and the national levels. International law witnessed a major paradigm shift: the way a government treated its own citizens was no longer considered exclusively a matter of domestic jurisdiction and sovereignty could be no longer used as a shield against any external criticism or legal interference. The Universal Declaration of Human Rights, adopted by the UN General Assembly in 1948, was followed by a considerable number of human rights instruments, including two covenants, five additional core human rights treaties, and many regional human rights instruments, including the European Convention on Human Rights (hereinafter ECHR or the Convention). By the same token, the incorporation of binding human rights into new national constitutions has become the general practice since the end of the Second World War.

Equally importantly for our purposes, during the second wave of democratization judicial review was re-established in Austria (1945) and introduced in Japan (1946), Italy (1948), India (1949) and Germany (1951). Of these institutions, the Federal Constitutional Court of Germany (hereinafter FCC) is of special significance for my narrative. Since the drafters of the German Basic Law of 1949 wanted to prevent the recurrence of a Nazi-type totalitarian regime, they conferred sweeping powers on the FCC. Due to these sweeping powers, the FCC has become a major player in German politics and is arguably the most influential

---

[27] Heinrich Triepel, Hans Kelsen, Max Layer and Erst von Hippel, 'Wesen Und Entwicklung Der Staatsgerichtsbarkeit. Uberprüfung von Verwaltungsakten Durch Die Ordentlichen Gerichte. Verhandlungen Der Tagung Der Deutschen Staatsrechtslehrer Zu Wien Am 23. Und 24. April 1928: Mit Einem Auszug Aus Der Aussprache' (de Gruyter 1929) 70.

[28] Samuel P Huntington, 'Democracy's Third Wave' (1991) 2 *Journal of Democracy* 12.

court after the US Supreme Court worldwide, serving as a role model for many constitutional courts established later.[29]

The 'third wave of democratization', beginning in Portugal in 1974, saw judicial review spread to the new democracies of Southern Europe, Central and Eastern Europe,[30] Latin America,[31] Asia[32] and Africa.[33] Based on the analysis of the constitutional systems of 72 'third wave democracies', Tom Ginsburg could conclude already in 2004 that 'providing for a system of constitutional review is now a norm among democratic constitution drafters'.[34]

Although the constitutional courts of new democracies had to build up their reputation and earn respect, as a general rule, they, unlike the American Supreme Court, did not have to fight for judicial supremacy. In most cases, the constitution itself, or the Act that established the court, made it clear that the court's interpretation of the constitution is binding on everyone, including the other branches of the government.[35] To put it another way, in these jurisdictions, judicial supremacy was coeval with judicial review, and departmentalism, which dominated arguably the first century of American constitutionalism, has never been a real contender.

Similarly, unlike the American Supreme Court that built up its judicial power gradually and exercised its powers rather cautiously for the most part of the nineteenth century, the constitutional courts established after the Second World War usually did not go through such a long gestation period of deferential judicial review. The Warren and Burger courts (1953–69 and 1969–86 respectively) are usually considered as the paradigmatic examples of the robust exercise of judicial review in the United States. During these 33 years the US Supreme Court declared 42 federal laws and 291 state laws (out of 5,008 cases) unconstitutional.[36] Between 1951 and 1990, the German Constitutional Court declared 198

---

[29] For details, see subsection 1.2.7.

[30] Wojciech Sadurski, *Rights before Courts: A Study of Constitutional Courts in Postcommunist States of Central and Eastern Europe* (Springer 2007).

[31] Rachel Sieder, Line Schjolden and Alan Angell, *The Judicialization of Politics in Latin America* (Palgrave Macmillan 2011).

[32] Ginsburg (n 17).

[33] H Kwasi Prempeh, 'Africa's "Constitutionalism Revival": False Start or New Dawn?' (2007) 5 *International Journal of Constitutional Law* 469.

[34] Ginsburg (n 17) 6.

[35] Brewer-Carías (n 24) 64.

[36] Harold J Spaeth, Lee Epstein, Andrew D Martin, Jeffrey A Segal, Theodore J Ruger and Sara C Benesh, 'Supreme Court Database, Version 2015 Release 01' (2015) <http://Supremecourtdatabase.org> accessed 1 December 2015.

federal laws invalid or incompatible with the constitution.[37] In its first 12 years of existence, the Constitutional Court of South Korea has found 451 cases (out of 3,126) unconstitutional in whole, in part, or in the application.[38] The general perception about many of the newly established courts has been that they have become formidable institutions very soon after their creation. As a commentator notes about Costa Rica's constitutional court: 'Immediately after its creation in 1989, the new constitutional court became a major actor in Costa Rican politics and one of the most influential and activist courts in Latin America.'[39] The Hungarian Constitutional Court delivered landmark decisions on the death penalty, abortion, hate speech, and the conditions of democratic transition in the first three years of its existence.[40] This evidence suggests that many of the new constitutional courts, from very different regions of the world and with very different constitutional traditions, started to exercise the power of judicial review quite robustly from the outset.

I will conclude my historical sketch with two 'side-effects' of the third wave of democratization. First, roughly simultaneously with the third wave of democratization, the jurisprudence of the European Court of Human Rights (hereinafter ECtHR) also took a more activist turn. This change exerted institutional pressure on domestic courts to pay more attention to the jurisprudence of the ECtHR, and as a consequence, this jurisprudence has, through various channels, infiltrated into virtually all European legal systems.[41] Some constitutional courts, like the Czech one, decided to interpret their own domestic constitutions in light of the jurisprudence of the ECtHR. In other cases, the constitution itself prescribed the method of Convention-friendly interpretation. Still other countries, like Finland, have reformed their domestic bill of rights to

---

[37] Christine Landfried, 'The Judicialization of Politics in Germany' (1994) 15 *International Political Science Review* 113, 113.

[38] Ginsburg (n 17) 223.

[39] Bruce M Wilson, 'Changing Dynamics: The Political Impact of Costa Rica's Constitutional Court' in Rachel Sieder, Line Schjolden and Alan Angell (eds), *The Judicialization of Politics in Latin America* (Palgrave Macmillan 2011) 47.

[40] László Sólyom and Georg Brunner, *Constitutional Judiciary in a New Democracy: The Hungarian Constitutional Court* (The University of Michigan Press 2000).

[41] For a detailed analysis of the relationship between the jurisprudence of the ECtHR and domestic law, see Catherine Van de Heyning, 'Constitutional Courts as Guardians of Fundamental Rights: The Constitutionalisation of the Convention through Domestic Constitutional Adjudication' in Patricia Popelier, Armen Mazmanyan and Wouter Vandenbruwaene (eds), *The Role of Constitutional Courts in Multilevel Governance* (Intersentia 2013).

accommodate the changes required by the ECHR. Finally, the United Kingdom has incorporated the ECHR into domestic law in the absence of a domestic bill of rights.

These developments have proved crucial in the process in which mature 'first wave democracies' also started to experiment with the judicial review of legislation. The very purpose of the UK Human Rights Act 1998 was 'to give further effect to rights and freedoms guaranteed under the European Convention on Human Rights.' The European context has also been a major factor in the creation of judicial review in Luxembourg. The influence of the ECHR has transformed the Scandinavian constitutional landscape, making judicial review more robust than before.[42] Finland, the only Nordic country that dismissed judicial review out of hand previously, also joined the global trend in 2000.

Second, with the third wave of democratization, democracy has become an almost irresistible normative ideal. The number of old-fashioned authoritarian systems, that, as a general rule, reject judicial review, like one-party systems, personal dictatorships and military regimes, is steadily decreasing in the world.[43] Ever more political regimes adopt at least the forms of democracy, hold elections and mimic the institutional set-up of mature democracies. Since there has been a close historical link between the spread of constitutional review and democratization, the very success of constitutional review paradoxically has given incentives to authoritarian regimes to incorporate judicial review to their democratic mimicry.

Political scientists hotly debate how these political regimes should be conceptualized and distinguished from full-fledged democracies. They also make a lot of effort to further classify those regimes that occupy the conceptual space between proper democracies and old-fashioned dictatorships.[44] To use one possible classification, ever more illiberal (electoral) democracies, competitive authoritarian regimes and even hegemonic systems tend to accommodate judicial review in their constitutions. By today more than 170 countries have established some form of judicial review. Although political scientists disagree on the proper definition of

---

[42] Veli-Pekka Hautamäki, 'The Question of Constitutional Court: On Its Relevance in the Nordic Context' in Jaakko Husa, Kimmo Nuotio and Heikki Pihlajamäki (eds), *Nordic Law: Between Tradition and Dynamism* (Intersentia 2007).

[43] Larry Jay Diamond, 'Thinking about Hybrid Regimes' (2002) 13 *Journal of Democracy* 21, 25–7.

[44] Diamond (n 43); Lucan Way and Steven Levitsky, 'The Rise of Competitive Authoritarianism' (2002) 13 *Journal of Democracy* 51.

democracy, every plausible account suggests that the number of real democracies is much lower than that. According to the democracy index of the Economist Intelligence Unit that analyses 165 independent countries, the number of full-fledged and flawed democracies is 25 and 50, respectively. This shows that we can no longer assume the strong correlation between the spread of judicial review and democratization. This fact also underlies my previous claim that the theoretical possibility of judicial review, without knowing how judicial review actually operates in a particular legal system, is rather uninformative of a political system. Although I will argue that in full-fledged democracies judges should most often defer to the views of political branches, this is perfectly compatible with the empirical claim that in other electoral regimes robust judicial review is a much more reliable indicator of a relatively well-functioning democracy than the mere existence of the institution.

To sum up the story so far, after the Second World War, the constitutional set-up of new democracies has increasingly relied upon the combination of four institutional features: dualist constitutional architecture, a codified bill of rights, judicial supremacy and the robust exercise of judicial review.

As of today, the United Nations has 193 member states. Setting aside some transitional political regimes, of these 193 countries, there are only three, Israel, New Zealand and the United Kingdom, whose constitutions deviate in some respects from the standard dualist constitutional architecture.[45] There are very few constitutions that do not have an entrenched bill of rights.[46] In addition, even New Zealand and the United Kingdom have introduced a parliamentary bill of rights, subscribing to the second, if not the first tenet of the new constitutional paradigm. As of 2015, the World Conference on Constitutional Justice unites 97 constitutional courts and supreme courts in Africa, the Americas, Asia and Europe. Based on my own calculations, at least 177 of the 193 UN member states

---

[45] None of the above countries has a codified constitution. Although New Zealand has a 'big-C' constitution, it does not include all the constitutional documents. Most provisions of the Israeli Basic Laws are not entrenched, and even the entrenched one can be relatively easily changed. However, since 1992 the Israeli Supreme Court uses the Basic Laws to scrutinize ordinary legislation. Suzie Navot, *Constitution of Israel: A Contextual Analysis* (Hart Publishing 2014) 25–46.

[46] I could find only two such constitutions on the website of the Comparative Constitutions Project: Australia and Brunei. <https://www.constituteproject.org> accessed 1 December 2015.

institutionalized some form of constitutional review.[47] Although the robust exercise of judicial review is a matter of degree and therefore it is quite difficult to measure how many constitutional courts satisfy this criterion, it seems safe to claim that in consolidated democracies the great majority of constitutional courts are closer to the robust than to the deferential pole of the continuum. Due to the similarity of the reasoning process employed by constitutional courts, one could convincingly argue that there exists a global model for constitutionalism that entails not only common institutions, but also common reasoning techniques, with a relatively robust proportionality review at its heart.[48]

The result of the historical development I sketched above was the rise of a distinctive constitutional model that comprises a set of ideas, institutions and institutional practices. If one focuses on the content of this model, it can be defined by the combination of the four tenets I identified above. Focusing on the origins of the model, one would be tempted to coin it as the American model, since all the ingredients of it were already available in the United States. However, following a fairly well-established usage,[49] I prefer to use the term New Constitutionalism, for two reasons.

First, although the model was inspired by American constitutionalism, it would be a mistake to claim that post-war democracies simply copied the USA. The fact that the USA has become the strongest and most influential democratic country certainly left its mark on this development, and in many cases the direct American influence can be unmistakably identified (eg Japan), in other cases the development of constitutional ideas and practices was inspired by indigenous sources. At the same time, American judicial review itself was also influenced and shaped by the intellectual climate of the post-war years that gave pre-eminence to

---

[47] Tom Ginsburg and Mila Versteeg, 'Why Do Countries Adopt Constitutional Review?' (2014) 30 *Journal of Law, Economics, and Organization* 587. The data can be downloaded from the website of the Comparative Constitutions Project. <http://comparativeconstitutionsproject.org/download-data/> accessed 1 December 2015. However, this study does not include jurisdictions where judicial review was developed by courts. In addition, it also disregards some countries with weak judicial review.

[48] Kai Möller, *The Global Model of Constitutional Rights* (Oxford University Press 2012); Anne-Marie Slaughter, 'A Global Community of Courts' (2003) 44 *Harvard International Law Journal* 191.

[49] Ran Hirschl, *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism* (Harvard University Press 2004); Alec Stone Sweet, *Governing with Judges: Constitutional Politics in Europe* (Oxford University Press 2000) 37.

human rights and institutionalized the judicial protection thereof. As the *Cooper* case testifies, judicial supremacy was still occasionally challenged and therefore it was in need of further solidification. In addition, the activism of the Warren and Burger courts raised the robustness of judicial review to new levels in the 1960s and 1970s.

Second, and more importantly, the term New Constitutionalism emphasizes not the origins of a set of ideas and institutional practices, but rather, their current intellectual prominence. It reflects that these ideas decisively shape how constitutionalism is generally understood and what it is generally thought to require today. Since the second wave of democratization, the new understanding of constitutionalism has proved to be more dynamic and attractive than its rival, the Orthodox Model of Parliamentary Supremacy, and the latter, which was characterized by Woodrow Wilson as 'the world's fashion' in 1884,[50] has gradually lost its appeal. With the third wave of democratization, the new paradigm has changed from the dominant model of constitutionalism to the new orthodoxy. As Stone Sweet aptly puts it: 'As an overarching political ideology, or theory of the state, the new constitutionalism faces no serious rival today.'[51] Or what is just the flip side of the same coin: by today, the Orthodox Model of Parliamentary Supremacy has become an abstract ideal-type to which no existing constitution corresponds completely. As Mark Tushnet sarcastically states, '[f]or all practical purposes, the Westminster model has been withdrawn from sale'.[52] What is really new is not the combination of the four ingredients, but the claim that this combination defines the very meaning of constitutionalism. Alec Stone Sweet and Mark Tushnet just accurately describe the current state of affairs. By contrast, the Statute of the World Conference on Constitutional Justice (hereinafter WCCJ), adopted in 2011, not only describes the current situation but also prescribes how constitutionalism should be understood when it proclaims: '[The WCCJ] promotes constitutional justice – understood as constitutional review including human rights case law – as a key element for democracy, the protection of human rights and the rule of law.'[53] That is, they claim that rights-based constitutional

---

[50] Arend Lijphart, *Patterns of Democracy: Government Forms and Performance in Thirty-Six Countries* (2nd Revised Edition, Yale University Press 2012) 10.

[51] Stone Sweet (n 49) 37.

[52] Mark Tushnet, 'New Forms of Judicial Review and the Persistence of Rights – and Democracy-Based Worries' (2003) 38 *Wake Forest Law Review* 813, 814.

[53] Article 1.1.

review is not one of the rival institutional implementations of democracy and the rule of law, but it is a defining feature of those political ideals.

1.2 THE APPEAL OF THE NEW CONSTITUTIONALISM: 6 HYPOTHESES

1.2.1 Explaining the Success of the New Constitutionalism

The previous section (1.1) has defined *what* the New Constitutionalism means and has documented *how* it has emerged. The purpose of my book is to subject the underlying principles of the New Constitutionalism to critical scrutiny and challenge them. This exercise is fundamentally normative: the central questions my book addresses are about the justification of certain institutional choices and practices. Therefore, it is beyond the scope of my book to give a detailed explanation of *why* the New Constitutionalism has become the dominant paradigm in constitutional law. However, I cannot ignore this question altogether: if there are strong arguments against the New Constitutionalism, as I will suggest, the overwhelming dominance and almost orthodox intellectual status of the new paradigm is in need of some explanation. I will therefore sketch a couple of hypotheses that provide at least a plausible explanation for the intellectual prominence of the New Constitutionalism.

Even if my enterprise focuses on justificatory questions, a survey of the plausible explanations for the rise of the New Constitutionalism is not entirely unrelated to my project, since the wall between these two enterprises is not impenetrable. It is true that in many cases people act upon their own self-interest and self-interest is normally incapable of serving as justification for others. However, on other occasions, we are motivated by the very same reasons that we use to justify our choices and actions to others. Therefore it is no wonder that some reasons that serve as plausible *explanations* for the rise of the New Constitutionalism will also surface in our normative discussions about the *justification* of judicial review.

Before sketching the possible explanations, let me make first my question more precise by distinguishing it from two closely related issues. There is a growing body of literature on the question of why self-interested politicians choose to establish judicial review in the first place, or strengthen judicial review at a particular time.[54] Although the

[54] See, for instance, Ginsburg and Versteeg (n 47); Hirschl (n 49); Stone Sweet (n 49).

question I raise here is related to the aforementioned one, they are not identical. The fact that it is in the interest of politicians to introduce judicial review does not necessarily explain the intellectual prominence of the new paradigm: self-interested politicians can often get away with decisions that are not backed by the almost unanimous support of the broader intellectual elite. Similarly, the fact that constitutional courts are generally considered highly credible institutions by the whole population does not fully explain the intellectual success of the New Constitutionalism. There can be a discrepancy between what is supported by the intellectual elite and what is popular within the citizenry at large. What interests me here is primarily the positive attitude of opinion leaders rather than that of the whole population, because it is the former that had a decisive role in securing the intellectual prominence of the New Constitutionalism.

As a final preliminary point, I want to make clear that I do not assume that the rise of the New Constitutionalism can be explained by a single factor. On the contrary, it was probably the result of a combination of many causes. As Jon Elster reminds us, constitution-making tends to occur in waves: constitutions belonging to different waves were made under significantly different circumstances.[55] That makes it very likely that the combination of causes that contributed to the spread of judicial review varied greatly during the different waves of constitution-making.

1.2.2 Aversive Constitutionalism

In the first section, I tried to document how judicial review has spread all over the world. However, even describing these events means that one tells a story, and a story is in need of some organizing principles. The story I sketched above was organized around the process of democratization. The first hypothesis just makes the explanation, already implicit in the narrative of the previous section, more explicit.

As Kim Lane Scheppele has explained, the drafters of a constitution very often do not have a clear vision about what they exactly want to achieve, but they know very precisely what they want to avoid.[56] The spread of constitutional review, as the previous section suggests, was closely related to the transition from authoritarian regimes to democratic

---

[55] Jon Elster, 'Forces and Mechanisms in the Constitution-Making Process' (1995) 45 *Duke Law Journal* 364.

[56] Kim Lane Scheppele, 'Aspirational and Aversive Constitutionalism: The Case for Studying Cross-Constitutional Influence through Negative Models' (2003) 1 *International Journal of Constitutional Law* 296.

ones. The engineers of these new constitutions most often wanted to break with the past, create a new political regime and prevent the recurrence of authoritarianism. The desire for a 'new beginning', to use Bruce Ackerman's term,[57] is not conducive to the nuanced analysis of the fallen political regime and to incremental reforms. The reformers tend to reject the principles of the past as a package, and favour a radical change, since the symbolic dimension of the transition is as important as the practical one. My contention here is that the desire for a fresh start explains not only why politicians created constitutional courts, but also goes a long way to explain the intellectual prominence of the New Constitutionalism. I will illustrate my general point with two examples where aversive constitutionalism seems to provide a particularly convincing explanation for the success of the new paradigm: the German Basic Law, and the constitutions of post-communist states.

Democratic constitutions empower people by creating representative institutions (and making other institutions accountable to them), but they also impose limits on those who exercise power. Under the shadow of a totalitarian regime, it is understandable that the framers of the German Basic Law were afraid, most of all, of the abuse of power. As Martin Borowski says:

> The institutions of the Weimar Republic reflected what proved to be an undue optimism about things democratic; indeed these institutions facilitated the National Socialists' seizure of power early in 1933. In the wake of Hitler's so-called *Third Reich*, it was clear to the post-War Constitutional Assembly's members that another lawless regime (*Unrechtsregime*) should be prevented at all costs.[58]

Poor constitutional engineering certainly contributed to the failure of the Weimar Republic, and the framers of the Basic Law wanted to correct the mistakes made by their predecessors. But it is important to see that the failure of constitutional engineering did not consist of giving too much power to the legislature, but rather of undermining parliamentarism. The Weimar Constitution of 1919, by using an almost perfectly proportional electoral system without an electoral threshold, contributed to the fragmentation of the parliament and to the instability of the government. In addition, the weakness of the parliament and the government not only made it possible, but to a certain extent invited a strong

---

[57] Bruce Ackerman, 'The Rise of World Constitutionalism' (1997) 83 *Virginia Law Review* 771, 778.

[58] Martin Borowski, 'The Beginnings of Germany's Federal Constitutional Court' (2003) 16 *Ratio Juris* 155, 159.

and decisive president. Cindy Skach convincingly points out that 'Weimar's divided minority government did lead to a circular pattern of presidential emergency rule, on the one hand, and Reichstag abdication of responsibility, on the other.'[59]

The Basic Law put heavy emphasis on power-sharing by strengthening federalism; it made the fragmentation of parliament less likely by changing electoral law; it cleverly stabilized the government by the introduction of the constructive vote of no confidence; and it also reduced significantly the power and legitimacy of the president. These institutional innovations, taken together with the changes in the broader society and in the international context, might have been sufficient to prevent the future abuse of power. But the framers wanted to err on the side of the limiting, and not the democratic-empowering principle.

Most of the innovations mentioned above are related to the *input* of democratic decision-making. They reduce the chance of abusing power, but cannot guarantee the proper output, that is, that the decisions will satisfy the substantive principles of justice. It was a fundamental experience for many Germans that statutes enacted in an impeccable procedure can be still blatantly unjust. 'Statutory lawlessness', to use Gustav Radbruch's famous expression, could still happen.[60]

Therefore, they also wanted to impose limits on the outcome of the legislative process. This mindset, the lack of trust in the political process, is reflected primarily in the sweeping eternity clause of the Basic Law[61] and the abolishment of referendums,[62] but the creation of a strong constitutional court was also the brainchild of this mindset. The FCC was meant to guard against unjust outcomes.

Aversive constitutionalism also goes a long way in explaining the success of judicial review in post-communist Central and Eastern Europe. After the collapse of communism, the new democracies of the region wanted to break with the doctrines of the Marxist-Leninist theory of state. This theory explicitly rejected the principle of separation of powers

---

[59] Cindy Skach, *Borrowing Constitutional Designs: Constitutional Law in Weimar Germany and the French Fifth Republic* (Princeton University Press 2009) 61.

[60] Gustav Radbruch, 'Statutory Lawlessness and Supra-Statutory Law (1946)' (2006) 26 *Oxford Journal of Legal Studies* 1.

[61] Article 79(3).

[62] Cristoph Möllers, 'We Are (Afraid of) the People: Constituent Power in German Constitutionalism' in Martin Loughlin and Neil Walker (eds), *The Paradox of Constitutionalism: Constituent Power and Constitutional Form* (Oxford University Press 2007).

and was based instead on the unity of power. Writing on the separation of powers, Marx said: 'Here we have the old constitutional folly. The condition of a "free government" is not the division but the unity of power. The machinery of government cannot be too simple. It is always the craft of knaves to make it complicated and mysterious.'[63]

This view had important implications for the position of the parliament within the communist state structure. Although the legislatures of these countries did not have real power and only rubber-stamped the decisions made by party leaders, according to the official constitutional doctrine, the legislative body had primacy over the executive and the judiciary.

After the collapse of communism, therefore, the doctrine of parliamentary supremacy had a bad reputation in those countries. Similarly to Germany, they might have been able to create a competitive political system, and prevent the abuse of power without the creation of strong constitutional courts. However, they wanted to get rid of the whole package of principles that were associated with the old regime, and parliamentary supremacy was part and parcel of this package. Parliaments could not remain the highest state organs, but had to become one of the coordinated branches. Constitutional courts have been considered the institutional manifestations and symbols of a new conception of democracy, not only by the politicians, but by the whole intellectual elite.

1.2.3 The Insurance Theory

The first hypothesis linked the spread of judicial review and the rise of the New Constitutionalism to the process of democratization. For many people, the assumed link between democracy and judicial review justifies the creation of this institution. The same reason, however, can also serve as an explanation of why the framers of new constitutions chose to introduce judicial review into their legal systems. However, there is a growing literature that suggests that it is not self-evident that politicians as rational actors would choose to create judicial review, even if it was considered to be justified, if this institution were against their own self-interest. There must also be less lofty and more realistic motives that explain why self-interested politicians introduced judicial review in so many new democracies.

---

[63] Hal Draper, *Karl Marx's Theory of Revolution, Volume I: The State and Bureaucracy*, vol 2 (Monthly Review Press 1977) 316.

One of the most compelling explanations is provided by the so-called insurance theory of judicial review. Tom Ginsburg's summary of the core idea runs as follows:

> By serving as an alternative forum in which to challenge government action, judicial review provides a form of insurance to prospective electoral losers during the constitutional bargain. Just as the presence of insurance markets lowers the risks of contracting, and therefore allows contracts to be concluded that otherwise would be too risky, so the possibility of judicial review lowers the risks of constitution making to those drafters who believe they may not win power. Judicial review thus helps to conclude constitutional bargains that might otherwise fail.[64]

Ginsburg also makes a compelling argument to the effect that there is a strong correlation between the creation and the strength of judicial review and the competitiveness of the political system. In such a political system where a party can reasonably expect to dominate politics after the constitutional bargain is closed, the party in question has no strong incentives to create a constitutional court in general, or to create a strong constitutional court in particular.[65]

However, as I have emphasized, I am more interested in the question of why the New Constitutionalism has become intellectually so dominant than in the question of why self-interested politicians have a reason to introduce judicial review. Although the insurance theory gives a compelling answer to the latter question, it seems to be less pertinent to the former. Nevertheless, it is not entirely irrelevant for our purposes, for a couple of reasons.

First, politicians are part of the opinion leader elite whose general belief in the desirability of judicial review greatly contributes to the intellectual prominence of the New Constitutionalism. Since their opinion is internalized and widely shared by political think tanks, NGOs, politically committed press organs and intellectuals, the strategic interest of politicians in the creation of judicial review can induce a large scale acceptance of the institution among the members of the broader elite.

Second, by creating constitutional courts worldwide, politicians have made the institution familiar and the choice of judicial review salient. I will argue below (subsections 1.2.6 and 1.2.7) that our constitutional choices are shaped and limited to a great extent by what models are available and familiar to us. Thus the logic of insurance has indirectly contributed to the intellectual prominence of the New Constitutionalism.

---

[64] Ginsburg (n 17) 25.
[65] ibid 34–64.

Third, and most importantly, I will argue that the logic of the insurance theory can be extended beyond self-interested politicians: combining it with the policy maximizing hypothesis, it also provides a plausible explanation of why, under certain circumstances, the members of the intellectual elite will support judicial review.

1.2.4 Maximizing Policy Preferences

Modern societies are usually characterized by deep moral disagreement. Most of us hold strong views on abortion, the just allocation of resources, the role of religion, or the proper balance between personal liberty and national security. However, since we disagree on those issues, we need procedures and institutions that adjudicate between our conflicting policy preferences. In a political system that is based on the Orthodox Model of Parliamentary Supremacy, most of these policy decisions are made by the legislature. By creating a constitutional court, we remove many of those decisions from the parliament and confer them on courts.

The third hypothesis suggests that when we make such institutional choices, our choice is informed and determined by our expectations about how a certain institution will promote our own policy preferences. Let us suppose that Amy believes that abortion should be relatively free from state interference, religion should not play an important role in public life, and she strikes a balance between personal liberty and national security that prioritizes the former.[66] If she expects that a constitutional court is more supportive of her policy preferences than the legislature, she will probably prefer the institutional arrangement of the New Constitutionalism to that of the Orthodox Model of Parliamentary Supremacy.

Once we have identified the mechanism that creates the link between the individual's policy preferences and her institutional choices, we need to add only an empirical premise in order to complete the explanation. This empirical claim is that the intellectual elite supports the New Constitutionalism because courts are more likely to agree with their policy preferences than legislatures. Jeffrey Goldsworthy is one of the leading critics of judicial review who subscribes to this explanation:

---

[66] Occasionally, I find it easier to articulate a thought or provide an example by using proper nouns instead of pronouns or logical symbols. The names I use come from a children's book, called *Sleepovers* by Jacqueline Wilson (Doubleday 2001).

> If I am right, the main attraction of judicial enforcement of constitutional rights in these countries is that it shifts power to people (judges) who are representative members of the highly educated, professional, upper-middle class, and whose superior education, intelligence, habits of thought, and professional ethos are thought more likely to produce enlightened decisions.[67]

Ran Hirschl's more elaborated 'hegemonic preservation thesis' is compatible with Goldsworthy's explanation, but makes stronger assumptions than that. While Goldsworthy's explanation suggests only that the members of the elite want to maximize the policy choices that they consider morally right, Hirschl's explanation also assumes that: (1) the members of the elite are in a hegemonic position; (2) this position is threatened by other groups; (3) the elite is motivated by its own self-interest.[68] Although I believe that the hegemonic preservation thesis provides a highly convincing explanation in some cases, Hirschl's strong assumptions are unnecessary for my purposes. (To be fair to Hirschl, he is more interested in what motivates the actions of the politicians than in what explains the beliefs of the broader elite.) I will not assume that the views of the elite are always influenced by their self-interests, but leave open the possibility that in many cases they simply want the collective decision of the community to reflect what they sincerely believe to be the correct policy.

The policy maximizing hypothesis seems to be the most plausible in those countries where the main dividing line in politics is related to social status (class affiliation or income). In these countries, the members of the elite have good reasons to think that judges, as representatives of their own socio-economic group, will share their policy preferences. The same logic applies to countries where the main political cleavage is not class affiliation, but the latter maps onto the dominant cleavage. Ran Hirschl convincingly points out that this was the case in Israel, Egypt and Turkey, where the main dividing line was the secular/religious cleavage, but the members of the secular group were over-represented among the elite in general and among judges in particular.[69]

However, the policy maximizing hypothesis, in itself, seems less plausible in cases where the main political cleavages cut across the elite. In many Western democracies the main cleavage in politics is related to identity issues: the religious/secular, nationalist/cosmopolitan,

---

[67] Jeffrey Goldsworthy, *Parliamentary Sovereignty: Contemporary Debates* (Cambridge University Press 2010) 10–11.

[68] Hirschl (n 49).

[69] Ran Hirschl, 'Constitutional Courts vs. Religious Fundamentalism: Three Middle Eastern Tales' (2004) 82 *Texas Law Review* 1819.

conservative/liberal divides or simply national affiliations determine the policy preferences of the elite to a greater degree than social status. Conservative members of the elite, for instance, do not seem to have a priori reason to expect that their policy preferences will be realized to a greater extent by a constitutional court than by the legislature. If I am right on this issue, the policy maximizing hypothesis alone cannot explain the intellectual dominance of the New Constitutionalism. Its explanatory power under those circumstances when the elite is divided will hinge to a great extent on the same considerations that are emphasized by the insurance theory. In a competitive political system a risk averse policy maximizer has good reasons to prefer the court to the legislature, even if her preferred political party is currently in power and, therefore, in the short run the legislature would be her first choice. By contrast, where there is a dominant political party that is likely to stay in power for a long period, the supporters of the dominant party have good reasons to prefer the legislature as the main policy-making institution.

Hungary gives a fairly good illustration of the general thesis. The Hungarian elite is deeply divided, but the main cleavages have been identity- rather than income-related. Under these circumstances, it is implausible to claim that all members of the elite support the constitutional court primarily because judges come from the same social strata as they do. After the political transitions in 1989–90, conservatives, for instance, had every reason to think that their policy preferences about abortion, gay marriage, or transitional justice will be better promoted by the right-wing legislature than by the Constitutional Court. However, since the political system was fairly competitive between 1990 and 2010, and the governing party could stay in power only once, the members of the elite generally respected the court as an institution and, apart from a couple of highly sensitive issues, did not criticize the decisions of the court openly. However, since 2010, when right-wing nationalists won a landslide victory, this situation has been changing and the respect for the Constitutional Court has been declining among right-wing intellectuals. The prospect that a single party can dominate the political arena for a long time makes it irrational for right-wing intellectuals to expect the maximization of their policy preferences from the court. It is not a coincidence that the idea of political constitutionalism was discovered and popularized by right-leaning intellectuals only after 2010, the landslide victory of their preferred party, Viktor Orbán's Fidesz.[70]

---

[70] Ágnes Kovács, 'Fényevők? A Hazai Alkotmányelmélet Esete a Politikai Konstitucionalizmussal' (2015) 19 *Fundamentum* 2–3.

1.2.5 The Declaratory Theory of Adjudication

The policy maximizing hypothesis acknowledges, or even presupposes, that constitutional provisions are, to a great extent, indeterminate. According to this view, judges should be authorized to make important policy decisions because they are more likely to choose policy decisions that the members of the elite prefer. The fourth explanation is based on an assumption that is diametrically opposed to the one behind the policy maximizing hypothesis. It says that we should confer the authority to make important policy decisions on judges, not because they are better moral reasoners than legislators, but because constitutional interpretation requires first and foremost legal expertise.

I do not claim that those people, and especially those lawyers, who subscribe to this idea hold an utterly naive, mechanical view of legal interpretation; nothing would be further from the truth. They are well aware that constitutional interpretation gives certain discretionary power to judges and, therefore, have developed highly sophisticated theories of constitutional interpretation to tame this power. However, they insist that their preferred theory imposes sufficiently strong constraints on judicial discretion to make constitutional interpretation a predominantly legal activity.

The fact that judges invalidate an Act of the legislature as unconstitutional is considered legitimate because what makes the Act unconstitutional is not the view of judges, but the constitution itself. As Justice Scalia said, 'To hold a governmental Act to be unconstitutional is not to announce that we forbid it, but that the *Constitution* forbids it.'[71] According to the declaratory theory, constitutional interpretation as a predominantly legal activity can be distinguished from or juxtaposed with open-ended moral or political reasoning. As a consequence, a theory of constitutional interpretation that openly acknowledges that moral reasoning plays a decisive role not only at the periphery of constitutional interpretation, but at the very core of it, is considered by most lawyers illegitimate.

As Ronald Dworkin notes in relation to the American tradition, there is a mismatch between the actual role and the reputation of the moral reading of the constitution:

> There is therefore a striking mismatch between the role the moral reading actually plays in American constitutional life and its reputation. It has inspired all the greatest constitutional decisions of the Supreme Court, and also some

---

71 *American Trucking Associations v Smith*, 496 U.S. 167, 201 (1990).

> of the worst. But it is almost never acknowledged as influential even by constitutional experts, and it is almost never openly endorsed even by judges whose arguments are incomprehensible on any other understanding of their responsibilities.[72]

I believe that the attitude Dworkin refers to is shared by many, if not most, lawyers, and its influence is not limited to the United States. Judges recurrently claim that what they are doing is fundamentally different from the policy-making activity of legislatures.

Although the fourth hypothesis makes a claim about the nature of legal reasoning, its explanatory power is not limited to lawyers. If this is the general view of legal decision-making among lawyers, it is very difficult to challenge this view from outside the legal profession. Relatively few non-lawyers have sophisticated views about the nature of legal reasoning. This would presuppose that the challenger is at least broadly familiar with the main theories of constitutional interpretation that claim to tame the discretionary power of judges.

Once a constitutional court is created, this challenge becomes even more difficult. Since constitutions are highly abstract documents, they require courts to erect a complex doctrinal edifice to bridge the abstract norms of the constitution with day-to-day constitutional controversies. This complex doctrinal edifice, comprised of fine conceptual distinctions and tests, is not easily accessible to non-lawyers. Those who are not familiar with constitutional case law, the repository of all this wisdom, often do not feel competent enough to contribute to the debate about human rights or challenge the court's interpretation. Constitutional courts raise the entry level of the competent contribution to human rights discourse considerably.

1.2.6 Conventionalism

Finally, the spread and the increasing popularity of constitutional review is, to some extent, the result of a self-generating process. I will briefly touch upon two explanations that account for this self-generating process and discuss the two mechanisms in turn: the first one is conventionalism and the second is constitutional borrowing.

The policy maximizing hypothesis assumes that, when an abstract human right has to be specified, citizens, legislators and judges already have a more or less clear idea how the right in question should be

---

[72] Ronald Dworkin, *Freedom's Law: The Moral Reading of the American Constitution* (Oxford University Press 1996) 3.

interpreted. However, this is not necessarily the case. When a society and its political and legal system faces a new challenge, it takes time for people to give serious consideration to the issue and develop their own position in the debate. However, if the authority to determine the meaning of the constitution has already been conferred on a particular institution, in our case a constitutional court, it gives people an incentive to epistemic free riding, that is, an incentive not to give serious consideration to the issue and not to develop their own position. This will be particularly true if, in retrospect, they will usually find the court's interpretation broadly reasonable. Mark Tushnet has emphasized for a long time that the introduction of constitutional review can debilitate the other branches, since they will not feel responsibility for the interpretation of human rights.[73] My hypothesis builds on this insight, but couples the phenomenon of epistemic free riding with conventionalism.

Following David Strauss, by conventionalism I mean the generalization of the idea that very often it is more important to have a decision (or a rule) than to have an optimal decision (or rule).[74] Applying conventionalism to constitutional adjudication suggests that, when people do not have a strong and considered position on a certain issue, they will accept the court's interpretation, even if it does not correspond to what they would personally prefer, if the court's interpretation remains within the range of reasonable interpretations.

In addition, conventionalism applies not only to the acceptance of individual decisions, but also to the institution of constitutional review as a whole. The advocates and opponents of judicial review are in symmetrical positions if a society has to make an institutional decision on the issue afresh. However, when an institution is firmly established in a society, institutional conservatism favours the status quo. Wherever judicial review has become part of the institutional set-up for a certain reason, and it operates acceptably, the positions of the two camps become hugely asymmetrical. Even if the institution was not widely accepted when it was first introduced, its acceptance can grow considerably over time. The original rationale for introducing an institution is not necessarily the same that explains the contemporary attitudes towards it.

---

[73] Mark Tushnet, 'Policy Distortion and Democratic Debilitation: Comparative Illumination of the Countermajoritarian Difficulty' (1995) 94 *Michigan Law Review* 246.

[74] David A Strauss, 'Common Law Constitutional Interpretation' (1996) 63 *University of Chicago Law Review* 877, 879–80.

1.2.7 The Limits of Constitutional Imagination

The explanations I have sketched so far all envisage a self-contained political community. However, the institutional choices that the framers of a constitution make take place in an increasingly globalized world. It is well known to every scholar of comparative law that one of the primary vehicles of legal development is using legal transplants. Constitutional framers rarely innovate; more often they choose from a range of available alternatives and follow some blueprints. It is a commonplace, for instance, that most post-colonial constitutions were heavily influenced by the constitutional tradition of the empire they previously belonged to.[75] Sometimes the genealogical link is less predictable, but nonetheless well documented. The Japanese constitution of 1883, for example, was modelled on the Prussian constitution of 1852, to give only one cursory example. We have no reason to assume that the establishment of constitutional courts is an exception to this general rule.

The spread of constitutional courts in Europe can serve as a good illustration. We know that the framers of the German Basic Law were familiar with the experience of the Austrian Constitutional Court and the latter obviously informed how the FCC was conceived.[76] It is also well known that the framers of the Spanish constitution were heavily influenced by the German experience. There is a privileged relationship between the Spanish Constitutional Tribunal and the FCC, since the former was modelled on the latter. Roman Herzog, a former president of the FCC and Bundespräsident of Germany, portrayed this genealogical link between European constitutional courts quite vividly by calling the Spanish and the Portuguese constitutional courts the daughters and the Polish and Hungarian ones the granddaughters of the FCC.[77] We also know that the influence of the FCC is not limited to Europe: its imprint can be easily detected both on the Korean, and the South African constitutional courts.[78] However, my purpose here is not to catalogue the

---

[75] Julian Go, 'A Globalizing Constitutionalism? Views from the Postcolony, 1945–2000' (2003) 18 *International Sociology* 71.

[76] Borowski (n 58).

[77] László Sólyom, 'The Role of Constitutional Courts in the Transition to Democracy with Special Reference to Hungary' (2003) 18 *International Sociology* 133, 153 footnote 4.

[78] James M West and Dae-Kyu Yoon, 'The Constitutional Court of the Republic of Korea: Transforming the Jurisprudence of the Vortex?' (1992) 40 *The American Journal of Comparative Law* 73, 77.

evidence for the genealogical relationship between particular constitutional courts. Rather, I want to emphasize the general point that the more legal systems have adopted judicial review, the more obvious the choice of judicial review has become.

When analysing constitutional borrowing, following David Law and Mila Versteeg, it is useful to distinguish between (1) constitutional learning, when country *A* imitates country *B* because it thinks that copying country *B* is a recipe for success; (2) constitutional competition, when adopting a certain institution will help country *A* to attract valuable resources, like capital and skilled labour; (3) constitutional conformity, when country *A* wants to secure the recognition of the international community and/or country *B* that *A* considers as an important point of reference, regardless whether *A* is convinced of the merits of the institution or practice that is transplanted; (4) constitutional network effects, when country *A*'s choice of an institution will in itself make the same choice more attractive to country *B*, because in this way it can belong to a more extensive community.[79]

Not all the four mechanisms are equally important for explaining the widespread endorsement of the New Constitutionalism. Adopting judicial review in order to secure a better position in the international competition for scarce resources, or in order to be recognized by other states, does not necessarily amount to the endorsement of constitutional review. However, these four mechanisms are so closely intertwined in real life instances of constitutional borrowing that it is very difficult to dissect them.

Let me use a couple of examples to illustrate my point. I have argued above that the activist turn of the ECtHR gave strong institutional incentives to many European countries to introduce judicial review. In the case of Central and Eastern Europe, this institutional salience was accompanied by political pressure. As László Sólyom summarizes the process:

> Membership in the Council of Europe counted as recognition as a democratic state. For that reason, all new democracies applied for it at the earliest possible time. In the admission process the existence of a constitutional court has been a particularly important point and the Council scrutinized the conditions of the constitutional review. The more the democratic functioning of a given state was uncertain, the more the Council of Europe prescribed

---

[79] David S Law and Mila Versteeg, 'The Evolution and Ideology of Global Constitutionalism' (2011) 99 *California Law Review* 1163, 1171–87.

> measures for strengthening the powers of the constitutional court, as in the cases of Belarus and Azerbaijan, for example.[80]

However, since I am primarily interested in the intellectual prominence of the New Constitutionalism, the point I want to make is not directly this institutional or political pressure. Instead, I want to emphasize that these external expectations were, to a great extent, met by the aspirations of the intellectual elite of new democracies. European institutions made the choice of judicial review salient, but what made judicial review highly desirable in those countries was that they internalized those expectations. Judicial review was part and parcel not only of the institutional set-up of their model countries, but also of the European project. Since they wanted to belong to Europe, and judicial review was part of the European project, the desirability of judicial review was beyond question.

As an additional point, it is also worth emphasizing that constitutional imitation is not necessarily a conscious process. In some cases, the constitutional imagination of the framers is so limited that they do not even realize the alternatives. Alec Stone Sweet notes, for instance, that the drafters of the Spanish constitution did not even consider *not* adopting a Kelsenian court.[81] This formulation is telling. If true, it shows that the constitutional imagination of the Spanish framers was limited when they adopted constitutional review. The highly successful democratic transition of Germany (a reason for constitutional learning), the political and intellectual reputation of the FCC, Germany's weight within the EU (reasons for constitutional conformity) and the civil law paradigm as a common legal framework (network effect) have all made the German model a salient choice for the Spanish founding fathers. For very similar reasons, the German model was also an obvious choice for Central European countries. However, for them, the spread of judicial review to Southern Europe made the choice even more compelling. First, Spain's successful transition to democracy was an additional reason for imitation. Second, the fact that Spain, Portugal and Greece also joined the club made the club bigger, and thereby more attractive. In addition, Central and Eastern European countries also learnt from and were competing with each other. The fact that others were experimenting with judicial review gave strong incentives to each Central European country. The snowballing effect helped to introduce constitutional review all over Central Europe during a very short historical period.

---

[80] Sólyom (n 77) 153, footnote 1.
[81] Stone Sweet (n 49) 41.

This short overview could not do full justice to the six hypotheses that it surveyed. However, I hope that my overview could establish that these hypotheses are at least highly plausible in explaining why the New Constitutionalism has become the dominant paradigm of constitutional law. The survey of these explanatory theories also sets the stage for my normative analysis: so far I have identified the beliefs of the intellectual elite that explain the success of the New Constitutionalism. The following chapters will subject some of these beliefs to critical scrutiny. The explanatory theories surveyed above raise at least four questions that will surface in the chapters that follow. First, the success of the New Constitutionalism can be explained to a great extent by the general belief that judicial review is an integral part of a conception of democracy that is superior to majoritarianism. But is the new conception of democracy really more attractive than the majoritarian one? Second, others believe that judicial review is justifiable because their sophisticated theories of constitutional interpretation impose sufficiently strong limits on judicial discretion. Is this account of constitutional interpretation adequate? Third, many people are of the opinion that we should choose between decision-making procedures on the basis of which procedure is more likely to make decisions that we genuinely believe to be morally right. Is this assumption correct? Finally, most advocates of the New Constitutionalism believe that judges are more likely to make good decisions (whatever they mean by that) than legislators. Are they really right? All of these questions will play a pivotal role in the central chapters of the book.

1.3 FROM EXPLANATION TO JUSTIFICATION

1.3.1 Some Methodological Points

I have defined what the New Constitutionalism means, explained how the new paradigm has emerged, and also surveyed the most plausible explanations for the intellectual dominance of the new paradigm. Now I am in the position to address the central question of the book: is the central institutional tenet of the New Constitutionalism, that is to say, strong judicial review, justified? I am going to challenge the normative underpinnings of the New Constitutionalism and defend a position that, broadly speaking, is sceptical about the justifiability of this institution. The purpose of the present section is to give my readers a rough road map to the argument of the book. However, to draw this map properly

and explain it, I also have to clarify some of the methodological assumptions of my project.

In the course of developing my argument against the New Constitutionalism, I will commit myself to a couple of methodological tenets. Although they are hardly original or controversial in principle, they are so often overlooked in the literature that it is worth emphasizing them here. Also, since these methodological insights can be detached from my substantive claims, it might be useful to identify and isolate them at the outset. I contend that these claims can and should be endorsed even by those people who hold a position on the substantive issues that is diametrically opposed to mine.

1.3.1.1 Comparative institutional analysis

First, I submit that a proper analysis of the legitimacy of judicial review has to proceed at two, relatively autonomous, levels: at the level of political principles and the level of institutional design.

Writing on the legitimacy of judicial review, many scholars conceptualize the debate as a disagreement between different conceptions of democracy. Ronald Dworkin's distinction between majoritarian and constitutional democracy, or Bruce Ackerman's distinction between monistic democracy, dualist democracy and rights foundationalism[82] are well known to most constitutional theorists. Although these distinctions are very useful for some purposes, the fundamental problem with them is that they conflate the two levels of analysis and suggest necessary links between certain principles of political legitimacy and certain forms of institutional design.

I will use the concept of majoritarian democracy to explain my point. Majoritarian democracy can be understood both as a decision-making process that belongs to the institutional level of constitutional theory or as a claim about the legitimacy of political institutions. To simplify the issue, I will assume that, as an institutional arrangement, majoritarian democracy is roughly identical with the Orthodox Model of Parliamentary Supremacy. However, this decision-making process is compatible with more than one set of justificatory principles. (1) One can argue that in a modern pluralist society where people disagree on the principles of justice, the fairest procedure is the one that gives equal weight to the views of each citizen (the principle of procedural fairness). (2) Alternatively, one can claim that a political system is legitimate only if it satisfies a certain conception of justice (the principle of justice) and

---

[82] Dworkin (n 72) 17; Ackerman (n 10) 3–33.

simultaneously believe that the Orthodox Model of Parliamentary Supremacy is the best way to approximate this state of affairs. (3) I will contend in this book that, as a general rule, majoritarian democracy is the best way to define the publicly justified principles of justice (the principle of public reason). (4) The critics of majoritarian democracy sometimes associate the Orthodox Model of Parliamentary Supremacy with the view that the majority's decision constitutes what is morally right or wrong (the majoritarian conception of justice). (5) Some moral relativists suggest that since there are no moral truths, whatever the majority favours is politically legitimate (the will of the majority).[83]

At this stage of the analysis, I can remain agnostic in the debate about the justification of majoritarian institutions. The upshot of my argument is that there is not always a one-to-one correspondence between certain legitimizing political principles and certain political institutions. On the one hand, different justificatory principles can converge on the same institutional design, as the above example testifies. On the other hand, people who agree on roughly the same political principles can disagree on the institutional implications of those principles. People who share the same conception of justice, for instance, can disagree whether parliaments or courts are more likely to track their preferred principles of justice. (See subsection 1.2.4 on maximizing policy preferences.)

Furthermore, commentators often compare the outcomes generated by imperfect majoritarian institutions to their ideal anti-majoritarian political principles. However, our political principles are not self-executing but are applied by fallible human beings and imperfect institutions. Institutional transmission is necessary, and ignoring the price of this transmission is not an option. The relevant comparison is therefore not between ideal political principles and outcomes generated by imperfect political institutions, but either between two sets of principles or two sets of imperfect political institutions. It is not sufficient for the critics of majoritarian institutions to establish that majoritarian decisions fall short of their ideal political principles, but they are also required to establish that imperfect anti-majoritarian political institutions are superior to imperfect majoritarian institutions in light of some attractive justificatory principles.

1.3.1.2 The need for empirical analysis

Second, when justificatory principles underdetermine the proper institutional set-up, the choice between different institutional solutions will

---

[83] For the link between democracy and relativism, see Hans Kelsen, *Vom Wesen Und Wert Der Demokratie* (Mohr 1929) 36–8.

very often depend on empirical premises. This book embraces the 'institutional turn' in constitutional theory urged by Neil Komesar, Cass Sunstein, Adrian Vermeule and others,[84] even if it often fails to live up to its own aspirations. As the above authors claim, constitutional theory must necessarily address the questions of institutional capacities, and these questions are, to a great extent, empirical. 'Empirical questions always and necessarily intervene between high-level premises, on the one hand, and conclusions about the decision-procedures that should be used at the operating level of the legal system, on the other.'[85]

Many people have the impression that the arguments for and against judicial review are so well known and well rehearsed that the debate has reached a certain impasse, and the chances of making further progress are relatively slim. I emphatically disagree with this position. If my argument is correct, empirical questions about institutional capacities are directly relevant to the justificatory enterprise. Therefore, even if it were true that everything has been already said about the political principles that are relevant for the debate, the same certainly does not apply to the related empirical questions. I tend to think that Adrian Vermeule is right in claiming that the empirical analysis of our political institutions is still in its infancy.[86] But if empirical research about institutional capacities is in its infancy, and this research is directly relevant to the broader justificatory enterprise, then the progress we make in empirical research can also result in some progress in the overall justificatory enterprise.

1.3.1.3 Institutional analysis cannot be self-standing

The above considerations have made some institutionalists highly sceptical about the relevance of normative political theory for constitutional design and constitutional interpretation. As Vermeule puts it, 'a commitment to democracy or majoritarianism is too abstract to tell us how to interpret statutes …'[87] and 'democracy is too abstract a commitment to cut between various positions on the desirability of judicial review. The

---

[84] Neil K Komesar, *Imperfect Alternatives: Choosing Institutions in Law, Economics and Public Policy* (University of Chicago Press 1997); Neil K Komesar, 'The Logic of the Law and the Essence of Economics: Reflections on Forty Years in the Wilderness' (2013) 2013 *Wisconsin Law Review* 265; Cass R Sunstein and Adrian Vermeule, 'Interpretation and Institutions' (2003) 101 *Michigan Law Review* 885.

[85] Adrian Vermeule, *Judging under Uncertainty: An Institutional Theory of Legal Interpretation* (Harvard University Press 2006) 13.

[86] ibid 3.

[87] ibid 45.

choice between those positions turns on questions of institutional capacities and systemic effects.'[88]

As I have emphasized, I consider the institutional turn a major contribution to constitutional theory and, therefore, we have a good reason to embrace this turn. But, in contrast to Vermeule, I would like to stress not only the relative autonomy of the institutional approach, but the interplay between our abstract political principles on the one hand and empirical institutional considerations on the other. Even if our political principles are not determinate enough to single out one particular institutional choice, sometimes these theories do cut between the various institutional choices.

Institutional capacities are influenced by many factors, and the error-cost of decision-making is one of them. To assess the competence of our institutions, we need to know their purpose. We cannot intelligibly answer the question of whether a hammer is a good tool without knowing the nature of the task at hand. Similarly, we cannot intelligibly form a judgement on the adequacy of an institution without first specifying the purpose of the institution in question. Our claims about error-costs will make sense only if we have an idea about the institution's function. In the context of constitutional theory, the political principles that define the proper relationship between democracy and fundamental rights will define the purpose of our institutions, and different conceptions of democracy will define this purpose in different ways. I do not claim that we have to know the right answer in advance for each case to form a judgement about the likelihood of erroneous decisions.[89] Nevertheless, the political principles that define the purpose of our institutions can make the range of sensible institutional choices more determinate and can make certain institutional features salient when evaluating the strengths and weaknesses of different institutional designs.

Vermeule himself has admitted that his institutional theory is based on a consequentialist approach;[90] but our political institutions are not always justified in such terms. Jeremy Waldron's distinction between outcome-related and process-related reasons seems highly relevant in this context.[91] Although we often assess our institutions in light of the outputs

---

[88] ibid 237.

[89] Adrian Vermeule, *Law and the Limits of Reason* (Oxford University Press 2009) 8; Jeremy Waldron, 'The Core of the Case against Judicial Review' (2006) 115 *Yale Law Journal* 1346, 1373–4.

[90] Vermeule (n 85) 5.

[91] Waldron (n 89) 1372–3.

they (are likely to) produce, sometimes we value the fairness of the procedures our institutions employ independently of the outcomes.

Even if a general commitment to democracy is unhelpful in this context, the fact that people disagree on the concept of democracy does not show that the more specific conceptions of democracy would not cut between various positions on the desirability of judicial review. The choice between the process-related and outcome-related justifications of democracy will have far-reaching consequences for the issue under consideration. On the one hand, if someone opts for the procedural justification of democracy, the institutional considerations central to Vermeule's investigation will have only a marginal role. If, on the other hand, someone defends democracy by outcome-related reasons, those institutional considerations will become eminently relevant. The caveat is that the debate about the proper institutional capacities of our legal institutions presupposes that we have already committed to an outcome-related justification of democracy. Yet, the choice between the outcome-related and the procedural justification for democracy cannot be based on empirical considerations; it must be based on a normative political theory.

1.3.1.4 Interpretation and the institutional turn

Fourth, the above methodological considerations have important implications not only for institutional design but also for the theory of constitutional interpretation. Many theories of constitutional interpretation tend to focus on the question of *how* the true meaning, or the best interpretation, of the constitution can be established and abstract away from the agent *who* interprets the constitution. To put it otherwise, they presume that the 'how-question' can be usefully separated and insulated from the 'who-question'. Once we have reached a decision on institutional design, so the argument runs, we can focus our efforts on the proper method of interpretation. Although I do not deny that these two issues can be analytically separated, for practical purposes the how-question cannot be insulated from the considerations of institutional capacities and political legitimacy.

The four comments above, taken together, provide us with a rudimentary map of constitutional theory. This map suggests that an adequate theory has at least three different, but interconnected domains. We need to have a theory about the meaning of the constitution. However, since the constitution is not self-executing but is interpreted by fallible human beings and imperfect institutions, the analysis has to remain open to institutional considerations. In addition, although the questions about institutional capacities are to a large extent empirical, empirical analysis

cannot be self-standing, since institutional capacities have to be assessed in light of the underlying justificatory principles of our institutions. Although the theories of constitutional interpretation, institutional design and political legitimacy are relatively autonomous, there is a complicated interplay between them, and an adequate theory must be able to handle the complexity of these interrelationships.

1.3.2 Outline of the Argument

The methodological considerations sketched above will shape how my argument will proceed. I will develop my position in four steps.

1. Chapter 2 is about the justificatory principles of constitutional democracies. I will argue that there are two dominant theories that shape the debate about the legitimacy of judicial review, and I will call them the Principle of Equal Participation (hereinafter PEP) and Rights Foundationalism (hereinafter RF), respectively. The two theories aim to prevent very different dangers, and they put the emphasis on different values. I will contend that in a modern pluralist society we cannot rely on RF, and PEP is a more plausible contender for our allegiance. However, I will also argue that there is a principled middle way between these two extremes. Political liberalism, properly articulated, unlike PEP, imposes substantive limits on the range of legitimate political decisions. And unlike RF, it takes reasonable pluralism seriously.
2. Chapter 3 will be devoted to institutional considerations and will present a prima facie case against the desirability of judicial review. Constitutions with written bills of rights tend to employ highly abstract language. As a consequence, the institution that is authorized to articulate fundamental rights and give more specific content to these abstract provisions becomes a moral arbitrator: it has the right to adjudicate between reasonable, but inconclusively justified, moral beliefs. I will call this process the *specification* of human rights and argue that in light of the most attractive justificatory principles, the arguments for a strong form of judicial review are not robust enough.
3. Even if my case against the desirability of strong judicial review were conclusive, a realistic constitutional theory would have to face the fact that the authority to specify abstract human rights provisions has been, in most countries, already conferred on the judiciary. Those who are sceptical about the legitimacy of judicial review must therefore also offer a non-ideal, or second-best, theory

as to how courts already authorized to apply human rights provisions should interpret those provisions. That is the primary reason why I dedicate a separate chapter to constitutional interpretation. The general thrust of my argument in Chapter 4 is that judges should usually defer to the views of the legislature in interpreting the constitution. However, the chapter on constitutional interpretation is also instrumental in developing the concept of deferential judicial review that plays a crucial role in the argument of Chapter 5.

4. Although Chapter 3 puts forward a prima facie case against strong constitutional review, it does not claim that judicial review is always illegitimate. In Chapter 5, building on the insights of the previous chapters and equipped with the concept of deferential judicial review, I aim to explore the nuanced institutional implications of my general sceptical stance. Chapter 5 will develop what can be called a theory of weak judicial review. In doing so, I will deviate from the established terminological conventions of the literature in one important respect. Simply put, according to the established convention, the hallmark of strong judicial review is judicial supremacy, that is, that courts have the final say in constitutional disputes, their interpretation cannot be overridden by the ordinary legislative process. By contrast, in the terminology of my book, strong judicial review entails not only (1) judicial supremacy, but also (2) the broad scope (rights-based), and (3) the robust exercise of judicial review. As an implication, I will also deviate from how the term of weak judicial review is usually used. I will argue that judicial review can be weak in three different dimensions and, therefore, distinguish three forms of weak judicial review; each of them is lacking one of the defining features of strong constitutional review.

   Judicial review is *limited* if the constitution lacks a bill of rights and judges can appeal only to structural-organizational norms when they scrutinize the constitutionality of legislation. Among mature democracies, Australia exemplifies this form of limited judicial review. Judicial review can be coined *penultimate*, if judges are authorized to scrutinize legislation, but the legislature has the possibility to override or disregard judicial decisions.[92] If that is the case, the final word on the meaning of the constitution (or a

[92] I borrow the term from Michael J Perry, 'Protecting Human Rights in a Democracy: What Role for the Courts' (2003) 38 *Wake Forest Law Review* 635.

parliamentary bill of rights), at least formally, belongs to the legislature. That is a defining feature of the Commonwealth model of judicial review that was introduced in Canada, New Zealand and the United Kingdom.[93] Finally, judicial review is *deferential* if courts usually defer to the views of the elected branches or are constitutionally required to do so. The legal systems of the Nordic countries are consistently characterized by a strong tradition of judicial self-restraint and trust in representative institutions. In addition, in Sweden and Finland judicial deference is not only an empirical feature of the legal system but is also a constitutional requirement.[94]

My main reason for deviating from the established terminological convention and using weak judicial review as an umbrella concept that covers all these three types of judicial review is that to some extent these institutional solutions can be considered as functional equivalents: they all want to strike a balance between democracy and the protection of human rights that differs from the balance struck by the New Constitutionalism. In Chapter 5, I am going to compare the strengths and weaknesses of the different forms of weak judicial review and evaluate them in light of the normative principles that are spelled out in the earlier chapters of the book.

---

[93] Stephen Gardbaum, *The New Commonwealth Model of Constitutionalism: Theory and Practice* (Cambridge University Press 2013).

[94] J Lavapuro, T Ojanen and M Scheinin, 'Rights-Based Constitutionalism in Finland and the Development of Pluralist Constitutional Review' (2011) 9 *International Journal of Constitutional Law* 505, 505.

2. Political principles

2.1 THE PUZZLE OF CONSTITUTIONAL DEMOCRACIES

2.1.1 The Institutions of Constitutional Democracy

The central question of my book, namely the legitimacy of constitutional judicial review, is an institutional question. However, institutional questions about constitutional design are rarely, if ever, freestanding. Whether judicial review is justified depends to a great extent on what one thinks about the legitimizing principles of constitutional democracy. Authorizing courts with the power of judicial review can be a good institutional choice relative to one theory of constitutional democracy and a poor choice relative to another one. This insight also applies to the institutional arguments I will develop in the next chapter of the book. Although many of my institutional arguments are compatible with more justificatory principles of constitutional democracy, they are informed by and tailored to a particular theory of legitimacy. The purpose of the present chapter is therefore to outline the theory of legitimacy that underpins my institutional analysis and defend that position against two potent rivals. Although I spoke about the justificatory principles of constitutional democracies in general, I do not aim to provide a full-scale justification of democratic institutions. My ambition is much more modest here. My analysis focuses on how different justificatory theories try to solve the puzzle to find the right balance between democratic decision-making and the adequate protection of human rights. I will start the explication of the puzzle with a very brief sketch about the institutions of constitutional democracies.

Modern constitutional democracies appeared first in the nineteenth century as a result of two significant developments.[1] The first one changed the balance of power between the monarch and the parliament and circumscribed the power of the former and vested the primary

[1] Roger D Congleton, *Perfecting Parliament: Constitutional Reform, Liberalism, and the Rise of Western Democracy* (Cambridge University Press 2010) 2.

decision-making authority in the latter, and the second made the political system more inclusive by extending the suffrage.

As Roger Congleton has pointed out, many organizations, including most political ones, tend to follow a general institutional model, what he calls the 'king-and-council' template.[2] The king-and-council template shares the power between an executive and an advisory body. This model is extremely flexible and can be easily adapted to changing political circumstances. Medieval kingship gave relatively great weight to the advisory body, but the rise of absolutism concentrated power in the hands of the monarch. However, with the decline of absolutism the tide changed, and significant powers were transferred to parliaments. As a result, absolute monarchy gave its place to constitutional monarchy. Later the gravity of executive power also shifted from the monarch to an elected prime minister, transforming constitutional monarchy into a parliamentary one.

The other development that shaped the central political institutions of Western societies was the democratization of governments. As is well known, modern democracies did not follow the template of ancient city-states; our legislative bodies developed from a markedly anti-democratic institution, the medieval parliament. Medieval parliaments represented the nobility and autonomous cities, and consequently most members of society remained without representation and were excluded from the demos. With the gradual transformation of the UK Parliament and the establishment of the American and French legislative assemblies at the end of eighteenth century, the main contours of a new type of representative government were laid down.[3] But even using a relatively lenient standard, the majority of adult men having the right to vote, only the United States was inclusive enough at the beginning of the nineteenth century to qualify as a democracy.[4] It remained to the reforms of the nineteenth and twentieth centuries to gradually extend suffrage and make representative governments truly inclusive.

These two developments did not necessarily coincide. In England, the 1688 settlement transformed the country into a constitutional monarchy; the most significant decision-making authority had been transferred from the Crown to the elected branches well before the majority of adult men acquired the right to vote (1884). By contrast, the German imperial

---

[2] Ibid 28.

[3] Bernard Manin, *The Principles of Representative Government* (Cambridge University Press 1997) 94–131.

[4] Carles Boix, Michael Miller and Sebastian Rosato, 'A Complete Data Set of Political Regimes, 1800–2007' (2013) 46 *Comparative Political Studies* 1523.

constitution of 1871 granted suffrage to all adult men, but the Parliament did not become the central policy-making authority before 1919. According to the imperial constitution, the Chancellor was responsible only to the Emperor, not to the Parliament.

This historical asynchronicity between the developments of the constitutional and the democratic components clearly shows that constitutional democracies have analytically distinct institutional elements. Is it possible that the institutional complexity of constitutional democracies just reflects a more fundamental tension at the level of political principles? And is it possible that constitutional democracies are built upon a set of principles that can pull in different directions?

As the above institutional sketch shows, constitutional democracies try to both empower their citizens by giving them a fair share of political authority and protect their rights by imposing limitations on the power of the government. To put it more generally, they are committed to both the principle of democratic legitimacy and the effective protection of human rights. The puzzle that no constitutional theory can ignore is that there is no institutional framework that could simultaneously *guarantee* the achievement of both goals. If we put certain decisions (policies) beyond the reach of the political process, those decisions will suffer from a democratic deficit. By contrast, if we rely on the political process, the outcomes of the process will be prima facie democratic, but we have no guarantee that they will comply with human rights. The relationship between fair process and just outcomes is only contingent; the political process might or might not produce good results (including justice and the protection of human rights).

Facing this dilemma, constitutional theorists are forced to clarify what they think about the relationship of the aforementioned justificatory principles and what institutional choice they would make on that basis. There are two well-identifiable alternatives that dominate our debates, the Principle of Equal Participation (PEP) and Rights Foundationalism (RF).

2.1.2 The Principle of Equal Participation

I will use PEP as a shorthand that comprises four tenets. The first two give content to the principle, and the second two specify how the substantive theses are related to the idea of legitimacy. (1) The demos should be inclusive: every competent adult who is a permanent resident of the country should be considered as a member of the demos. (2) The political process ought to give equal weight to the views of each member of the demos. (3) An authoritative decision is legitimate if, and only if, it is supported by the majority of citizens (or their representatives) or is

made by an institution the authority of which can be traced back to the majority of citizens. (4) The support of the majority is not only necessary but also a sufficient criterion of political legitimacy.

For the purposes of a full-fledged democratic theory, all tenets of PEP should be spelled out more precisely[5] However, in the present polemical context, where the emphasis is on the contrast between the rival justificatory principles, hopefully, this rough definition will suffice. Nevertheless, let me add a few comments to clarify the status and the implications of PEP.

First, although PEP imposes considerably strict limits on the acceptable decision-making procedures, it is, in itself, not a decision-making procedure, but a justificatory principle. It explains what makes a particular decision-making process legitimate and worthy of our respect. This point is important because one can argue for the same (or the same set of) decision-making procedures by claiming that they are likely to produce the best outcomes (whatever one means by that). In the latter case, what makes the results of the decision-making process worthy of our respect is not that it reflects the support of most citizens, but that it tracks the correct outcome. In the contemporary constitutional discourse many proponents of unconstrained or majoritarian decision-making, like Jeremy Waldron[6] and Richard Bellamy,[7] combine these argumentative strategies.

Second, although PEP is a highly abstract consideration, it is not an ultimate legitimizing principle but is in need of further justification. People with different ultimate grounds can converge on PEP as a mid-level political principle. A more abstract form of equality, consent, or the maximization of self-determination all have some initial plausibility to lend support to PEP.

To illustrate how PEP can fit into a broader framework of ideas, let me refer to the works of Robert Dahl, one of the most influential proponents of democracy. Dahl contends that the ultimate justification of democracy is the Principle of Equal Consideration. This principle prescribes that:

---

[5] They could also be broken down into more principles. For instance, in the context of representative democracy (2) assumes that there are free and fair elections; the executive is responsible either to the electorate or to the legislature and that the demos has the right to control the agenda.

[6] Jeremy Waldron, 'The Core of the Case against Judicial Review' (2006) 115 *Yale Law Journal* 1346.

[7] Richard Bellamy, *Political Constitutionalism: A Republican Defence of the Constitutionality of Democracy* (Cambridge University Press 2007).

'No distribution of socially allocated entities, whether actions, forbearances, or objects, is acceptable if it violates the principle that the good or the interest of each member is entitled to equal consideration.'[8]

However, the Principle of Equal Consideration is not distinct enough to justify PEP. Although it requires us to give equal consideration to the interests of Amy and Bella, if Bella knows better what Amy's interests are than Amy herself, and she can be expected to act upon this knowledge, we will be better off by not complying with PEP, but by conferring all decision-making authority on Bella.[9] To support PEP, therefore, we need an additional premise, what Dahl calls the Burden of Proof: 'In the absence of a compelling showing to the contrary everyone is assumed to be the best judge of his or her own good or interests.'[10] To exclude Amy from the decision-making process assumes that it can be demonstrated that Bella knows Amy's interests better than Amy herself and can be also expected to act upon Bella's interests. Thus, in Dahl's theory of democracy, PEP is justified by a combination of the Principle of Equal Consideration and the Principle of Burden of Proof.[11]

Third, using Jeremy Waldron's important distinction between process-related and outcome-related justifications,[12] PEP belongs to the former category. I am not saying that PEP is devoid of all epistemic (and, therefore, outcome-related) considerations. Whether we follow Dahl's line of argument, or put the emphasis on consent or the maximization of self-determination, the argument makes assumptions about the cognitive capacities of citizens and limits the participation in the decision-making procedure to those who pass a certain threshold of epistemic competence. I maintain nevertheless that there is an important difference between a process that relies on epistemic considerations in delimiting the list of participants, but treats afterwards all decisions that are made by the majority as legitimate whatever their content is, and a procedure that aims at producing outcomes that are valued independently of the decision of the majority.

Fourth, as I understand the principle, the 'support of the majority' is a loose criterion that is compatible with different decision-making procedures and does not necessarily require simple majority rule. That means

---

[8] Robert A Dahl, 'Procedural Democracy' in Gerald F Gaus and Chandran Kukathas (eds), *Handbook of Political Theory* (Sage 2004) 119.

[9] Robert A Dahl, *Democracy and Its Critics* (Yale University Press 1991) 87.

[10] Dahl (n 8) 119.

[11] ibid.

[12] Waldron (n 6) 1372.

that at the institutional level PEP is compatible with both the Orthodox Model of Parliamentary Supremacy and an entrenched constitution that is one of the hallmarks of the New Constitutionalism.

Finally, I have formulated the principle in a way that it is capable of accommodating delegated decision-making. It would be both impossible and undesirable to confer all decision-making authority directly on citizens or their representatives. However, from the fact that the support of the majority is not a legitimacy criterion of each authoritative decision, it does not follow that PEP ceases to be an important criterion for institutional design. The implication of this fact is that a decision-making procedure that meets the above criterion better ought to be, other things being equal, preferred over procedures that meet the criterion worse.[13]

2.1.3 Rights Foundationalism

Let us now turn to the rival theory of political legitimacy that I, borrowing Bruce Ackerman's term, will call Rights Foundationalism (hereinafter RF).[14] RF says that: (1) an authoritative decision is legitimate if, and only if, it complies with a certain set of fundamental rights; (2) the validity and content of these rights does not derive from a collective decision-making procedure, but is independent of and prior to it.

Unlike PEP, RF belongs to the family of outcome-related considerations. However, it is important to note that RF does not provide us with a full-fledged theory of political goals. Rather, it imposes side constraints within which political objectives can be pursued. As such, it does not aim to replace PEP as a general theory of legitimacy entirely but specifies an additional criterion for legitimate decisions.

Similarly to PEP, RF is interpreted here as a principle of political legitimacy that is compatible with different comprehensive moral theories. The term foundationalism is not meant to imply a moral theory that is itself right-based in the Dworkinian sense.[15] It does not presuppose either that right-based morality is somehow more fundamental than its goal-based or duty-based rivals, but is compatible with different background justifications of rights. The differences of the background justifications for RF will also inform how different rights foundationalist philosophers interpret RF. Although there is a considerable overlap between the implications of various rights foundationalist approaches, the

---

[13] Dahl (n 8) 109.

[14] Bruce Ackerman, *We the People: Volume 1 – Foundations* (Belknap Press 1993) 10.

[15] Ronald Dworkin, *Taking Rights Seriously* (Duckworth 1977) 171.

set of rights they defend and their meaning differ from one rights foundationalist theory to the other.

The second tenet of RF entails two ideas. It implies that, contrary to Bentham's claim, the general idea of moral rights is not 'nonsense upon stilts'. As the language of many constitutions suggests, constitutions only *recognize* rights, and do not create them. RF, however, goes further than endorsing the intelligibility of moral rights. Rights foundationalists also claim that the set of constitutional rights that impose legal obligations on the legislative power and the precise content of these limits can be determined independently of the political process. The rights foundationalist philosopher, of course, does not believe that the rights she advocates impose obligations on the legislature, just because they happen to be the rights she prefers. On the contrary, she believes that they create obligations because they can be justified in an intersubjective way.

As principles of political legitimacy, PEP and RF are mutually exclusive alternatives. The former claims that the support of the majority is a sufficient condition for political legitimacy, and the latter denies this. However, despite their rivalry, the two principles may find their ultimate justification in the same overarching principle or, using Dworkin's terminology, in the same sovereign virtue.[16] The Principle of Equal Consideration, mentioned above, seems to be an especially plausible candidate for that purpose. This principle, supplemented by the idea of Burden of Proof led Robert Dahl to accept PEP. However, one could plausibly argue that treating citizens as equals does not only require us to give each person an equal vote, but has clear implications for our substantive moral debates. Punishing someone, for instance, for his or her homosexual preferences seems to deny the equal protection of laws from homosexuals. Making the worship of one particular religion compulsory seems to mean that we do not give equal consideration to the interests of those people who do not believe in that particular religion. Although both of our principles appeal (or at least can appeal) to the idea of Equal Consideration, they draw different and incompatible conclusions from the more abstract principle.

2.1.4 Is there a Dualist Alternative?

Since I borrowed the term 'Rights Foundationalism' from Bruce Ackerman, and PEP seems to chime well with what he calls monistic

---

[16] Ronald Dworkin, *Sovereign Virtue* (Harvard University Press 2000).

democracy,[17] it might occur to my readers that Ackerman himself mentions three rival paradigms of constitutional law and offers an alternative to Rights Foundationalism and monistic democracy: dualist democracy.[18] Dualist democracy, as the name suggests, separates two levels of political decision-making, those of constitutional and ordinary politics. Since fundamental rights are incorporated into the constitution by constitutional politics, the authority of fundamental rights is linked to the political process. On the other hand, by separating constitutional politics from ordinary politics, the constitution is more likely to give effective protection to fundamental rights: the requirement of a broad consensus at the level of constitutional politics decreases the chances of the tyranny of the majority. Is it possible that dualist democracy provides a solution to the puzzle of constitutional democracy?

It is true that dualist democracy offers an alternative to monistic democracy at the institutional level. However, dualism as such does not provide a distinctive theory of legitimacy. The set of rights that binds the legislature is either determined independently of and prior to the political process as RF suggests, or is determined by the political process, in the case of dualist democracy, by constitutional politics. Although a dualist institutional framework mitigates the danger of the tyranny of the majority by putting certain issues beyond the reach of ordinary majorities, the authority of the constitution still derives from a collective decision, and the relationship between the rights foundationalist's ideal set of rights and the rights arrived at by the constitution-making process remains contingent. Ackerman is well aware of this contingency. He asks us to consider a hypothetical, where the American constitution is amended by an impeccable procedure and the new amendment establishes Christianity as state religion.[19] Ackerman says that a consistent rights foundationalist should reject the authority of such an amendment (assuming that the prohibition of establishment is part of her ideal set of rights). He makes it abundantly clear that dualist democracy, as he interprets the term, would consider such an amendment binding, even if as a private individual he would vehemently argue against it. If that is the case, dualism, as Ackerman understands it, is just a special case of PEP, since its legitimacy comes from a collective decision.

---

[17] Ackerman (n 14) 7–10.
[18] ibid 3.
[19] ibid 14.

2.1.5 Two Interpretations of the Puzzle

Contrasting PEP with RF helps us to identify one of the central puzzles of modern constitutional democracies. However, this framework is not yet sophisticated enough to fully understand the complexity of the problem. I submit that the dilemma we face can be conceptualized at least in two different ways, and the two interpretations have very different ramifications.

According to what I will call the 'simple view of the puzzle', the dilemma of constitutional democracy is similar to many other situations in which we have to balance competing values. For instance, legislators and judges are often required to strike a balance between freedom of speech and reputational interest. By striking a balance between these two interests, they attach a particular weight to the values affected by the dilemma and establish priority rules accordingly. Since they agree that both interests are important, it is highly likely that under some circumstances the decision-makers will give priority to the former and under different circumstances they will give priority to the latter.

Putting the puzzle this way, the proponents of the two positions strike a different balance between fair procedures and just outcomes. According to this interpretation, although the advocates of procedural democracy are ready to admit that fair procedures will not always generate just outcomes, they will give preference to the former over the latter. By contrast, rights foundationalists are ready to sacrifice procedural fairness if it is needed to avoid the violation of fundamental rights. As a general rule, they are willing to give precedence to procedural fairness over substantive justice. However, when fundamental rights are affected, they will trump procedural fairness. The interests that are protected by constitutional rights cannot be violated even by the majority.

Although the simple view of the puzzle offers valuable insights, it distorts the nature of the problem in a crucial way. The rub is that just outcomes do not reveal themselves to us, or to use the language of the American Declaration of Independence, they are not 'self-evident truths'. Therefore, rights themselves cannot serve as side constraints on fair procedures; what serves as a side constraint is always someone's interpretation of or view on fundamental rights. The simple view distorts the puzzle by not taking the fact of moral disagreement seriously enough.

I will take it for granted that moral disagreement is an enduring feature of our lives; people in modern societies endorse different and incompatible religious, philosophical and ethical doctrines. This disagreement, as John Rawls has pointed out, cannot be considered irrational; on the contrary, it is the natural consequence of the free exercise of reason.

Reasonable people arguing conscientiously and in good faith can reach different conclusions on complex moral issues, due to what Rawls called the 'burdens of judgment'.[20]

Under circumstances of reasonable pluralism, it is instructive to distinguish between two different moral perspectives and two sets of moral ideals. On the one hand, we have moral views on what justice requires: for instance, how scarce resources should be allocated, whether euthanasia ought to be legalized or the consumption of recreational drugs ought to be criminalized, to name just a few. But since we disagree about these issues, we also need principles to handle our moral disagreements. We can express this idea by saying that when we make claims about what justice requires, we speak from the *first-person singular* perspective. At the same time, we should recognize that our moral outlook is only one of many moral perspectives. As moral agents, we also need to be able to take up the *first-person plural* perspective and argue from that vantage as well. Arguing from that perspective, our first-person singular views should be weighted by an appropriate mechanism or procedure, and balanced against the rival moral views of others.

By giving centre stage to the idea of reasonable pluralism and the distinction between the two moral outlooks, we can reformulate the dilemma more accurately. The difficulty is different from striking a balance between two values that occupy the same conceptual space. The above-mentioned choice between freedom of speech and reputational interests might be a daunting one, but its character is different from our dilemma. The former conflict is internal to the agent's first-person singular views on justice and rights, while the puzzle of constitutional democracy cannot be fully understood without the first-person plural perspective. Justice is a vital virtue of political institutions, but since we disagree on what justice requires, we need a procedure to select between the rival conceptions of justice. What we choose together will become the community's conception of justice, or we might also call it the first-person plural conception of justice.

According to the advocates of PEP, democracy provides us with a fair procedure of choosing between the competing conceptions of justice. If one finds this idea plausible, it is a kind of category mistake to balance one's first-person singular view of justice against the first-person plural conception of justice.[21] By taking up the first-person plural perspective, we have already attached proper weight to our own first-person singular

---

[20] John Rawls, *Political Liberalism* (Columbia University Press 1993) 54–8.

[21] See Jeremy Waldron, *Law and Disagreement* (Clarendon Press 1999) 197.

view of justice. Balancing the two conceptions of justice against each other is just another way of giving additional weight to our own moral view in the collective decision-making process.

If democratic decision-making is understood this way, the puzzle does not disappear but is in need of reconceptualization. On the one hand, the central insight of RF still seems to be correct: it is still true that democratic decision-making can go astray and the tyranny of the majority, which rights foundationalists are most afraid of, is more than an imaginary danger. There is nothing in PEP that would prevent the majority from making discriminative or blatantly unjust laws. Perhaps most importantly, relying on PEP alone, we do not have political principles that we could mobilize to challenge those laws. Let me explain this point. The principles of justice that we would naturally fall back on for such a criticism belong not to the first-person plural, but to our first-person singular theory of justice. The proponents of PEP would say that these principles were given proper consideration and weight in the political process. Giving additional weight would mean that we unduly privilege one person's (or group's) conception of justice.

On the other hand, by distinguishing the different moral outlooks, it becomes evident that PEP is much more attractive if we interpret it not as a first-person singular, but as a first-person plural principle. Its proponents do not want to give priority to their first-person singular conception of fairness over their first-person singular conception of rights but prioritize the first-person plural conception of rights. They claim that by putting rights beyond the reach of the political process, rights foundationalists simply give privileged status to their own first-person singular conception of justice and rights and, as a consequence, would establish a rule of Platonic guardians. When rights foundationalists speak about the rights that should trump democratic decision-making, they naturally mean the rights they prefer. As Ackerman states sarcastically: 'Rights trump democracy – provided, of course, that they're the Right rights.'[22] However, as the intensive controversies about the interpretation of rights amply show, constitutional rights themselves are subject to reasonable disagreement. If that is so, why should we give a privileged position to the rights foundationalist philosophers' view? And if rights foundationalists disagree, which Platonic guardian should prevail?

Although both legitimizing principles have some flaws, I want to make clear that I find the deficiencies of RF much more fundamental. Even if PEP has its blind spots, as I will argue below, it offers the right *kind* of

---

[22] Ackerman (n 14) 12.

theory, that is, a first-person plural theory of justice. By contrast, RF, as it stands, is fundamentally incomplete and inadequate under the circumstances of reasonable pluralism.

To avoid any misunderstandings about my position, let me emphasize that I find the first tenet of RF, which underlies the importance of rights, fundamentally attractive, and it is part of my own first-person singular theory of justice. Besides, I am also convinced that a fair selection process would choose such moral principles as our first-person plural conception of justice that incorporate many fundamental rights. However, without a complementing first-person plural theory, RF is simply inadequate for the purposes of institutional design. Due to the above asymmetry, I will subject PEP to a more sustained scrutiny in the next section, but do not analyse RF in more detail.

2.1.6 The Promise of Political Liberalism

Although I argued that PEP offers the right kind of theory under the circumstances of reasonable pluralism and as such is superior to RF, I would like to explore whether we have a superior alternative to PEP. There is a family of political ideas that promises to avoid both the tyranny of the majority and the rule of Platonic guardians. I allude here to theories that put a particular emphasis on the notion of public reason, and give it a constitutive place in their theory of political legitimacy. For the sake of convenience, I will refer to this strand of ideas as political liberalism, indicating that the most important representative of this tradition is John Rawls. However, since the concept of public reason has become a catch-all in modern political philosophy, I must define more clearly the concept of political liberalism. I will associate this idea with three tenets.

2.1.6.1 The thesis of reasonable pluralism

Reasonable pluralism is a descriptive thesis about the human condition, or as Jeremy Waldron puts it, about the circumstances of politics.[23] If a disagreement on matter *M* is reasonable, Amy is justified in believing *p*, while at the same time Bella is justified in believing not-*p*.[24] The concept of reasonable disagreement does not mean that there can be no correct answer on matter *M*; it presupposes only that both *p* and not-*p* are inconclusively justified.

---

[23] Waldron (n 21) 159–60.

[24] Gerald F Gaus, *Contemporary Theories of Liberalism: Public Reason as a Post-Enlightenment Project* (Sage 2003) 14.

It is important to clarify what political liberals mean by saying that Amy and Bella are 'justified in believing *p*'. Some atheists believe, for instance, that religious beliefs are manifestly irrational. So Amy, an atheist, could say that Bella, a believer, is justified in accepting that God does not exist, even if the existence of God is the cornerstone of Bella's belief system. But this interpretation of 'being justified in believing *p*' would be incompatible with the thesis of reasonable disagreement. By saying that Bella is justified in believing *p*, political liberals mean that *p* is justifiable in the belief system that is in a meaningful sense *her* belief system. This slightly convoluted formulation is meant to make sure that not all beliefs that Bella currently holds are necessarily justified within her belief system. For instance, let us assume that Bella aims to follow the teachings of the Catholic Church, but she is mistaken what these teachings, in fact, are. In that case, even if she believes that *q* is the case, not *p*, she would be justified in believing in *p*.

2.1.6.2 The thesis of substantive public reason

The advocates of political liberalism suggest that, even under reasonable pluralism, some of our political principles can be publicly justified. A political principle is publicly justified if each citizen is justified in believing it.

Our publicly justified political principles form what Rawls calls the political conception of justice. As his well-known metaphor suggests, the political conception of justice is a module, a constituent part, which fits into and can be supported by various comprehensive doctrines.[25] People with different religious and moral views can converge on and accept the same political conception of justice since it does not presuppose the acceptance of any particular comprehensive doctrine.

It is important to note that a reason can be public in different senses of the word, and therefore not all conceptions of public reason are substantive; that is, not all conceptions of public reason depend upon public justifiability. Some conceptions of public reason may focus on the decision-making procedure and deem a reason public if everyone has an opportunity to influence the decision, even though the outcome cannot be justified to everyone. Richard Bellamy's account can be used to exemplify such a procedural version of public reason. As he puts it, public reason is 'not a mode of justification, but a means of legitimating decisions'.[26] We respect it for its legitimating rather than for its epistemic

---

[25] Rawls (n 20) 12.
[26] Bellamy (n 7) 178.

properties,[27] and the test of a political process is not so much that it generates outcomes we *agree with* as that it produces outcomes that all can *agree to*, on the grounds they are legitimate.[28]

2.1.6.3 The Liberal Principle of Legitimacy

According to political liberals, public justification should put constraints on the way the state exercises its power. I take it for granted that the political power of the state is backed by the use of force, and this power is in need of justification. This assumption is also shared by many of those who are in power, as shown by the state's claim to legitimate authority over its citizens.[29] The state does not just coerce its citizens but claims that its coercive power is exercised appropriately, that is, in a justified way. The distinctive feature of the Liberal Principle of Legitimacy (hereinafter LPL) is that it creates a strong link between the conditions of legitimacy and public justification. According to political liberals, the very process of justification implies that the person who tries to justify something must refer to reasons that are available to the person to whom the justification is addressed. LPL implies that a decision (policy) is legitimate only if all citizens can be reasonably expected to endorse it;[30] that is, if it can be publicly justified.

The three theses identified above constitute the skeleton of political liberalism. Later I will put flesh on its bare bones to make political liberalism a credible theory for the purposes of institutional design. At this stage, however, it is worth exploring the appeal of the doctrine. Its main attraction is the promise that *if* the thesis of substantive public reason is sound, and we adhere to LPL, we can avoid both the tyranny of the majority and the rule of Platonic guardians. If we endorse LPL, the protection of minority rights is no longer contingent upon the will of the majority. The idea of public justification implies that the decisions of the state have to be justifiable to minorities, too. On the other hand, since a decision is legitimate only if it can be justified to each citizen, political liberalism does not give privileged status to the views of the rights foundationalist philosopher, thus escaping one of the most forceful objections put forward by procedural democrats. I will pick up the analysis of the question whether political liberalism can make good this promise in Section 2.3.

---

27 ibid 191.
28 ibid 164.
29 Joseph Raz, *The Morality of Freedom* (Clarendon Press 1988) 4, 70.
30 Rawls (n 20) 139–40.

2.2 THE CRITIQUE OF THE PRINCIPLE OF EQUAL PARTICIPATION

2.2.1 The Case for the Principle of Equal Participation

Although I argued that political liberalism gives us the hope of steering clear of both the tyranny of the majority and the rule of Platonic guardians, the proponents of political liberalism must admit that LPL conflicts with a widely shared conception of democracy. According to PEP, we ought to respect the outcome of our collective decisions not because it is just, good, or right judged by a process-independent criterion, but because it is the result of a fair procedure. A more detailed argument for PEP would proceed in the following steps:

1. Under the circumstances of reasonable pluralism, the members of the political community endorse different religious and moral beliefs and pursue different ways of life.
2. As we disagree on substantive political principles, we need a procedure to make collective decisions about our disagreements. This procedure is fair only if it gives equal weight to the views of each citizen.
3. Since moral disagreement extends to the core of our political principles, we cannot impose substantive legitimizing principles on democratic decision-making without unfairly favouring someone's point of view.
4. If we authorize Amy to specify the substantive limits of democratic decision-making, we necessarily privilege Amy's view on where the boundaries of collective decision-making should be drawn, since the interpretation of these boundaries is also subject to moral disagreement.
5. If Amy's views on the limits of collective decision-making are privileged, it implies that we do not give equal weight to the views of other citizens, and therefore they do not have an equal status in the community.
6. It follows from the lack of substantive limits on legislative power that whatever the majority of citizens supports is legitimate.
7. A fair procedure may produce results that are blatantly unjust according to certain conceptions of justice. However, these decisions are only the contingent outcomes of an otherwise fair procedure.

8. By conferring the authority to determine the limits of collective decisions on Amy, we systematically, that is, directly and immediately violate PEP; by contrast, the tyranny of the majority is only a contingent outcome of procedurally fair decisions.

In summary, the first step of the argument is a descriptive thesis about the human condition; step 2 formulates the core normative principle of PEP; steps 3–5 put PEP on the offensive by drawing our attention to the inherent weakness of the alternatives; steps 6–8 admit the drawbacks of PEP but offer a cost-benefit analysis to lend further support to the argument.

My case against PEP rests on two lines of argument. In the remainder of this section, I will develop four objections to PEP to point out why step 6 is problematic and contend that LPL offers a more attractive interpretation of equality than PEP (step 2 of the above argument); an interpretation that does not imply step 6. In the section that follows, I will challenge the other part of the equation, steps 3–5, and claim that imposing substantive limits on democratic decision-making does not necessarily mean that we must give unjust privilege to someone's moral views. If this strategy is successful, we can preserve the valid core of the proceduralist argument without becoming vulnerable to the objections that PEP endures. I hope that the combined force of these two strategies will present a compelling case against PEP.

2.2.2 Towards a More Attractive Conception of Equality

I have argued that one way to understand the difference between PEP and RF is to consider them as different attempts to spell out what equality really requires. LPL is not different from its two rivals in that respect. It also embodies a particular conception of equality, and I will argue that this interpretation is more attractive than those offered by either PEP or RF.

According to PEP, giving equal consideration to people means that we give equal weight to the preferences of each in the process of preference aggregation. Let me make clear immediately that the way I understand the term preference here is not limited to mere 'liking' that can be contrasted, for instance, with a moral position one holds, but also includes the latter. A preference simply reflects how an individual ranks different states of affairs or different actions. It also follows that I am not assuming here a sharp contrast between the aggregative and the deliberative conceptions of democracy, the process of aggregation can also include deliberation.

For the proponents of LPL, giving equal consideration means that the government aims to justify its authoritative decisions to each citizen. The difference between PEP and LPL is related to the fact that the justifiability of a particular belief and the actual acceptance of it do not necessarily coincide. It is entirely possible for someone to reject a belief even if it is justified in her belief system, or accept a belief even if it is unjustified to her. LPL focuses on the justifiability of authoritative decisions: in order to be legitimate, a decision has to be justified to each citizen. By contrast, the ultimate justification of PEP lies in actual acceptance: a decision has to be accepted by the majority of citizens. Why then, should LPL be preferred to its rival?

The most fundamental objection to PEP, in my view, is that it misconstrues the place of preferences in our practical deliberation. PEP seems to aggregate fairly what people actually prefer but is insensitive to the question of whether people are justified in preferring a certain state of affairs. A state of affairs is not inherently good just because we have a preference for it. (I set aside here judgements of taste.) Conversely, we are justified in preferring a given state of affairs if it is good. Preferences should not be respected simply for being preferences, but because they are justified by some human good. The fact that many Germans preferred to eliminate Jews under the Nazi regime does not make these preferences justifiable. If preferences can be subjected to rational revision, and can be either justified or unjustified, our principles of political legitimacy should reflect this fact.

Let me spell out in more detail in what sense PEP is insensitive to the justification of preferences. The main attraction of PEP is that it takes the fact of reasonable disagreement seriously. Under the circumstances of reasonable disagreement, it would amount to the rule of Platonic guardians if we gave a privileged position to someone's moral point of view. By giving equal weight to the moral views of each citizen, PEP aims to avoid Platonic guardianship. However, it goes further than fairly aggregating the moral judgements of all citizens. Since there are no substantive limits on the possible outcomes of the decision-making process, the process of aggregation also takes into account those preferences that are based on prejudice and social stereotypes. As I said before, I do not contrast preferences with considered moral positions, but do not limit them to those positions either. Preferences might reflect considered moral beliefs, but might also be based on sheer prejudice; PEP aggregates both the former and the latter. Although it is not always easy to distinguish considered moral positions from pure prejudice at the practical level, we should insist on the theoretical claim that a preference does not automatically qualify as a moral view. Reasonable moral disagreement

requires us to give equal weight to the moral views of each person, but it does not follow that we should give equal weight to all preferences just because they happen to be someone's preferences. An interpretation of equality that is sensitive to the distinction between considered moral judgements and naked preferences is preferable to the one that ignores this distinction.

Even if PEP could filter out those preferences that are based on prejudice, ignorance or malice, we could still object to it on the ground that it is insensitive to how the burdens of a given policy are distributed among the citizens. To use Bruce Ackerman's example, if, for instance, the majority chose to establish Christianity as the state religion in a certain country, and the members of the majority were sincerely convinced that everyone should follow the doctrines of Christianity, the advocates of PEP would not have the resources to challenge this practice.[31] Even assuming that the members of the non-Christian minority can participate in the political process, for them the equal weight of their votes would be outweighed by the burdens imposed on them. PEP is insensitive to the disparate impact of the burdens imposed by an authoritative decision. But the example is not simply about the disparate distribution of certain burdens. We can go further and say that the proponents of PEP are insensitive to the problem of coercion. For them, Amy's preference to coerce Bella and Bella's preference not to be coerced by Amy are symmetrical. In their view, this situation is not qualitatively different from distributing a cake, where the decision is just if we give everyone's moral demands equal consideration. By contrast, LPL treats Amy's and Bella's situation in the above example as asymmetrical. The assumption behind LPL is that coercion is always in need of justification. An interpretation of equality that considers Amy and Bella's position in the above example as asymmetrical is preferable to the one that considers them symmetrical.

2.2.3 The Preconditions of Membership

Although my previous comments used rather extreme cases as examples, they do not presuppose that PEP will often or regularly lead to blatantly unjust results. Extreme cases might be rare in practice, but what they illuminate with particular clarity belongs to the very core of PEP. By its very nature, PEP is insensitive to whether the preferences of the majority are justified or how the burdens of a certain decision are distributed. Still,

---

[31] Ackerman (n 14) 13–14.

there is a well-known argument against PEP, put forward perhaps most forcefully by Ronald Dworkin,[32] which focuses on the particularly unjust implications of PEP. I will dub this the argument from membership. Reduced to its bare essentials, the argument from membership runs as follows: (1) a fair decision can impose obligations on Amy, even if she disagrees with it. This obligation, however, presupposes an existing political community and makes sense only within that community. Giving equal weight to the views of each French and Belgian citizen on questions of Belgian politics could mean that French people outvote their Belgian neighbours. What makes this example absurd is that the Principle of Equal Participation is always understood relative to a particular, bounded community. However, the principle itself is silent about how the boundaries of the relevant community should be drawn. (2) The concept of political community entails the concept of membership. As a general rule, Amy is bound by the decisions of a community only if she is a member of that community.[33] (3) Even if membership is most often created by a brute fact (Amy was born in country *X*), it is a concept of utmost moral significance and has certain moral criteria. Amy is not a member of the relevant political community in a meaningful sense if she is not considered so by the other members and/or if her interests are systematically ignored and/or violated. Jews in Nazi Germany, argues Dworkin, were clearly not considered as members of the political community. In fact, it was part of the Nazi ideology to dehumanize Jews and thereby deny membership of any community of human beings. (4) The conditions of membership put limits on the acceptable outcomes of collective decision-making. Even if a decision-making procedure satisfies the criteria of procedural fairness, it does not bind Amy if it violates the moral conditions of membership. The upshot of the argument is that even if PEP imposes an obligation on Amy to obey laws that she disagrees with, this obligation is not unconditional but depends on Amy's continuous membership of the political community. Although the precise conditions of membership can be contested, a theory that is sensitive to the moral criteria of membership of the political community is preferable to one that ignores this condition.

---

[32] Ronald Dworkin, 'Equality, Democracy, and Constitution: We the People in Court' (1990) 28 *Alberta Law Review* 324, 335–43; Ronald Dworkin, *Freedom's Law: The Moral Reading of the American Constitution* (Oxford University Press 1996) 19–35.

[33] So far, there is nothing distinctively liberal in this argument. For an influential formulation of this position, see Carl Schmitt, *Constitutional Theory* (Duke University Press 2008) 257–64.

2.2.4 The Argument from the Rule of Law

When we assess political principles, it is always instructive to ask how those principles fit with our existing institutions. I am not saying that the lack of fit is a conclusive argument against the desirability of those principles. However, this exercise can help us to test our intuitions and sharpen our understanding of the implications of the principles in question. Looking at PEP from that perspective, we can say that although PEP, on its face, is incompatible with the New Constitutionalism, it seems to fit perfectly well with the dominant constitutional paradigm of the nineteenth century, the Orthodox Model of Parliamentary Supremacy. I will contend that this is not the case. My next two arguments suggest that PEP cannot account for two pivotal features of our constitutional democracies, the rule of law and the central role of parliaments. I will discuss these two questions in turn.

As my sketch about the institutions of constitutional democracies has indicated, modern constitutional democracies combine the principles of democracy with those of constitutionalism. I will assume that the rule of law is part of the latter notion. Within the institutional framework of constitutional democracy, the democratic principle has a well-defined, but limited role. The rule of law requires that the exercise of political authority be mediated by law. That implies that parliaments are expected to exercise their authority through general rules that bind all citizens, including the rulers of the political system. The democratic component of modern constitutional democracies is linked to this understanding of the rule of law. The democratic principle does not authorize an unmediated exercise of power but confers authority on legal rules. Although law is backed up by effective power, it is not identical with it. To borrow Lon Fuller's terminology, law is a distinctive form of social control that can be contrasted not only with terror or psychiatric manipulation but also with managerial direction.[34]

This distinction between the rule of law and the democratic principle is not only an analytical one but also reflects the genealogy of many modern constitutional democracies. To put it simply, in most constitutional democracies compliance with the rule of law pre-dated the compliance with PEP. To use the German terminology, the *Rechtsstaat* was born well before the democratic state. In our constitutional systems, the democratic element was never understood as a source of unrestrained

---

[34] Lon L Fuller, *The Morality of Law* (Revised edition, Yale University Press 1977) 207–13.

power but was fitted into the institutional framework of the *Rechtsstaat* to confer legitimacy on its laws.

My contention is that PEP cannot account for this feature of modern constitutional democracies. If the ultimate justificatory principle of political authority is the will of the majority, then the limits on this authority, even if set by the rule of law, seem to be problematic. Why cannot the will of the people override pre-existing legal rules in individual cases if these rules are in conflict with the conception of justice the majority momentarily prefers? The idea that power is mediated by the rule of law also implies that once a legal rule is enacted it will be applied by judges. Individual judicial decisions cannot be overridden by legislatures even if the majority does not agree with the moral content of those decisions. In addition, it also follows from the rule of law that the majority cannot satisfy its sense of justice or rectify past injustices by enacting retroactive laws on a regular basis. Disregarding the applicable legal rules, to override allegedly unjust judicial decisions or enact retroactive laws would clearly violate even a thin or formal conception of the rule of law,[35] but there is nothing in the core idea of PEP that would be inconsistent with these practices if the majority chose to go for them. My claim is not that rule-of-law values should never be outweighed by justice or procedural fairness, but that PEP cannot explain why they should *generally* limit majoritarian decision-making. To put it bluntly, PEP does not explain why we should prefer the rule of law to managerial direction if the latter reflects the will of the majority.

It was already emphasized by Aristotle that democracy (defined as the uncontrolled power of the many) and the rule of law are only contingently related to each other.[36] However, a contemporary example illustrates more effectively the possibility of this conflict. The following quote is about the Law and Justice party (PiS) of Poland that won the general elections in 2015:

> The PiS refused to honor the appointment of justices made by the late Parliament and to swear them in, while instead appointing its own 'good judges', by arrogating to itself the power of constitutional review and retroactively extinguishing the term of office of the current President and Vice President of the Court. To make the new doctrine and legal philosophy completely clear, the honorary speaker of the Lower House of Parliament (Sejm) ominously summed up the state of play few days ago: 'it is the will of

---

[35] Paul P Craig, 'Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework' [1997] *Public Law* 467.

[36] Aristotle, *The Politics of Aristotle* (Benjamin Jowett tr, Clarendon Press, 1885) 117, 1292 a 24–35.

> the people, not the law that matters, and the will of the people always tramples the law'.[37]

One can object at this stage that although the rule of law imposes limits on PEP, those limits are essentially formal: they do not pre-empt the result of our substantive moral debates in a question-begging way and, therefore, are compatible with PEP. This objection, however, misses the point. Although the above requirements of the rule of law are indeed formal in a certain sense, they are justified by substantive moral values. Since the values associated with the rule of law, or at least their weight, can also be subject to disagreement, in the theoretical framework of PEP these questions should also be up for grabs. If we elevated these values above politics, we would unjustly privilege a particular moral point of view that puts special emphasis on the rule of law. If someone rejects the idea of rights as a priori limits on democratic decision-making, she also has to reject the idea of rule of law, since it does the same. Although the rule of law limits PEP in a different way than fundamental rights, neither of them can be derived from the idea of PEP and both are external to it.

2.2.5 The Argument from Caesarism

Although PEP might justify why a parliament should be *sovereign*, it cannot account for why a *parliament* should be sovereign. In his critique of parliamentarism, Carl Schmitt argued forcefully that parliamentarism is a not a democratic, but a liberal ideal. Although parliaments were born as representative institutions, Schmitt argues that there is nothing in the idea of representation that requires such an institution like our parliaments. If citizens can be represented by a body of MPs, they can also be represented by a much smaller body, and, in the final analysis, by one person.

> In spite of all its coincidence with democratic ideas and all the connections it has to them, parliamentarism is not democracy any more than it is realized in the practical perspective of expediency. If for practical and technical reasons the representatives of the people can decide instead of people themselves, then certainly a single trusted representative could also decide in the name of

---

[37] Tomasz Tadeusz Koncewicz, 'Polish Constitutional Drama: Of Courts, Democracy, Constitutional Shenanigans and Constitutional Self-Defense' *International Journal of Constitutional Law Blog* (6 December 2015) <http://www.iconnectblog.com/2015/12/polish-constitutional-drama-of-courts-democracy-constitutional-shenanigans-and-constitutional-self-defense/> accessed 6 December 2015.

> the same people. Without ceasing to be democratic, the argument would justify an antiparliamentary Caesarism.[38]

We need not embrace the full scope of Schmitt's antiliberal argument in order to agree with the above point. So far as parliaments have a distinctive contribution to our public life, so Schmitt's argument runs, it is not their representative, but their liberal character. As is well-known, Schmitt referred here to the deliberative character of parliaments. As the etymology of the word itself suggests, the parliament provides a public forum where political questions are discussed and political arguments are heard. Modern legislative bodies typically consist of hundreds of MPs and are precisely such deliberative institutions. The point I want to make is not that the essence of parliamentarism is deliberation as opposed to representation. Rather, the claim I wish to defend is that procedural fairness alone cannot explain why we confer the role of representation on large deliberative bodies, like parliaments.

We need to proceed with caution here. Representation is a notoriously complicated idea. Schmitt is certainly right that a single individual can represent a political community without being necessarily right that she can represent the community in the requisite sense. To explain the difficulty, I will use an important distinction that I borrow from Hanna Pitkin. Pitkin distinguishes representation as 'standing for' and representation as 'acting for'.[39] When a flag symbolizes a community, it represents the community by standing for it. She claims that a person can represent the community in the same sense. This is usually the case with a monarch or a president whose main functions are primarily ceremonial. However, the members of parliament do not represent their constituencies in the same sense: they do not stand for their constituencies similarly to a flag, but act for them. Thus, the question is not whether a single individual can represent a political community, but whether it can represent the community in the requisite sense. I will say more in the next chapter about what representation as 'acting for' the community involves. For the time being, it suffices to say that I can see no conceptual reason why a single individual could not represent a community in the same sense. The claim I wish to defend here is therefore that PEP does not necessarily require a parliament as a pivotal or as the

---

[38] Carl Schmitt, *The Crisis of Parliamentary Democracy* (MIT Press 1985) 34.

[39] Hanna Fenichel Pitkin, *The Concept of Representation* (University of California Press 1967) 59. The distinction comes from the German *darstellen* and *vertreten*.

supreme political institution. The reason why we are better off by having a parliament is epistemic and is not that only a parliament is able to represent a political community in the requisite sense or that a parliament is required by procedural fairness.

Let us imagine the American political system without the Congress. The President of the United States certainly has democratic credentials and is supposed to represent the whole political community. His powers are not limited to symbolic representation, as are those of a monarch or a president in a parliamentary democracy. He is also required to act for the community. The American political system would be worse off if we abolished the Congress. However, it would not be worse off for being less fair in procedural terms. The system would be worse off, because we lacked the system of checks and balances, the expertise of the Representatives and the Senators, and an essential forum for public deliberation. However, these virtues have nothing to do with procedural fairness. If the argument from Caesarism is correct, PEP cannot account for one of the most distinctive institutions of our constitutional democracies.[40]

2.2.6 Civil Disobedience

Let me conclude this section by a comment on civil disobedience. My purpose here is not to develop an additional argument against PEP; rather, I want to highlight an implication of the previous objections. Let us imagine that the majority enacts a tax law that shamefully discriminates against a vulnerable minority. Let us assume further that the new tax law cannot be criticized on procedural grounds. The members of the minority were not excluded from the political process, the rules governing the legislative process were impeccably followed, and the legislative majority's view reflects the views of the popular majority. The critics of PEP are right to point out that a fair procedure in itself cannot prevent such a scenario. However, the point I want to make here is separate from the question of how effective protection, a purely procedural ideal of democracy, can provide against such injustice. My contention is that PEP

---

[40] More recently, it was David Estlund who developed a forceful argument to similar effect. David M Estlund, *Democratic Authority: A Philosophical Framework* (Princeton University Press 2009) 93–6. However, Estlund makes a much more radical claim and argues that PEP is not a purely procedural ideal at all. Although I believe that Estlund's argument is correct, since he does not challenge the merit of PEP, I followed the mainstream terminology and refer to PEP as a procedural ideal.

does not have the necessary intellectual resources to challenge those discriminatory measures. Let me spell out this point in more detail.

Let us assume that Amy finds the above-mentioned discriminatory law totally unacceptable and decides to protest against it. She is so upset that she is ready even to break the law as a sign of her disapproval. The problem with PEP is that it cannot interpret Amy's criticism as a form of proper *political* criticism. Amy's views on taxation, of course, are eminently political in the sense that they are about a question that was made politically relevant. They can also become political in the sense that she can appeal to them in the political process and can try to convince her fellow citizens about the validity of those views. However, when Amy criticizes the law in question, she does not aim merely to propose a fairer tax law for the future. What she says is that the existing law is blatantly unjust, and, therefore, is illegitimate and not worthy of our respect.

Her friend, Bella, agrees with Amy that the tax law is unjust. However, as a proponent of PEP, she feels uncomfortable with Amy's position. Bella replies to Amy that saying that a law is illegitimate means something stronger than and something different from saying that it is unjust. And the difference is not, or is not primarily, a matter of degree. Rather, it is saying that the law is unjust in a specific sense. What Bella means by that is that the law violates what some people call the political morality of the community. In the terminology of this book, it violates the first-person plural view of justice. Seeing from that perspective, Amy's claim simply does not make sense to Bella. Since we disagree on the questions of justice, the community's conception of justice is not something that is given but has to be established by a fair procedure. Amy's views were given fair consideration in that process and were outvoted by her fellow citizens. Therefore, the new tax law cannot violate the community's conception of justice. Even worse, for Bella, Amy's claim about the illegitimacy of the new tax law is considered by Bella as a sign of some kind of incivility. By insisting that the new tax law is illegitimate and is not worthy of our respect, Amy wants to give additional weight and privileged status to her own first-person singular views of justice, despite the fact that those views were rejected in a fair procedure. For Bella, Amy is similar to the card player Hobbes described in his *Leviathan*:

> And therfore, as when there is a controversy in an account, the parties must by their own accord, set up for right Reason, the Reason of some Arbitrator, or Judge, to whose sentence they will both stand, or their controversie must either come to blowes, or be undecided, for want of a right Reason constituted

> by Nature; so is it also in all debates of what kind soever: And when men that think themselves wiser than all others, clamor and demand right Reason for judge; yet seek no more, but that things should be determined, by no other mens reason but their own, it is as intolerable in the society of men, as it is in play after trump is turned, to use for trump on every occasion, that suite whereof they have most in their hand. For they do nothing els, that will have every of their passions, as it comes to bear sway in them, to be taken for right Reason, and that in their own controversies: bewraying their want of right Reason, by the claym they lay to it.[41]

In his *A Theory of Justice*, John Rawls makes an important distinction between conscientious objection and civil disobedience.[42] This distinction sheds further light on my point, although I believe that the point I make cannot be limited to the justification of lawbreaking, but applies to how certain laws can be criticized in general. For Rawls, the essential difference between the two acts is that someone who disobeys a law on conscientious grounds appeals to her own comprehensive view and not to the political conception of justice. Of course, she would be happy if the law were changed, but she does not claim that the law is not worthy of the respect of other people right now. By contrast, a person who engages in civil disobedience appeals to the political morality of the community. She does not only say that she is not ready to obey a certain law, but she also believes that the law is not worthy of the respect of her fellow citizens either. A system of democracy that is justified by PEP can theoretically accommodate conscientious objection to some laws. However, in such a system there is simply no conceptual space for civil disobedience. Although Amy considers the discriminatory tax law in our previous example blatantly unjust, she cannot claim that the law in question violates the political morality of the community, since only the principles that were accepted in a fair procedure can be considered to be political in the requisite sense. In the framework of PEP, all substantive challenges to the discriminatory tax law would have the same status since such criticism can never claim to be more than someone's first-person singular theory of justice.

---

[41] Thomas Hobbes and Kenneth R Minogue, *Leviathan* (JM Dent 1987) 19 (ch. 5).

[42] John Rawls, *A Theory of Justice* (Oxford University Press 1973) 369.

2.3 PUTTING FLESH ON THE BONES OF POLITICAL LIBERALISM

2.3.1 Challenges to Political Liberalism

I argued in subsection 2.1.6 that political liberalism, unlike PEP, promises that we can avoid both the tyranny of the majority and the rule of Platonic guardians. However, it is easy to see that the bare bones of this theory, defined by three tenets above, are insufficient to provide us with a viable theory of constitutional design. Two interrelated objections are particularly germane to our concerns. First, our disagreements about constitutional issues seem to cast some doubt on the claim that our constitutional essentials can be publicly justified. Second, even if we can publicly justify some constitutional essentials, unlike PEP, LPL does not provide us with a built-in selection procedure to identify them.

When confronted with these difficulties, the advocates of public reason tend to follow one of two unconvincing strategies. They either disregard our profound disagreements at the level of constitutional issues or believe that the actual deliberative procedure, provided that it satisfies certain background conditions, proves or at least indicates what is publicly justifiable. John Rawls, for instance, hoped that even if our comprehensive religious, moral and political views differ, we can still agree on a political conception of justice, or at least what he called constitutional essentials.[43] The proponents of PEP are clearly right to emphasize, however, that reasonable disagreement permeates not only our views on how we, as individuals, should live but also our opinions about the fair terms of social cooperation. Others, like Jürgen Habermas, are optimists in a different way. They assume that the outcome of the actual voting process, if the background conditions of deliberation are satisfied, indicates what people would have good reasons to accept.[44]

However, these alternatives just reproduce the two dangers we wanted to avoid within the theory of public reason. To assume optimistically consensus where there is no consensus is the benign way to the rule of Platonic guardians. To assume optimistically that actual voting is an indicator of public justifiability is to collapse LPL into PEP; but we have no reason to believe that a fair procedure in itself can prevent the tyranny of the majority.

---

[43] Rawls (n 20) 214.

[44] Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (Polity Press 1997) 475.

Although the difficulties noted above pose serious obstacles to political liberalism, I believe that these obstacles are not insurmountable. I am of the opinion that the most successful attempt to meet these challenges can be found in Gerald Gaus's theory of public justification.[45] I would like to highlight two interrelated features of this theory. But first, let me reinforce a general point I made earlier. Combined, these three ideas will flesh out the bones of the version of political liberalism that underpins my institutional arguments.

2.3.2 The Conceptual Distinction between Public Justifiability and Actual Consensus

When analysing the concept of substantive public reason, it is of vital importance to keep in mind the difference between public justifiability and actual acceptance. If we define the concept of substantive public reason in terms of actual acceptance and consensus, the advocates of PEP are clearly right. It is indisputable that even what Rawls calls 'constitutional essentials'[46] are contested by many people in constitutional democracies. Perhaps it is not a coincidence that Richard Bellamy does not distinguish between the two when he is attacking the substantive conceptions of democracy. By equating the substantive account of public reason with actual consensus, he can easily point out that our constitutional essentials are not publicly justified. If we insist on this conceptual distinction, however, we open up the logical possibility that a policy can be publicly justified even if it is not adopted by all citizens (or vice versa).

Although what is publicly justified itself can be contested, and we do not have a simple litmus test to identify those beliefs, I believe that the category of publicly justified beliefs is neither empty nor trivial. Even if there can be people who deny that women are entitled to the right to vote, this belief seems to me conclusively defeated. Or to give another illustration, although we strongly disagree about animal rights, it seems to be beyond question that animals can suffer, therefore the way we treat them is of moral significance, and therefore we should not impose unnecessary pain on them.

---

[45] Gerald F Gaus, *Justificatory Liberalism: An Essay on Epistemology and Political Theory* (Oxford University Press 1996).

[46] Rawls (n 20) 214.

2.3.3 Nested Inconclusiveness

Gaus takes the fact of moral disagreement seriously and does not assume consensus where there is none. However, he is keen to emphasize that not all disagreements pose the same challenge to the theory of public reason. Let us say that a policy is victoriously justified if the objections to it are defeated in the process of justification. This way, we can say that some policies are victorious or defeated.[47] These two options, however, do not exhaust all the possibilities; a policy can also be inconclusively justified. For example, if Amy has good reasons to favour policy *p*, but she cannot defeat the objections to *p* by Bella, then *p* is inconclusively justified, and Bella is justified in favouring non-*p* to *p*. The critics of political liberalism can say that since our views are usually inconclusively justified, adherence to LPL would paralyse collective action and would lead to anarchy. If all our disagreements followed the same pattern, this would be close to the truth, but many of our disagreements are different in nature. Sometimes both Amy and Bella have good reasons to favour *p*, and neither of them has good reasons to reject *p*, yet *p* is open to different interpretations, none of which can be conclusively justified. To distinguish between the two types of disagreements, Gaus refers to the first one as *merely inconclusive justification*, and the second as *inconclusive interpretations of justified principles.*[48] In the latter case, it would be irrational for us to wait until one of the opposing interpretations can be publicly justified, since it would mean that, until then, our publicly justified policy cannot be applied. For all practical purposes, it would mean, as Gaus says, 'to embrace the defeated option that P is not justified or is irrelevant to practice'.[49]

2.3.4 The Arbitrator Conception of Authority

This leads us to the theory of authority, the second important element of Gaus's account of public reason. Under these conditions, it is irrational to wait for a victorious justification of a contested interpretation of *p*, but it would be unacceptable to simply unilaterally impose our own interpretation on others, we need a moral arbitrator to choose from the rival interpretations of *p.* To put it bluntly, the primary function of political authority is to adjudicate between the inconclusive interpretations of our justified principles. The distinctive feature of the Gausian conception of

---

[47] Gaus (n 45) 144–51.
[48] Gaus (n 24) 216.
[49] ibid 217.

authority is the way it combines practical and epistemic considerations. The arbitrator must tell us what we should do, since waiting for a victorious justification is irrational if we have a publicly justified principle at our disposal. But the arbitrator has to also provide a plausible interpretation of a publicly justified policy. This implies that in order to be successful the arbitrator has to meet certain epistemic criteria. It does not mean that the arbitrator must be 'smarter than us', but its procedures have to 'track' public justification.

Let me compare political liberalism once again to its two main rivals. Each rights foundationalist theory asks us to accept one particular interpretation or specification of human rights as the correct one. The proponents of RF claim that we have not only practical reasons to act upon or comply with one particular specification of human rights, but also have reasons to believe that that particular system of rights is the correct one. If our interpretation is different, it must be somehow flawed. Thus, RF is incompatible with the idea of reasonable disagreement that assumes that complex moral questions can have more, equally reasonable, but inconclusively justified interpretations.

I believe that the arbitrator conception of authority is successful in preserving the core idea of PEP and maintains real respect for moral disagreement. The proponents of PEP often refer to what Richard Wollheim called the paradox in the theory of democracy: as a citizen, I can claim that *A* ought to be enacted, where *A* is the policy of my choice, and that *B* ought to be enacted, where *B* is the policy chosen by the democratic machinery.[50] This is also the message of Bellamy's distinction between outcomes we *agree with* and outcomes that all can *agree to*, on the grounds they are legitimate.[51] Political liberalism can account for this paradox by pointing out that citizens are not expected to believe in the correctness of the arbitrator's interpretation and give up their own, and they are not supposed to agree with the collective decision or reach consensus, but they still have good reasons to act upon the arbitrator's directive, so far as it is based on a plausible interpretation of a publicly justified policy.

Unlike the proponents of PEP, though, political liberals do not assume that the task of authority is entirely practical or that the legitimacy of a policy is unrelated to the content of the decision. Political liberalism, unlike PEP, has the theoretical resources to challenge the legitimacy of

---

[50] Richard Wollheim, 'A Paradox in the Theory of Democracy' in Peter Laslett and WG Runciman (eds), *Philosophy, Politics and Society (2nd series): A Collection* (Reprinted edition, Basil Blackwell 1979) 84.

[51] Bellamy (n 7) 164.

blatantly unjust but procedurally impeccable decisions, since the authority of the arbitrator is limited to adjudicating between the inconclusively justified interpretations of justified principles. My contention is that a more detailed analysis could show that political liberalism can accommodate all the objections to PEP that I surveyed in Section 2.2.

When facing the challenge of extreme cases, the proponents of PEP cannot criticize those decisions without falling back on their own first-person singular theory of justice. This would be incompatible with the central tenet of PEP, since falling back in a public debate about justice on my own first-person singular view of justice implies that I demand a privileged position for my own views. Political liberalism, by contrast, can account for the paradox of democracy and the illegitimacy of extreme cases within a unified theoretical framework.

I started this chapter by claiming that the institutional question whether constitutional review is justified cannot be answered in the abstract; constitutional review can be a sensible institutional choice within a particular theory of legitimacy and a bad choice relative to another theory. But I have also emphasized in the introduction that a particular theory of legitimacy is not necessarily determinative of the justifiability of judicial review. Although the received wisdom is that judicial review is a counter-majoritarian institution and as such is incompatible with PEP, as we will see in the next chapter, even this position can be contested. It is even easier to demonstrate that neither RF nor LPL determines the optimal constitutional design. Whether constitutional review is justified will depend on whether courts or legislatures are better at tracking an ideal set of rights (RF) or publicly justified principles (LPL). These questions beg for institutional analysis. This will be the subject matter of the next chapter.

3. From principles to institutions

3.1 SETTING THE SCENE FOR THE DEBATE

By criticizing PEP, I have argued that we have good reasons to impose substantive or outcome-related limits on the political decision-making process. Many supporters of the New Constitutionalism assume that if they have a strong case for imposing substantive limits on the outcome of collective decision-making, they have already won the debate. By adding some uncontroversial premises to the argument for those limits, so the argument runs, we are inevitably led to the desirability of constitutional review. This position would be plausible, if the theories of constitutional interpretation imposed sufficiently strong limits on judicial discretion and judges could enforce the substantive limits of political decisions without making controversial value judgements, relying exclusively on their superior legal expertise. According to this view, constitutional review is legitimate exactly because judges are *not* moral arbitrators. A fundamental assumption of my argument is that this position is untenable. In the debate about the nature of constitutional interpretation I side with Ronald Dworkin, who claims that, in most cases, judges cannot avoid the moral reading of the constitution.[1] I contend that when judges apply highly abstract and value-laden human rights, they have to articulate and give more specific content to those rights and they *do* become moral arbitrators in the sense the term is explained in the previous chapter. I am aware that it would be a fatal mistake to build my case against the New Constitutionalism on an unsubstantiated assumption. However, a more sustained analysis of this question must await the discussion in the next chapter that is devoted to the problem of interpretation.

If judges do make controversial value judgements when interpreting the constitution, the desirability of substantive constitutional limits does not automatically imply the desirability of constitutional review but the latter has to be established separately. Since substantive limits are, by definition, related to the outcome of political decisions, we cannot avoid

[1] Ronald Dworkin, *Freedom's Law: The Moral Reading of the American Constitution* (Oxford University Press 1996) 1–38.

the question of institutional capacities. We have to assess which institution is more likely to make optimal decisions, and the answer to this question depends to a great extent on empirical considerations. A general political argument about the desirability of substantive limits remains inconclusive and, therefore, toothless in the debate about the legitimacy of constitutional review if it is not supplemented by a matching institutional analysis.

The theory I argued for above did not stop at advocating outcome-related limits on legitimate political decisions in general, but also specified the nature of those limits. The content of substantive limits on legislation cannot derive from any first-person singular theory of justice. Rather, these limits are legitimate only if they are publicly justified or are the reasonable interpretations of publicly justified principles. This is the fundamental consideration that will focus my inquiry and inform my institutional analysis. When we discuss the relative merits of different institutional designs, the crucial question we have to ask is whether a given institutional framework tracks better our publicly justified principles than its alternatives.

I will argue that in mature democracies, legislatures, as a general rule, are better at tracking publicly justified principles than constitutional courts, therefore, in such societies the case for strong judicial review is not compelling. My position rests on four arguments: the argument from equal participation; the epistemic argument; the argument from public reason; and the mismatch argument. These arguments will structure the present chapter. First, I will argue that a process-related consideration, the argument from equal participation, creates a strong presumption against judicial review (Section 3.2). Then I set out two outcome-related considerations to support my position, the epistemic argument (Section 3.3) and the public reason argument (Section 3.4). It is convenient to address many of the objections to my stance alongside the way I advance my own arguments. However, I will dedicate a separate section to the most forceful outcome-related consideration for judicial review (Section 3.5). Finally, the mismatch argument is neither a process- nor an outcome-related reason: its main claim is that even if the arguments of the New Constitutionalism were correct, they do not fit well with the institutional arrangement the proponents of the New Constitutionalism usually advocate (Section 3.6).

3.2 THE ARGUMENT FROM EQUAL PARTICIPATION

3.2.1 The Case against Judicial Review

Although the arbitrator conception of authority puts special emphasis on outcome-related reasons and considers the epistemic qualities of the arbitrator paramount, it does not mean that we can completely ignore the value of procedural fairness. Procedural fairness has a limited, but vital role in the arbitrator theory of authority: it helps to clarify where the burden of justification lies. I will argue that procedural fairness gives a definite edge to legislatures over courts. I am not saying that this consideration can never be outweighed. If the proponents of the New Constitutionalism could present compelling outcome-related reasons to the effect that courts produce better decisions than legislatures, we would be justified in conferring the role of moral arbitrator on courts. However, if my argument is correct, and procedural fairness gives the edge to legislatures, the burden of proof is on the advocates of the New Constitutionalism. In the absence of compelling evidence, we should vest the authority to specify the meaning of fundamental rights in legislatures.

The argument from equal participation (hereinafter AEP) consists of two parts. (1) The first comprises the two substantive tenets of PEP, that is, that (a) the demos should be inclusive: every competent permanent resident of the country is a member of the demos, and (b) the political process ought to give equal weight to the views of each member of the demos. For the sake of convenience, I will continue to refer to the principle as PEP, even though I drop the claim here that equal participation is either a necessary or a sufficient condition of political legitimacy. (2) The second component of the argument is a comparative claim about our institutions. Therefore, I will call it the Institutional Claim of Equal Participation. It contends that legislatures that make decisions by majority rule approximate better PEP than courts.

Although AEP is well rehearsed enough, the proponents of constitutional review have developed many strategies to explain it away or at least mitigate its force. Therefore, I will subject their most forceful objections to critical scrutiny. The survey of the principal objections will also sharpen our understanding of the argument itself.

3.2.2 Cancelling and Overriding Reasons

Before commenting on the merits of the objections against AEP, let me make a general point about the argumentative strategy of my opponents. An argument can be defeated in two different ways: it is either cancelled

or overridden by countervailing reasons.[2] If AEP is cancelled, it cannot lend any support to my position, as if it did not exist at all. However, if it is not cancelled, it establishes a prima facie case against constitutional review, even if in the final analysis, it can be overridden by a stronger argument. The proponents of constitutional review are often far from clear whether they claim that the process-related case is completely cancelled or is just overridden by their counter-arguments. However, this distinction has two important implications. First, if AEP is not cancelled, the proponents of the New Constitutionalism have to admit that by excluding the citizens from the specification of fundamental rights we sacrifice something important. Second, in that case they need to say something about the balancing process they suggest and give reasons how and why outcome-related arguments override the value of fairness embedded in AEP. Since this task poses considerable methodological and substantive challenges, the New Constitutionalists are often silent about this balancing exercise and seem to assume that their preferred conception of democracy simply cancels AEP. Therefore, I will address first the 'cancelling version' of the argument and call it the Cancellation Thesis.

3.2.3 Challenging the Principle of Equal Participation

Since AEP itself consists of two parts, those who attack it can challenge either PEP or the Institutional Claim of Equal Participation. I will tackle the two strategies in turn. If PEP is offered merely as a justificatory principle of our political institutions and is considered neither a necessary nor a sufficient criterion of legitimacy, it seems so uncontroversial that few proponents of constitutional review argue directly against it. As a consequence, the debate appears to gravitate around the institutional claim. However, I cannot ignore a sophisticated challenge to PEP, put forward by Ronald Dworkin, since Dworkin's conception of constitutional democracy has had an immense influence on the current debate. Dworkin starts his analysis with the following question: 'We must therefore ask what political value a statistical conception of democracy, interpreted as requiring a majoritarian function, serves. Why should we want a form of government in which collective decisions are all and only those that are supported by most people?'[3]

---

[2] Joseph Raz, *Practical Reason and Norms* (Princeton University Press 1990) 27.

[3] Ronald Dworkin, 'Equality, Democracy, and Constitution: We the People in Court' (1990) 28 *Alberta Law Review* 324, 331.

He dismisses the epistemological case for democracy out of hand and suggests that the only plausible justification for the 'majoritarian function' should root in the idea of equality and fairness. Equality and procedural fairness applied to collective decision-making require, so the argument runs, that we should give *equal power* to each member of the political community. However, the idea of equal power is too indeterminate and is compatible with at least two different interpretations. It can refer to either *equality of impact* (where someone's impact is 'the difference he can make, just on his own, by voting for or choosing one decision rather than another'[4]) or *equality of influence* (where influence means 'the difference he can make not just on his own but also by leading or inducing others to believe or vote or choose as he does'[5]). Dworkin focuses on the latter, since he believes that this is the one that poses a more serious challenge to his theory. However, he points out with a characteristically elegant argument that equality of influence is not only a highly unrealistic but also an unattractive political ideal. This line of analysis suggests that if we subject PEP to closer scrutiny, the attractive idea that the opponents of constitutional review refer to simply evaporates.

It is not necessary to spell out Dworkin's argument against equality of influence in more detail, since I do not want to challenge it. This principle is indeed unrealistic and unattractive. However, I believe that Dworkin is too quick to dismiss the principle of equal impact. He criticizes this principle for not being demanding enough: 'Equal impact does require that each competent citizen have a vote and the same vote, and it also requires one-person-one-vote districting.'[6] But, Dworkin adds, a full-fledged democracy needs more than that. Democracy also presupposes freedom of speech and association, and a fair access to the media, among other things. The upshot of the argument is that 'we need reach beyond the idea of equal impact'[7] to explain why these structural features are also indispensable to a proper democracy.

The point I wish to make is that Dworkin's argument proves at best that equality of impact is not sufficient for a well-functioning democracy. It does not show that equality of impact is not necessary or at least not vitally important. So, if the structural features mentioned above by Dworkin can be secured only by compromising equality of impact, then, contrary to Dworkin's claim, we have to sacrifice something important.

---

[4] ibid 332.
[5] ibid.
[6] ibid 333.
[7] ibid 333.

The objector might accuse me of missing Dworkin's fundamental point, since the principle of equal impact is part and parcel of what Dworkin calls the statistical conception of democracy.[8] As is well known, Dworkin argues that this notion should be replaced by a more attractive interpretation of democracy, what he calls the communal or constitutional conception.[9] Overall, I am highly sympathetic to the principles behind Dworkin's constitutional conception of democracy. In fact, my critique of PEP has also relied heavily on the Dworkinian idea of political community and its correlative concept of membership. It is, therefore, important to clarify whether my argument becomes incoherent by picking bits and pieces from the two rival conceptions of democracy.

I submit that nothing in my reasoning above commits me to what Dworkin calls the statistical conception of democracy. The same argument I developed above makes perfect sense within the framework of constitutional democracy preferred by Dworkin. (Actually, I find it much easier to convey my message in the latter conceptual framework, where Dworkin explicitly mentions participation.) Dworkin argues that constitutional democracy requires moral membership in the community and membership has three conditions: the principle of participation, the principle of stake and the principle of independence. In such a democracy, people can participate in the political decision-making process. 'No one counts as part of a collective agent unless he is in a position to make a difference to what the collective agent does'[10] (the principle of participation). However, people are not proper members of the political community if their interests are ignored continuously or sacrificed by others and they are not treated as members by others (the principle of stake). But it is also a structural precondition of an attractive account of democracy that people should be left to form independent judgements about moral and political issues and their beliefs should not be dictated by the community (the principle of independence).[11]

The point I have made above about the equality of impact can be easily recast as an argument about participation. Even if participation is not sufficient to make a political system a full-fledged democracy, it is one of the criteria that define membership. The communal conception does not eliminate PEP and does not remove the potential conflict between process-related and outcome-related considerations. Instead, it explicitly endorses the principle of equal participation and thereby internalizes the

---

[8] ibid; Dworkin (n 1) 19.
[9] Dworkin (n 1) 17.
[10] Dworkin (n 3) 338.
[11] Dworkin (n 1) 24–5.

possibility of conflict between the three criteria of membership. Neither Dworkin nor those who build on the Dworkinian conception of communal (or constitutional) democracy address properly the possibility of this internal conflict between the criteria of membership. They tend to focus exclusively on Dworkin's view that participation is not *sufficient* for a full-fledged democracy to exist. However, Dworkin also says that participation is an important criterion of membership.

It might be the case that we should override PEP to realize the other two constitutive principles of communal democracy, but in that case we have to sacrifice something and pay the price for a solution that is better overall. Whether Dworkin characterizes the underlying principle as the principle of equal impact that forms part of a statistical conception of democracy, or as the principle of participation that forms part of the communal conception of democracy, his argument falls short of proving that the principle under consideration is irrelevant or, when we deviate from it, we are not required to compromise an otherwise attractive consideration. My argument leads to the same conclusion within the framework of the constitutional conception that I reached relying on the statistical notion: if the critics of constitutional review are correct and parliaments indeed come closer to the ideal of equal participation, the argument creates a strong presumption against judicial review, irrespective of whether it can be, in the final analysis, rebutted by countervailing outcome-related considerations.

Let me make a final comment on Dworkin's critique of majoritarian democracy. Although the aim of Dworkin's essay is to justify constitutional review, his argument moves exclusively on the level of political principles and says virtually nothing about political institutions. Even if we have good reasons to accept that a full-fledged conception of democracy is not exhausted by the principle of participation, it does not follow without further arguments that constitutional review is justified. Jumping from the attractiveness of the communal concept of democracy to the desirability of constitutional review is unwarranted. We have no reason to believe that parliamentary decision-making would be obviously incompatible with either the principle of stake or the principle of independence. Similarly, we do not have a priori reason to suppose that courts will always respect those principles. They can be violated both by legislatures and by courts, and a breach of either principle is as objectionable by the latter as by the former.[12] Therefore, the justification

[12] In fact, Dworkin admits that the possibility of error is symmetrical. ibid 33.

of judicial review requires more than an abstract argument about the principles of membership. It also has to establish that courts are more likely to realize or secure those principles and this claim is contingent upon the capacities of the different institutions.

By contrast, if the Institutional Claim of Equal Participation is correct, we regularly compromise PEP by excluding citizens from a set of crucially important collective decisions. We would consider it highly problematic if citizens (or their representatives) were not allowed to participate in the constitution-making process that defines their fundamental rights. We would also find it highly questionable if citizens were not allowed to take part in the normal law-making process. It is, therefore, doubtful why we should consider it entirely unproblematic if citizens are excluded from the specification of fundamental rights.

3.2.4 Challenging the Institutional Claim of Equal Participation

Perhaps the answer to all the questions I posed above is that, although the equal impact or the equal participation of citizens is indeed important, contrary to common opinion, legislatures do not approximate the principle better than courts; the Institutional Claim of Equal Participation does not stand up to closer scrutiny. The proponents of constitutional review present a whole variety of arguments to challenge the superiority of legislature in the dimension of procedural fairness. I will address three versions of that claim.

3.2.4.1 Courts track public opinion

The first version of the argument suggests that it is a misconception that courts are anti-majoritarian institutions. On the contrary, so the argument runs, they follow public opinion quite closely. Therefore, procedural fairness does not give any advantage to legislative bodies.

For a start, it is important to note that even if this strategy seems promising to the New Constitutionalists, it can hardly offer a universal argument for judicial review. As Robert Dahl pointed out a long time ago, there are good systematic arguments to the effect that constitutional courts cannot be *very insensitive* to public opinion and cannot deviate from it too much or for a long time.[13] But these mechanisms do not explain why courts would be *particularly sensitive* to the views of the majority. The correlation between judicial decisions and public opinion is

[13] Robert A Dahl, 'Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker' (1957) 6 *Journal of Public Law* 279.

contingent and context-dependent. Since it can vary from one legal system to another, it has to be established case by case.

In addition, the evidence that supports the empirical claim is hardly overwhelming. Even Armen Mazmanyan, who pushes this argument perhaps to the furthest, admits that the empirical evidence that underpins the claim comes primarily from the United States.[14] Of course, every constitutional lawyer can cite dozens of cases in which the representative majority departed from consolidated public opinion, but these case studies are incapable of establishing that courts *in general* track public opinion as faithfully as legislatures.

Mazmanyan, for instance, calls the Hungarian Constitutional Court's (hereinafter HCC) approach *paradigmatic* and relies extensively on the jurisprudence of this institution to back up his general claim.[15] However, I find even the case that he calls paradigmatic singularly unconvincing to support his sweeping conclusion. To start with, his characterization of the HCC fits very uneasily with the image the HCC wanted to portray about itself.[16] Mazmanyan is correct to point out that the public in Hungary greeted the HCC's decisions that invalidated some parts of the government's austerity programme in 1995. However, most of the court's decisions were based on technical details and did not challenge the fundamental features of the government's policy. This also poses a methodological challenge to Mazmanyan's position: a decision that is favourable to the public does not prove that judges also endorse the policy view favoured by the majority, let alone that they were motivated by it. But even if we set aside this difficulty, there is no evidence to back up Mazmanyan's contention that the court 'manifestly took the side of the public in the uneasy controversy over unpopular reforms that marked the transition to a market economy'.[17] It is even more far-fetched to jump to the conclusion that the HCC had an excellent record of tracking public opinion in general.

---

[14] Armen Mazmanyan, 'Majoritarian Countermajoritarian Courts: Introduction' in Patricia Popelier, Armen Mazmanyan and Werner Vandenbruwaene (eds), *The Role of Constitutional Courts in Multilevel Governance* (Intersentia 2013) 171.

[15] ibid 174.

[16] László Sólyom, 'Az Alkotmánybíróság önértelmezése' [1996] *Jogtudományi Közlöny*, 6.

[17] Mazmanyan (n 14) 174. In addition, the measures Mazmanyan is talking about had very little to do with the transition to a market economy. By 1995, Hungary was already a market economy, and the HCC invalidated some elements of the government austerity package.

However, let us grant that the claim that courts follow public opinion as sensitively as legislatures is supported by robust evidence. Does it prove that the adjudicative process comes as close to the realization of PEP as the political one? I would answer this question in the negative. Being majoritarian in the above sense is not the same as satisfying the criterion of participation. Let me introduce a very simple stylized example that I will tweak later to make a more relevant comparison. Let us imagine two countries and call them the Black Republic and the White Kingdom, respectively. In the Black Republic, the most important decisions are made by the assembly that all competent adults can attend. By contrast, the White Kingdom is governed by a benevolent monarch who is particularly sensitive to public opinion. Let us imagine further that the citizens of the two countries have exactly the same preferences and, therefore, the assembly of the Black Republic has so far always reached the same conclusion as the benevolent monarch of its neighbours. To put it differently, the political institutions of the two states are, *ex hypothesi*, equally majoritarian.

Even if the political institutions of the two countries track public opinion with the same accuracy, we have strong reasons to prefer the institutions of the Black Republic. The first reason is instrumental. Although the monarch of the White Kingdom is benevolent and has tracked public opinion accurately up until now, his subjects do not have any guarantee that he will also take public opinion into consideration in the future. And even if he himself remained benevolent, it would not guarantee that his heirs will act similarly. The decision-making process and the outcome are only contingently related to each other. Second, and more importantly, there is a crucial difference between the status of the populace. The residents of the White Kingdom are subjects whose preferences are taken into consideration, but they do not participate in the decision-making process. The political system of the White Kingdom, to use Richard Bellamy's words, denies its subjects the 'equal status as right-holders to play an equal part in defining and defending their rights on an equal basis with others'.[18] The White Kingdom satisfies the Dworkinian principle of stake but falls short of satisfying the Dworkinian principle of participation. Or to use Robert Dahl's conceptual framework, the two countries meet the criterion of Equal Consideration to the same extent, but only the Black Republic satisfies PEP.

---

[18] Richard Bellamy, *Political Constitutionalism: A Republican Defence of the Constitutionality of Democracy* (Cambridge University Press 2007) 98.

Although it is not without significance that constitutional courts are not countermajoritarian institutions (provided that the evidence supports this claim), this fact alone cannot compensate for the advantage of legislatures in the procedural dimension.

3.2.4.2 Courts have democratic pedigree

The New Constitutionalists would rightly object that the relationship between the imaginary Black Republic and the White Kingdom in my example is not analogous to the real-life relationship between legislatures and constitutional courts. First, the authority of our imaginary monarch in the White Kingdom was based on the hereditary principle and could not be traced back to the people. By contrast, constitutional courts are certainly democratic institutions in the sense that their authority derives in the final analysis from the people. Second, courts are also less dangerous than absolute monarchs since they do not have the power to enforce their decisions against other institutions. Third, although our fictitious king is benevolent to his subjects, they have no guarantee that he will always stick to that practice. By contrast, the democratic appointment process and the lack of actual power make it highly unlikely that a court would ignore public opinion in the long run.[19] That is, courts' sensitivity to public opinion is partly explained by systemic institutional rather than contingent personal factors.

These observations are certainly correct; however, the above differences do not invalidate my principal objection. Democratic pedigree in itself does not amount to democratic participation. History knows many dictators who had seized power in democratic elections but became dictators afterwards, excluding the people from the political process. But it is not necessary to evoke the example of infamous dictators to illustrate my point. The governing bodies of national banks, for instance, can usually also trace back their legitimacy to the people but we seldom think of them as democratic institutions. It would be far-fetched to claim that citizens somehow participate in the bank's decision-making process. Democratic pedigree is therefore only one dimension in which an institution can be considered democratic, but we should not equate it with participation.

3.2.4.3 The limitations of representative democracies

My hypothetical case offers, however, a much more promising line of argument to the advocates of constitutional review. They can challenge

---

[19] Dahl (n 13).

not only the analogy between hereditary monarchs and constitutional courts but can also point out the essential differences between the assembly of my fictitious Black Republic and modern day representative democracies. Unlike the citizens of the Black Republic, the citizens of our contemporary democracies do not literally participate in the determination of the content of rights. This limitation is not even a contingent deficiency of some governments, but an inherent feature that belongs to the very nature of representative democracies. The proponents of the Cancellation Thesis have two options at this juncture. They could maintain that whatever the virtues of our representative democracies are, the involvement of citizens in the political process does not qualify as participation in the proper sense. Therefore, procedural fairness does not give an edge to legislatures. Alternatively, they could argue that although citizens do participate in a certain sense in the decision-making process, this participation is so diluted that there is no qualitative difference between legislative and judicial bodies in that respect. The contrast between democratic legislatures and undemocratic courts is unwarranted; what seemed to be black and white reflects in fact only the different shades of grey.

I would reject both of the above arguments. I submit that the way representative democracies empower citizens can be considered participation in a meaningful sense of the word. Although it is unfortunate to contrast democratic legislatures with undemocratic courts, I also claim that there are clear qualitative differences to what extent legislatures and courts approximate PEP. To clarify my position, I do not claim that the level of participation representative governments provide to their citizens is optimal or the best we can achieve. It is clearly not. However, to establish a presumption in favour of representative institutions, we do not have to prove that they are optimal or perfect; it suffices to establish that they have a clear comparative advantage over courts in the dimension of participation.

Although the two claims I made above are not entirely uncontroversial, I believe that it is very difficult to reject them without also rejecting the whole idea of representative democracy. Therefore, some of my readers might have the impression that the following sections just belabour the obvious by cataloguing a couple of well-known features of representative democracies. However, since most proponents of the New Constitutionalism argue as if the introduction of constitutional review did not have a price tag in moral terms, I have to take this line of argument seriously.

The key to both of my above claims can be found in the idea of representation: on the one hand, I contend that the notion of representation can account for what I call here meaningful participation. On the

other hand, it also explains the qualitative difference between legislatures and courts.

I do not subscribe to the view that representative democracy is nothing more than the approximation of government by the people in large-scale political communities. Still, the commonplace is true: in large political communities, the demos cannot exercise its power directly, at least not on a regular basis. Therefore, equal participation should be analysed in the context of how the rulers are selected and what types of links exist between the rulers and the ruled. In this context, it is not surprising that the argument almost always focuses on how citizens can participate in the process of selecting *others*. But before addressing this issue, we should not dismiss the fact that in an inclusive democracy every adult has the right to run for office.

I assume that this point leaves many people unconvinced that representative democracies offer the proper opportunity for participation. However, it is important not to conflate the admittedly existing inequalities and unfairness of our electoral systems with the limitations of participation that are inherent in modern mass societies. My chances of winning in the lottery are so slim that I do not even consider buying a ticket. However, the extremely slim chances of winning do not make the game unfair in any way and do not negate my right to participate in the game on equal terms with others. Similarly, it belongs to the nature of large-scale political communities that the chances of becoming an MP are minuscule. However, the same would be true even if MPs were selected by lot instead of election. And unlike buying a lottery ticket, running for an office requires a substantial amount of time and energy that most of us are not willing to sacrifice. Because of the combined effect of the lack of political ambition and the slim chances of winning, most people do not even consider the possibility of running for an office.

Once again, I admit that the competition for political offices is often unfair. I even concede that some of this unfairness cannot be removed or mitigated. To give a banal example, good-looking people have more chance of winning, but even if this is unfair, voters cannot be instructed to disregard the look of a candidate. But, we must add that not all inequalities are unfair. Other things being equal, a candidate who works harder than her opponent has better chances of winning. The political process also gives people the possibility of influencing their chances to some extent. One might prefer to stand as an independent candidate for an office or under the banner of a small party. Others opt for joining an established party that gives them a much better chance of winning an office, but not without some compromises. But the crucial point is that we have to put all these inequalities into proper perspective. Despite the

inequality of our chances of winning in the political competition, we have an equal right to run for office. In the adjudicative process, there is simply no equivalent of this right. So all the deficiencies mentioned above notwithstanding, the political process is clearly superior to the adjudicative one in one dimension of participation. The right to compete for an office, that is, a share in the decision-making authority is an important dimension of participation.

Turning now from the perspective of becoming a ruler to the relationship between the rulers and the ruled, the most obvious difference between legislators and judges is that legislators are almost always elected in modern democracies, while judges, as a general rule, are appointed by the elected branches. In some cases, even this link to the democratic process is highly tenuous, since the appointment process is dominated by the legal profession itself.[20] I believe, however, that we should resist the temptation to rely too heavily on a formalistic legal distinction between election and appointment. More important than election per se is that election is part of a more complex relationship, what is called representation.

According to the mandate theory of representation, MPs carry out the wishes of their electors. If this were an accurate description of what MPs do, it would be easy to pin down the normative significance of the election–appointment distinction. However, no one can seriously claim that this description applies to the representative democracies we live in. MPs are certainly authorized by their electors but the former do not execute the instructions of the latter. However, as I argued above, judges also have proper democratic pedigree, that is, they are also authorized in the final analysis by the people. I am not saying that there is no normative difference between election and appointment; the number of transmissions surely matters. Legislators trace back their authority directly to the people while the authorization of the judges is indirect. But this difference alone does not seem to me decisive.

I believe that the most significant differences lie not in the distinction between appointment and election per se, but in other aspects of the relationship between the rulers and the ruled. Neither 'being authorized by the people', nor 'carrying out the wishes of the people' describes properly the kind of relationship that characterizes the representative systems we are familiar with. This chimes well with Hanna Pitkin's

---

[20] Kate Malleson, 'Appointments to the House of Lords: Who Goes Upstairs' in Louis Blom-Cooper, Brice Dickson and Gavin Drewry (eds), *The Judicial House of Lords: 1876–2009* (Oxford University Press 2009) 115.

classic analysis of the subject that holds that representation assumes both that a representative has independent judgement and that she is responsive to the wishes of those whom she represents.[21] Although legislators do not carry out the wishes of their electors, the characteristic institutional features of representative democracies provide important mechanisms that create a powerful link between the preferences of the citizenry and the acts of the politicians. Three mechanisms deserve special mention here.

First, politicians are expected to make their policy preferences public and people can choose between the candidates in light of those preferences. The fact that people very often do not choose between candidates on the basis of their political manifestos does not change the fact that very often they could do this. Besides, we should not entirely underestimate the role of ideologies that serve as shortcuts for the electors.[22] They help voters to anticipate the decisions of politicians, even if they are not familiar with the party's detailed policy preferences. It is also true that politicians often lie about what they would do if they were elected or prefer to remain silent on policy measures that are believed to be unpopular. Also, they often face decisions that they just could not anticipate when they came into power. However, in a competitive political system with a well-functioning press, we have considerably robust institutions to make these preferences known to the public and scrutinize them. More importantly, we should put all the existing defects of this mechanism into proper perspective: we simply do not have anything similar to scrutinize the political preferences of judges. In many countries, the appointment is deliberately insulated from politics; public hearing is not part of the selection process, and it would be considered quite improper to ask judges about their policy preferences. Even where there is a public hearing and politicians raise policy questions, judges can easily choose to focus on the more technical, legal aspects of a controversial issue.

Second, as Carl Schmitt argues, the people exists not only *anterior to* and *above* the constitution as the source of constitutional authority, and *within* the constitution exercising constitutionally regulated powers but also *next to* (*neben*) or *compared with* the constitution as bearer of public

---

[21] Hanna Fenichel Pitkin, *The Concept of Representation* (University of California Press 1967) 154–6.

[22] Gerald F Gaus, *On Philosophy, Politics, and Economics* (Thomson Wadsworth 2008) 180.

opinion.[23] To spell out this somewhat enigmatic Schmittian idea, we can say that the demos does not cease to exist after it conferred its authority to the representatives. There is a dynamic relationship between the acts of elected representatives and public opinion, the voice of demos. The public can make some issues political, can feed the political process with ideas and control politicians. As Bernard Manin says, public opinion is the 'counterpart to the absence of the right of instruction'.[24] As he points out, contrary to the Hobbesian idea of absolute representation, where citizens cannot have other voice than the voice of their representatives, in our political systems the representative does not entirely replace the represented. 'Freedom of public opinion keeps open the possibility that the represented might at any time make their own voices heard. Representative government is, thus, a system in which the representatives can never say with complete confidence and certainty "We the people."'[25]

Third, apart from promises given in the past, and the public opinion that informs politicians in the present, perhaps the strongest incentive for legislators to pay attention to the demos is the prospect of re-election. The contrast with the courts is quite stark here. Judges are not accountable to the public in a similar way and cannot be punished in the next election if they deviate from the views of the populace. To sum up, although legislators are not the agents or proxies of their electors, the notion of representation is not exhausted by the fact of being elected either. Representative democracies have mechanisms that create a robust relationship between the views of the public and politicians, even if the former do not literally participate in the decision-making process and cannot instruct the latter.

Some advocates of constitutional review argue that the adjudicative process offers the possibility of participation even to those people whose voice would not be normally heard in the political process.[26] I have no reason to challenge this claim. It is true that in the normal political process the voice of some unrepresented or under-represented minorities will be lost. This is a problem that should be taken seriously and I will tackle this issue under the heading of majoritarian malfunction in subsection 3.5.1. However, this consideration is hardly strong enough to undermine my general claim that the argument of equal participation

---

[23] Carl Schmitt, *Constitutional Theory* (Duke University Press 2008) 268–79. 'Compared with' is the official English translation.

[24] Bernard Manin, *The Principles of Representative Government* (Cambridge University Press 1997) 170.

[25] ibid 174.

[26] See, for instance, Aileen Kavanagh, *Constitutional Review under the UK Human Rights Act* (Cambridge University Press 2009) 339–44.

gives a clear edge to the political process. The above argument has two related weaknesses.

First, it treats participation as a monolithic concept. The adjudicative process does not simply give an additional channel of the same form of participation as the political process. It is important to see that the political process offers not only many channels to, but also different types of, participation. When someone runs for an office, she is competing for a share of the government's decision-making authority. For the rest of us who do not want to run for an office, participation primarily means being represented. But the political process also provides us with a whole variety of alternative forms of participation.

'Being heard' can be properly considered as one form of participation, and it is true that by amplifying the voice of some vulnerable minorities the adjudicative process is occasionally superior to the political process in that dimension. However, 'being heard' should not be confused with having (or competing for) a share in the decision-making authority or being represented. Judges are supposed to hear and make a judgment on the parties' interests. They are not supposed to 'act for' the views and values of the parties in the same way as representatives are supposed to act for the views and values of their electors. Even if an MP is not bound by the wishes of their electors, her role obligation goes beyond taking into consideration her electors' interests, values and views as a neutral observer. They are supposed to support those opinions and interests actively; 'acting for' her constituency is at the heart of the idea of representative democracy.[27] The fact that the adjudicative process is occasionally superior to the political process in one dimension of participation cannot compensate for the complete lack of the other dimensions of participation.

Second, although the proponents of the argument consider this form of participation *supplementary* to the normal political process, it is important to see that by conferring the decision-making authority on courts rather than legislatures we might make some people be heard, but at the same time prevent all others (except some judges) from participating in the decision-making procedure, either by having a share in the decision-making or being represented in it. 'Being heard' by judges does not supplement, but *replaces* other, more robust forms of participation in the specification of the content of fundamental rights.

Since many readers might find the picture of the political process offered by the foregoing analysis utterly naive and rosy, let me conclude this subsection with two general comments on the issue.

---

[27] Pitkin (n 21) 112–43.

First, the advocates of constitutional review are right to point out that, apart from the inherent limitations of participation in representative democracies, there are many flawed democracies that fall short, some of them miserably short, of the above ideal of the political process. As an implication, the idea of meaningful participation is a matter of degree and can be realized to a lesser or a greater extent. However, it does not follow from this that courts are superior institutions evaluated by PEP. What follows is that in flawed democracies the comparative advantage of legislatures is much less evident and the presumption against constitutional courts is easier to rebut.

Second, it is impossible not to recognize how many people are disillusioned with the political process even in mature democracies. However, it is important to see that when and to what extent the legislatures fail, they fail as representative institutions. Citizens might be less disillusioned with courts than with legislatures and our real-life courts might approximate better what we expect from an exemplary court than our real-life legislatures approximate what we expect from an exemplary legislature. But this does not make courts better representative institutions and does not give them an advantage in the dimension of equal participation.

Citizens can and do regularly criticize politicians for not being responsive enough to their interests or for departing from their pledges made during an election campaign, that is, for not being representative enough. This is not the way we usually criticize courts. Judicial decisions are often criticized for being motivated by reasons that are not explicit in the decision, for being poorly argued, for being unjust or for being out of touch with reality, but they are seldom criticized for not being representative. One of the emblematic figures of the New Constitutionalism, Justice Barak, the Chief Justice of the Israeli Supreme Court, sums up my whole point with exceptional clarity:

> Judges are not elected by and do not answer to the people the way that members of the legislature are and do. To be appointed, judges are not required to present a social platform that they intend to realise in the courtroom, and their term in office is not terminated when they fail to meet the people's expectations … Exercising judicial discretion, judges should not be viewed as 'representing' or 'accountable to' the people. Judges must stay 'above politics' and be constantly aware of that position.[28]

---

[28] Suzie Navot, 'The Israeli Supreme Court' in András Jakab, Arthur Dyevre and Giulio Itzcovich (eds), *Comparative Constitutional Reasoning* (Cambridge University Press forthcoming).

Most judges and advocates of constitutional courts believe that judicial decision-making is superior to its legislative counterpart as far as human rights are concerned *because* judges are insulated from the political process. The New Constitutionalists might be even right to claim that the superior outcomes generated by the adjudicative process outweigh AEP. However, it would be very surprising if, contrary to all these deliberate efforts to insulate judges from the political process, courts would be on a par with legislatures as far as the ideal of equal participation is concerned. If I replace democracy with procedural fairness, I have no reason to disagree with Robert Dahl's conclusion: 'But no amount of tampering with democratic theory can conceal the fact that a system in which the policy preferences of minorities prevail over majorities is at odds with the traditional criteria for distinguishing a democracy from other political systems.'[29]

3.2.5 Overriding the Argument from Equal Participation

If PEP is an attractive political ideal and representative institutions have a clear comparative edge over courts in the procedural dimension, AEP is not cancelled. As a consequence, the burden of justification is on the advocates of constitutional review: they are expected to explain why and how outcome-related considerations outweigh procedural fairness. Reaching this junction in the argument, we must notice that the Cancellation Thesis avoids the notoriously difficult question of balancing by defending a highly counter-intuitive and implausible position. Only by this way can one argue that there is nothing problematic in excluding citizens from a set of crucially vital moral decisions. The overriding version of the New Constitutionalist argument gives up the above-mentioned counter-intuitive view. But this way it becomes more vulnerable to the objection that its position rests on an ultimately questionable balancing act between procedural fairness and outcome-related considerations. Although we know much about *what* the advocates of constitutional review throw into the other side of the scale, we know very little about *how* they balance the conflicting considerations.

Of the few authors who say something about this balancing exercise, Aileen Kavanagh's position deserves special attention. She ingeniously translates this balancing exercise to the language of rights. To simplify the issue, one could say that the right to vote is the most important right that embodies PEP. So the point she makes is that the franchise is only

---

[29] Dahl (n 13) 283.

one of our cherished rights and many people value other rights much higher. Therefore, there is no reason to give such a privileged status to the right to vote at the expense of other rights as the opponents of constitutional review would like to see. As she says, '[a]lthough we care about popular participation in public decision-making, it is not the only thing we care about. … We also care deeply about the outcomes of those procedures i.e. whether democratic decision-making delivers good, sound, fair, just decisions which benefit the country and its citizens.'[30]

Although she is certainly correct to claim that the franchise is not necessarily the most important right, I do not believe that this argument captures accurately the nature of the balancing exercise we face here.

First, if AEP is correct, then removing the authority to specify human rights from the political process and transferring it to constitutional courts implies the systematic, direct and imminent sacrifice of the principle of equal participation, since the above transfer of authority directly and automatically excludes the overwhelming majority of citizens from one set of vital political decisions. Let us call this the process-related cost of constitutional review. By contrast, if we confer the role of the arbitrator on legislatures instead of courts, we do not *directly* violate the rest of our rights; their breach is only a remote possibility. Hence, what the proponents of the New Constitutionalism have to establish is only indirectly related to the value of rights (or how deeply we are concerned with different rights). They are required to substantiate, first of all, that judges will give stronger protection to our 'other rights' than legislatures. However, this is not sufficient. To win the argument, they have to make two additional comparative claims. First, they have to assess *how much better* courts will protect the rights in question. We can call this the benefit of vesting the authority of moral arbitrator in courts. Second, they have to compare the costs and benefits of their proposed institutional design. Constitutional review is justified if, and only if, the contingent benefit in the outcome-related dimension outweighs the certain cost in the dimension of participation. I understand why the adherents of constitutional review believe that courts will protect human rights better than legislatures. However, I do not see how one can confidently claim that the cost/benefit analysis tips the scale in favour of constitutional review.

I also have a related, but distinct reason to disagree with Kavanagh's position. To summarize my point succinctly, the value of a right to the

---

[30] Kavanagh (n 26) 373.

right-holder (whatever it means) does not necessarily reflect its importance for the purposes of institutional design. It is certainly intelligible for Amy to say that she values her right to privacy higher than her right to vote. But I believe that this comparison has little relevance when we face the institutional choice about judicial review. What I claim is not that the right to vote is more important than other rights, but that it has a different role in the institutional context than other rights. It belongs to a different dimension or level of politics.[31] Let me refer back to the distinction between first-person singular and first-person plural perspectives. The way we think about the importance of rights is part of our own first-person singular theory of justice. People with different conceptions of justice, for instance, will articulate the right to privacy and balance it against the public interest differently. In my above example, Amy compares the values she attaches to the right to privacy and the right to vote within her first-person singular theory of justice. However, because of the fact of moral disagreement, we need a procedure to choose from the rival first-person singular conceptions of justice. The right to vote has an important role in this process. It gives us a voice to participate in the selection or determination of our first-person plural conception of justice. We need a fair procedure of collective decision-making because we do not agree on the requirements of justice and rights. However, if that is the case, we cannot compare the value of a procedure that belongs to the first-person plural decision-making to any of the first-person singular theories of justice. The rules of the selection procedure are at a different level than the rules among which the procedure selects. Since we disagree on the content and value of rights, they do not have a fixed weight or value that is waiting for us there to be balanced against the right to vote. We need a collective decision-making process to determine how much weight we, as a political community, attribute to a certain right.

3.3 THE EPISTEMIC ARGUMENT

3.3.1 A Map to Outcome-Related Reasons

My argument so far has only established that equal participation creates a strong presumption in favour of legislative bodies. If the authority to specify the meaning of constitutional rights is conferred on unelected

---

[31] Jeremy Waldron, *Law and Disagreement* (Clarendon Press 1999) 195–8.

judges, we certainly sacrifice something important. In that case, citizens cannot participate in some of the most important decisions a political community can make. Therefore, we need robust outcome-related arguments to rebut this presumption.

Before discussing the relevant outcome-related reasons for judicial review in detail, let me make a couple of introductory remarks about the argumentative strategy my approach adopts. First, and most importantly, when someone contends that courts are superior to legislatures (or the other way around) in the outcome-related dimension, this claim can take two different forms, depending on the criteria she uses to evaluate the institution in question. On the one hand, someone can judge the performance of an organization in light of the outputs it produces. If the outputs of institution *A* are superior to those of institution *B*, so the argument runs, then she is justified in preferring *A* to *B*. Many scholars of constitutional law have strong views on whether a particular decision of a particular court was correct or not. Relying on an adequate number of decisions, such a scholar can reasonably generalize and conclude that judges are more likely to make morally correct decisions than legislators or not. The above argumentative strategy is open to the proponents of RF. Arguing from the vantage point of her own political philosophy, the rights foundationalist theorist can make such a comparative assessment. However, this approach is incompatible with the notion of reasonable pluralism and the principle of legitimacy that are the cornerstones of my theory. Even if I have considered views on many landmark constitutional cases, most of the time I cannot claim that my position is conclusively justified. My view reflects what I currently believe to be the best theory of justice and rights. However, if I take reasonable pluralism seriously and accept that my moral outlook is just one of the rival perspectives, I cannot base my institutional preferences on my own first-person singular view of justice, because that would give unfair weight to my own views of justice that other people, arguing from their own moral perspectives, have no compelling reason to accept.

But this does not mean that we cannot appeal to outcome-related considerations at all. The implication of the above limitation is that our outcome-related arguments should remain at a rather abstract level and focus on the general decision-making capacities of our political institutions. At this point, it seems to be useful to introduce a distinction between *outcome-related* and *output-based* arguments, where the latter denote a subset of the former. For instance, saying that a court is a superior decision-making institution to a legislature because it is more likely to deliver a decision that conforms to the morally sound position of abortion is appealing to an output-based consideration. By contrast, if

someone's preference for courts is based on the view that the requirement to deliver a reasoned opinion makes the decision-making process of judges superior, her position is based on outcome-related, but not output-based, considerations.

It is worth summarizing the matrix that shows how the theory of legitimacy one endorses influences the pool of arguments she can use for the purposes of institutional design. Those who endorse PEP claim to forgo reliance upon all outcome-related considerations. The supporters of RF can appeal to both process-related and outcome-related reasons, including output-based arguments. Finally, LPL takes the middle ground, since it can appeal to some, but not all, outcome-related reasons. This limitation distinguishes my position not only from many proponents of constitutional review, but also from some critics of the New Constitutionalism.[32]

Second, in the debate about constitutional courts, scholars on both sides of the divide often frame the relevant question as to whether legislative bodies *under-enforce* rights.[33] This is certainly a real danger that has to be addressed properly. However, it is crucial to be clear about what benchmark we use to assess whether an institution enforces rights properly. To make my point, let us imagine that judges are required to balance a right against the public interest (let us say, national security). Let us suppose further that under scenario *A* judges give more protection to rights, but under scenario *B* they strike a balance between rights and the public interest that is publicly justified. Even if under scenario *B* rights are under-enforced compared to scenario *A*, LPL should prefer scenario *B*, since its purpose is, by definition, to find a publicly justified system of rights, not the maximization of rights (whatever it means). The maximization of rights might be part of a reasonable first-person singular theory of justice, but this is not what our arbitrator should be after. Rights are crucially important moral considerations, but they cannot be exempted from the requirement of public justification. So within the framework of my justificatory theory, the relevant question is not which institution gives *more* protection to rights, but which institution is better at tracking a publicly justified system of rights. Even if the proponents of constitutional review were correct to claim that courts give more protection to rights than legislatures, this is not the right question to ask once we accept the limits imposed on us by reasonable pluralism.

---

[32] For a very clearly articulated output-based argument, see Wojciech Sadurski, 'Judicial Review and the Protection of Constitutional Rights' (2002) 22 *Oxford Journal of Legal Studies* 275.

[33] See, for instance, Stephen Gardbaum, *The New Commonwealth Model of Constitutionalism: Theory and Practice* (Cambridge University Press 2013) 54.

Third, to structure the discussion that follows, it is useful to make a further distinction between the various types of outcome-related arguments. Some of these arguments are related to the epistemic capacities of our institutions. Courts and legislative bodies differ in their composition, and they follow rather different procedures. Legislatures are large organizations, typically comprising hundreds of members. By contrast, the number of constitutional judges is below 20 almost everywhere but is usually much closer to 10. The members of the two institutions are also recruited differently and exhibit different kinds of expertise. These factors can be more or less conducive to collecting and processing information, evaluating evidence, pulling in and channelling external expertise, balancing the relevant considerations and justifying decisions. Courts and legislatures also give different incentives to their members, have different reward systems and value various types of behaviour. This affects how the members of these institutions are motivated to use the epistemic capacities of their respective institutions. Since we have no a priori reason to expect that the most competent decision-maker is also always the best motivated to make correct decisions, epistemic and motivational considerations can pull in opposite directions that makes it difficult to form an overall judgement on outcome-related considerations.

Finally, the limitation on the pool of arguments has also far-reaching methodological ramifications. Most studies on the legitimacy of constitutional review have been probably written by legal scholars, most notably by constitutional lawyers. The natural intellectual home of these lawyers is doctrinal legal scholarship and their bread and butter activity is analysing and critically commenting on judicial decisions. Their minds are populated by landmark constitutional decisions. Many of them specialize in a particular cluster of rights and write brilliant papers among others on whether hate speech should be prohibited, whether affirmative action is constitutional or if religious symbols can be worn in public schools. To put it another way, these scholars excel at developing a first-person singular interpretation or theory of individual rights. However, if we are to respect the limitations imposed on us by LPL, these output-inspired considerations are of very limited usefulness for the purposes of institutional design. As the previous points make it clear, our inquiry must focus on the epistemic capacities and motivational features of our institutions, and this requires a different expertise than the doctrinal knowledge constitutional scholars can usually offer. Empirical social sciences seem to be more relevant for the purposes of this inquiry than expertise on constitutional law.

3.3.2 Variations on the Epistemic Argument

Having provided a map to outcome-related reasons, the rest of this section will scrutinize the epistemic case for the rival institutional choices. In his essay, 'Equality, Democracy and the Constitution', Ronald Dworkin, discussing the value of democracy, starts his analysis with the following remark: 'We should notice, but only to set aside, an epistemological answer to that question: that the majority is more likely to be right about which political decision the community should take than any other group is.'[34]

I would suggest that rejecting the epistemic case for democracy can be the conclusion, but not the starting point of an argument. Although one can claim that there was not a consistent epistemic theory of democracy at the time Dworkin was writing, nevertheless there has been a long tradition, going back to Aristotle, that attributes epistemic advantages to collective decision-making.[35] In light of this tradition, dismissing the possibility of an epistemic case for democracy seems to be premature.

But let me approach the question first from the other angle: why do constitutional courts make better decisions than legislatures according to the advocates of the New Constitutionalism? The epistemic case for judicial review can be made in various forms and at different levels of generality. I suggest that it is worth distinguishing five possible versions of the claim. (1) The argument from the declaratory theory of constitutional interpretation suggests that the interpretation of constitutional rights requires first and foremost technical legal expertise and, therefore, it is natural to confer this authority on judges. (2) The argument that contrasts judicial reason with legislative will claims that courts are the paragons of public reasoning and represent reason in the public sphere, while legislators simply bargain with each other and aggregate preferences. (3) The argument from moral expertise claims that judges are usually better at making moral decisions. (4) The argument from rights-related expertise contends that even if judges are not better at making moral decisions in general, they are better at making rights-related decisions, and that makes them better at the specification of constitutional rights. (5) Finally, the argument from principle-related expertise states that there is a fundamental distinction between principles and

---

[34] Dworkin (n 3) 331.

[35] For an overview of this tradition, see Hélène Landemore, *Democratic Reason: Politics, Collective Intelligence, and the Rule of the Many* (Princeton University Press 2013) 53–89.

policies, and while legislators might be better at determining policies, courts are better at specifying principles.

I will relegate the argument from the declaratory theory of constitutional interpretation to the next chapter, where I will tackle the question of legal interpretation head-on. I will also ignore here (4) and (5). Although many advocates of judicial review believe that courts are especially well qualified to interpret rights and apply legal principles, these arguments are generally related to the different incentives and motivations of judges and politicians rather than to epistemic considerations. Therefore, I will reject without further argument the epistemic exceptionalism of rights-related and principle-related moral reasoning. If institution *A* is better in epistemic terms than institution *B* at making moral judgements, we have no reason to believe that *B* is epistemically superior to make moral judgements about rights and principles.[36] I will tackle the question of whether rights or principles have distinctive features in the motivational dimension in Section 3.5. This process of elimination leaves us with two versions of the epistemic claim, (2) and (3).

3.3.3 Judicial Reason versus Legislative Will

The idea that legislatures represent will and courts represent reason is not new in political philosophy; it was famously put forward among others by James Hamilton in the Federalist Papers.[37] Some contemporary commentators on judicial review echo the same idea and claim that judges reason and deliberate while legislatures bargain and make compromises.[38] This argument seems to raise a preliminary question before we can proceed with the discussion. If legislators are not moral reasoners at all, Jeremy Waldron's question whether judges are better moral reasoners than legislators[39] is based on a category mistake. So before we address the question of how good moral reasoners legislators are, we

---

[36] For a convincing refutation of this kind of epistemic exceptionalism, see Wojciech Sadurski, 'Rights and Moral Reasoning: An Unstated Assumption – A Comment on Jeremy Waldron's "Judges as Moral Reasoners"' (2009) 7 *International Journal of Constitutional Law* 25, 29–31.

[37] Alexander Hamilton, John Jay and James Madison, *The Federalist Papers* (Oxford University Press 2014) The Federalist, 78.

[38] David Robertson, *The Judge as Political Theorist: Contemporary Constitutional Review* (Princeton University Press 2010) 383.

[39] Jeremy Waldron, 'Judges as Moral Reasoners' (2009) 7 *International Journal of Constitutional Law* 2.

should clarify whether they are reasoners at all. I contend that the answer to this question is a straightforward yes.

First of all, it is important to notice that the contrast between legislators and judges can be formulated in different ways, and we should not conflate analytically separate versions of the general claim. In its most radical interpretation, the argument says that legislators do not *reason* at all. To use Cass Sunstein's term, they act upon 'naked preferences',[40] that is, preferences that are not based on reflection and are not supported by reason. If legislators do not reason at all, then it is certainly true that Waldron's question does not make much sense. In a less radical form, the argument suggests that legislators might have reasoned preferences, but they do not *deliberate publicly* about those preferences, that is, they do not subject them to public scrutiny. Still another possible interpretation of the general idea puts the emphasis on public *justification*. In virtually every sophisticated legal system judges are under an obligation to support their decisions with a reasoned opinion. Saying that legislators do not reason can mean that they do not support their decisions with similarly articulated reasoned opinion. Finally, the argument can also refer to the fact that what matters in the legislative arena is not the strength of arguments, but the number of votes.

It is important to notice that only the first interpretation of the claim makes the epistemic inquiry irrelevant. If legislators reason, that is, they reflect upon their decisions and support them with arguments, we can intelligibly subject their decision-making process to epistemic criteria. Public deliberation can make a decision better, detailed justification can make it more persuasive, but we should not confuse either of the latter with reasoning in general. It would be a fundamental error to equate the epistemic competence and performance of an institution with the process of public deliberation or the conventions of how those decisions are justified. Even if one finds the written opinions of judges more sophisticated than the justification of legislatures, epistemic competence has many other dimensions. Collecting and processing information, weighing evidence, solving problems, making predictions and channelling in different forms of external expertise are epistemic skills that are all highly relevant for the specification of human rights.

However, I believe that the reasoning-deliberation-justification distinctions do not have much significance in the present context. Legislators do

---

[40] Cass R Sunstein, 'Naked Preferences and the Constitution' (1984) 84 *Columbia Law Review* 1689.

not only reason but also collectively deliberate upon their decisions and justify them. Even a very rudimentary account of the political process makes it clear that justification is at the centre of the democratic political process. (1) In a robust democracy, political parties are expected to put forward policy alternatives in their political manifestos and try to justify those policy alternatives to the electorate. (2) The press can scrutinize those policy alternatives, and politicians are expected to defend and argue for them. (3) In a well-ordered democracy political rivals have the possibility to challenge their competitors' policies and require justification. (4) In many countries, the legislature itself is under an obligation to give reasons that support a bill that is proposed to the parliament. (5) In addition, the process of reasoning and justification begins well before political parties present their policy alternatives to the public. If parties operate in a democratic way, politicians are also required to justify their policies to their fellow party members. Although the actual practice of politicians often does not live up to these ideals, I find it extremely difficult to make even sense of many of our political institutions without the idea of justification.

I believe that part of the explanation of why people no longer believe that legislatures are deliberative institutions is the metamorphoses of representative government. Bernard Manin's influential analysis identifies three stages in the history of representative governments: parliamentarianism, party democracy and audience democracy.[41] What makes his analysis relevant for the present purposes is the insight that public deliberation has taken different forms at the three stages of this development. In parliamentarianism, that is, before the birth of mass parties, individual representatives very often literally formed their opinions in the parliament through public discussion. However, with the birth of modern mass parties, the nature of the political discourse changed considerably, since once a party took a position on a certain issue, individual representatives were bound by party discipline and could not change their minds. As Manin points out, however, discussion did not disappear but shifted to other forums, primarily to intra-party dialogues that preceded parliamentary discussion and to inter-party negotiations of coalition parties.[42] Finally, in what Manin calls audience democracy, in addition to intra- and inter-party discussions, politicians address the public directly through the media. The primary purpose of this media presence is to

---

[41] Manin (n 24) 193–236.
[42] ibid 217.

persuade the floating voter.[43] The details of these metamorphoses are beyond the scope of this book. The important point is that although it is true that the role of parliamentary debates have changed considerably, and it is also true that MPs characteristically form their opinion before parliamentary debates, it does not mean that the political process as a whole is no longer deliberative and that representatives do not offer justification for their decisions and their policies.

My conclusion is that it would be a mistake to deny the deliberative credentials of the legislative process. Turning now to the other part of the equation, it would be equally wrong to portray courts as the paragons of public reason. Most of the arguments that are meant to show that the political process is not reasoned or deliberative enough applies, to some extent, also to courts.

Just like politicians, judges can be also motivated by other factors than their publicly articulated reasons. We do not have to be legal realists to believe that the reasons they offer are sometimes only *post facto* rationalizations of decisions that they reach by following other motives. The quite impressive explanatory and predictive power of the attitudinal model of judicial decision-making suggests that judges very often make decisions following their policy preferences.[44] It is true that the attitudinal model has focused primarily on the United States, and there are many other legal systems in which there is not such a strong correlation between the political preferences of judges and their decisions.[45] However, the lack of correlation between political preferences and judicial decisions does not mean that judges are not influenced by other non-legal factors that are harder to pin down.

We also have strong evidence that judges, just like elected politicians, act strategically and make compromises.[46] Sometimes this bargaining is necessary to have a binding precedent. On other occasions, they make compromises in order to make a unanimous decision that gives additional authority to the court's decision. But they can also make strategic decisions by anticipating and factoring in the potential reactions of the other branches. When judges make such compromises, just like strategic

---

[43] ibid 232.

[44] Jeffrey A Segal and Harold J Spaeth, *The Supreme Court and the Attitudinal Model Revisited* (Cambridge University Press 2002).

[45] Chris Hanretty, 'The Decisions and Ideal Points of British Law Lords' (2013) 43 *British Journal of Political Science* 703.

[46] For an overview of the strategic model, see Lee Epstein and Jack Knight, *The Choices Justices Make* (CQ Press 1998).

voters and politicians, they misrepresent their real opinion and act upon their second-best options.

Although judicial decision-making is often idealized as a particularly deliberative process, empirical studies do not support this view. They suggest that collective deliberation has a relatively limited role in judicial decision-making. For instance, Alan Paterson, the leading authority on the decision-making process of the UK Supreme Court, notes that 'one of the curiosities of appellate decision-making is how little time is spent in collective deliberation'.[47] Richard Posner, who is also a practising judge, reaches a very similar conclusion: 'They do not deliberate (by which I mean deliberate *collectively*) very much is the real secret.'[48]

Also, head counting is not something that is limited to the political process. When judges disagree, their debates are decided not by the strength of their arguments, but by judicial votes. Hobbes's motto that *auctoritas non veritas facit legem* (authority, not truth, makes law) applies not only to legislatures but also to courts.

As a final point, let me emphasize that, although the conventions of judicial reason-giving and political justification are certainly different, it is not obvious at all that the former is superior to the latter. The more scholarly form of legal reason-giving does not mean that the process of political justification does not have advantages. For instance, if an argument of a judicial opinion is unconvincing, judges cannot be challenged at the time of opinion writing. By contrast, politicians can be instantly pressed by journalists and by their opponents to explain or elaborate upon a vague point, or back up an unsubstantiated claim with evidence.

Jeremy Waldron's question, whether judges are better moral reasoners than legislators, is not only intelligible but also inescapable for all of us who do not want to rely exclusively on process-related reasons. However, comparative institutional claims about courts and legislatures quite often tend to focus only on a couple of salient features of the political or the adjudicative process. These institutional claims are, therefore, as Waldron puts it, rather 'impressionistic'.[49] Although we do not have an agreed-upon conceptual framework to make such comparative claims, we need to make an effort to take into account as many dimensions of epistemic competence as possible. I suggest that there are four considerations that

---

[47] Alan Paterson, *Final Judgment: The Last Law Lords and the Supreme Court* (Hart Publishing 2013) 128.

[48] Richard A Posner, *How Judges Think* (Reprint edition, Harvard University Press 2010) 2. Posner also adds that this secret is a 'pretty open one'.

[49] Waldron (n 39) 3.

will undoubtedly influence the epistemic capacities of courts and legislatures: ability, diversity, numbers and procedure.[50]

3.3.4 Ability

Although sometimes we make decisions by using mechanisms that do not rely on human judgement (eg administering justice by ordeal, choosing magistrates by lot or investing money in index tracker funds), in most cases human judgement plays a central role in our decision-making process. Therefore, the performance of our institutions depends heavily on the performance of the individuals the organization is composed of. A hospital's performance is closely related to the ability of its doctors. Whether a university can produce excellent research depends heavily on the ability of its staff members. Or to use one of the favourite examples of the Greek philosophers, whether a ship reaches the harbour safely depends on the ability of the sailors and the pilot. Therefore, it has always been a central question of political philosophy who has the requisite knowledge to rule. If ability matters, it seems rational to confer the authority to rule on those who have superior knowledge. The question has been very often framed whether the state should be ruled by the many or by the few.

The proponents of democracy often appeal to two arguments to support their institutional choice. The first one contends that governance does not require one particular type of empirical knowledge. Since potentially all kinds of questions can become political, the range of required expertise varies from case to case.[51] Therefore, the analogies to physicians and shipbuilders are misleading, since these all require a relatively well-defined type of technical knowledge. Second, and perhaps most importantly, politics is not only about choosing the means to predefined ends, but also to determine the ends themselves. This choice requires not technical expertise, but moral understanding and the latter differs from the former.[52] To quote Leslie Green, 'there are experts on whales but not on whether we should save the whales.'[53]

---

[50] For a similar typology, see Adrian Vermeule, 'Collective Wisdom and Institutional Design' in Hélène Landemore and Jon Elster (eds), *Collective Wisdom: Principles and Mechanisms* (Cambridge University Press 2012).

[51] Robert A Dahl, *Democracy and Its Critics* (Yale University Press 1991) 69.

[52] ibid 66–7.

[53] Leslie Green, 'Law, Legitimacy, and Consent' (1989) 62 *Southern California Law Review* 795, 804.

Refining this picture even further, I suggest that the specification of abstract human rights provisions requires four types of knowledge: (1) moral understanding; (2) technical legal knowledge; (3) non-legal technical expertise; (4) and a residual category, let us call it ordinary life experience. I will assume that legislators and judges have the same ability in this latter category. Let me comment on the three other types of expertise briefly.

3.3.4.1 Moral understanding

I have no intention to reopen the debate about the epistemic justification of democracy or recapitulate the arguments I mentioned above in more detail. Although constitutional courts are sometimes portrayed as aristocratic institutions,[54] I will assume that the justification of judicial review takes place in a democratic framework, and the proponents of constitutional review do not claim that individual judges have superior moral expertise. If we accept this proviso, ability in moral reasoning does not give an edge to courts over legislatures to solve moral issues. As Justice Scalia expressed this idea in *Cruzan v Director, MDH*:

> The point at which life becomes 'worthless,' and the point at which the means necessary to preserve it become 'extraordinary' or 'inappropriate,' are neither set forth in the Constitution nor known to the nine Justices of this Court any better than they are known to nine people picked at random from the Kansas City telephone directory.[55]

3.3.4.2 Legal expertise

Since our question is how we should allocate the authority to specify abstract human rights provisions of a constitution, the question of legal expertise cannot be ignored. The claim I wish to defend here is that although judges are certainly very highly qualified lawyers and their legal expertise is well above that of an average MP, we have no reason to assume that the technical legal knowledge that is needed to understand human rights issues cannot be channelled into the legislative process. If that is true, MPs can rely on legal expertise that is comparable to that of judges.

Before I identify the typical channels that help to feed legal knowledge into the legislative process, let me note that there is nothing revolutionary in this idea. Although typically there are only a few doctors in a

---

[54] Jeffrey Goldsworthy, *Parliamentary Sovereignty: Contemporary Debates* (Cambridge University Press Press 2010) 11.

[55] 497 U.S. 261, 293 (1990).

parliament, we expect the parliament to enact well-crafted laws on health care and do not delegate health care legislation to doctors. The lack of atomic physicists or marine biologists in the legislative body does not have to prevent it from making competent laws on nuclear energy or deep sea fishing. That suggests that we can also expect parliaments to pass well-informed laws on human rights, even if individual MPs are much less knowledgeable on human rights law than individual judges.

As another preliminary point, it is important to note that the way we frame the question on legal expertise can have far-reaching implications on how we answer it. In a legal system with a well-established constitutional court, we can assume that the court has already developed a doctrinal edifice with hundreds of definitions, tests and distinctions. Framing the question of legal expertise in terms of knowledge of that particular doctrinal framework is obviously skewing the playing field in favour of courts. Judges are not only *experts on*, but to some extent also the *authors of* the constitution in such a legal system. The longer a judge serves on the bench, the more meaningful it is to attribute authorship to her. To level the playing field, we should not ask how well acquainted legislators are with the jurisprudence of a particular court. Rather we should ask the question as if we had a brand new constitution and we addressed the institutional choice for the first time.

So what are the channels through which legal expertise can be fed into the political process? (1) In many legislative bodies, there are a significant number of MPs who have a background in law. Although human rights law can be considered as a distinct branch of law, it is better to see human rights as requirements that permeate the whole legal system. Someone who is specialized in tax law might be able to avoid health law or planning law during her whole career. However, since human rights issues are ubiquitous, MPs will be necessarily exposed to them, and it is highly likely that MPs can develop an adequate understanding of this area of law during their career. (2) As a related point, in most legislative bodies, we will find a parliamentary committee whose members specialize in constitutional and human rights issues and develop in-depth knowledge of human rights law. (3) Most importantly, politicians can rely on the expertise of the bureaucracy. The government can employ high quality legal experts whose job is to aid the legislative process and screen the bills that the legislative body discusses. Providing only one example, many excellent lawyers, including many people who later became Supreme Court Justices, served in some form or another as legal counsellors to the President of the United States. This list includes Robert

Bork, William Rehnquist and Antonin Scalia.[56] (4) Many parliaments have a mechanism to utilize the expertise of lawyers who are independent of the government. In the final chapter of this book, I will discuss the constitutional review of some Nordic countries in more detail. For the sake of convenience, I will use the same examples here to illustrate my general point. The Law Council in Sweden is an advisory body that consists of active and retired Supreme Court Justices. The Swedish Parliament regularly relies on the opinion of that body to scrutinize the constitutionality of legislation.[57] Finland follows a slightly different method. The Constitutional Law Committee of the Finnish Parliament consists of active MPs. There seems to be a broad consensus in the literature that when the Committee was first established, its members included the best constitutional lawyers of the country.[58] Although this is no longer true, the Committee relies extensively on the expertise of high profile legal academics and, when the experts agree on a constitutional issue, the Committee almost always acts upon their advice.

3.3.4.3 Non-legal technical expertise

Human rights do not apply to a relatively well-defined area of life, but can be relevant in a whole variety of contexts. Even if one does not have to be a sociologist of religion to interpret freedom of religion, a certain understanding of religious phenomena is needed to apply the relevant clauses of a constitution. Abortion and assisted suicide cases require the knowledge of some medical or sociological facts. Anti-terrorism legislation requires judges to understand issues of national security. The examples could be multiplied endlessly. Empirical knowledge is relevant, however, not only to make sense of a legal question in general. Human rights adjudication very often requires judges to engage in a balancing exercise. Balancing presupposes that they can attribute certain weight to

---

[56] Frank H Easterbrook, 'Presidential Review' (1989) 40 *Case Western Reserve Law Review* 905, 917.

[57] Thomas Bull and Iain Cameron, 'Legislative Review for Human Rights Compatibility: A View from Sweden' in Murray Hunt, Hayley Jane Hooper and Paul Yowell (eds), *Parliaments and Human Rights: Redressing the Democratic Deficit* (Hart Publishing 2015).

[58] Kaarlo Tuori, 'Landesbericht Finland' in Armin von Bogdandy, Christopher Grabenwarter and Peter M Huber (eds), *Handbuch Ius Publicum Europaeum. Volume VI–VII. Verfassungsgerichtsbarkeit im europäischen Rechtsraum* (CF Müller forthcoming); Länsineva Pekka, 'The Constitutional Committee of Parliament: The Finnish Model of Norm Control' in Maija Sakslin (ed), *The Finnish Constitution in Transition* (Hermes-Myynti Oy: Finnish Society of Constitutional Law 1991).

conflicting considerations. But the weight they attribute to a consideration often depends on how they estimate the likelihood of future events. To exemplify this vague and general argument, in assisted suicide cases, judges often balance the interests of privacy against the potential abuses that would follow from the legalization of assisted suicide. The gravity of the danger cannot be assessed independently of the likelihood of abuses. My point is that in that case a moral argument makes an empirical consideration directly relevant. I do not see any reason why judges would have superior knowledge of these kinds of empirical considerations than legislators. I would go even further, and argue that we have at least some reasons to believe that on such empirical questions a legislative body has more expertise than a court.

Let us suppose that a human rights issue arises about a new medical technology. Presumably, the parliament is not full of medical doctors or scientists, but there is a good chance that at least some people have a solid professional background in the relevant disciplines. In addition, parliaments all around the world have specialized committees, so it is highly likely that we will find a committee the remit of which covers the medical or technological aspects of the human rights issue. For instance, in the UK both the House of Commons and the House of Lords have a Science and Technology Committee and the members have the kind of expertise that is likely to be relevant for the issue and probably goes well beyond that of senior judges. If we assume that non-expert MPs have roughly the same knowledge as non-expert judges, the special expertise of some MPs tips the balance of arguments in favour of the Parliament. It is not unreasonable to expect that at least some MPs will defer to the opinions of their more knowledgeable colleagues on these issues. By deferring to the expert committee members on these technical issues, the average ability of MPs will significantly increase.

To sum up my argument, I assumed that within the framework of democratic theory judges cannot claim superior moral expertise. Although their legal expertise is certainly superior to that of individual MPs, we have no reason to believe that the legislative process would be unable to mobilize legal expertise that is comparable to that of judges. Finally, I have argued that parliaments have a systematic advantage in the field of non-legal technical expertise. So the question of comparative ability seems to be very much context sensitive and depends on both the nature of the issue at hand and the contingent features of the particular legal system. Although courts can outperform legislatures, it is not unrealistic to assume that under some circumstances legislatures score higher even in the dimension of ability than courts. For instance, one can imagine a situation where the power of judicial review is vested in a

generalist Supreme Court, and human rights cases constitute only a small percentage of the court's case load. On the other hand, the legislature can rely on the best constitutional experts. In this case, it is not unreasonable to assume that the legislature can outperform the courts.

3.3.5 Diversity

Today, Lionel Messi is widely considered the best football player in the world. However, probably few people think that the best possible football team would consist of 11 Lionel Messis. Perhaps everyone would agree that our dream team would need a goalkeeper. Some would also add a couple of defenders to the list, and since Messi is not especially tall, I would also replace one Messi with a taller forward. So although it would be great to have more Messis on our team, at a certain point the diversity of abilities is more important than the level of individual ability. The lesson is that the best way to maximize the performance of a team is not necessarily to maximize individual abilities. The same logic might apply to the epistemic performance of our institutions. The ability of group members is only one aspect of a group's epistemic performance.

Before I would proceed with my argument, it is important to address a conceptual point. My example is predicated on the idea that ability and diversity are distinct concepts and they potentially pull in opposite directions. Erika Rackley, in her excellent book on judicial diversity, argues that – at least in that limited context – ability (for the sake of argument we can use merit and ability interchangeably here) and diversity are in complete harmony. 'If we want the best possible judiciary, if we want a judiciary that is comprised of individuals who are (on any view) the best, then we must also be committed to ensuring (among other things) that they are drawn from as varied and diverse backgrounds as possible.'[59]

If Rackley's point is correct and the logic of her argument can be extended beyond the context of judicial appointments, I would need to fundamentally re-evaluate my position. However, I claim that we should resist the temptation to conflate the concepts of ability (merit) and diversity even in the context of judicial appointments. If Rackley claims only that the judicial appointment process should focus on the overall epistemic performance of courts and a more diverse court performs better, I wholeheartedly agree with her point. However, I believe that to secure this conclusion we do not have to give up the idea that individual

---

[59] Erika Rackley, *Women, Judging and the Judiciary: From Difference to Diversity* (Routledge 2013) 195.

merit can be assessed independently of the composition of the group the individual is a member of.

Referring back to my previous example, I find it perfectly intelligible to say that Messi is a better player than his (otherwise also excellent) team mate, Dani Alves, even if, when building a team, at a certain point it would be reasonable to prefer Dani Alves to one more Lionel Messi. I do not see why the logic of my mundane example would be inapplicable to judicial appointments. It is always possible to raise the following counterfactual question: if the Supreme Court consisted of only one member, who would be the best candidate? It is not inconsistent to claim that Amy should be chosen if the court consisted of only one judge, but, were we asked to build a multi-member institution, under certain circumstances, depending on the composition of the court, we should prefer Bella to Amy. Rackley's conceptual strategy not only flies in the face of our ordinary understanding of merit, but, more importantly, also makes the above example unintelligible. But the fact that we are justified in choosing Bella under the second scenario does not make it unintelligible to claim that, on the basis of merit, we should choose Amy. I believe that we should honestly admit the existence of this dilemma rather than eliminate it by a conceptual argument.

Let us turn back to the main line of the discussion. In light of the insight that individual ability is only one aspect of a group's epistemic performance, the question whether judges are better moral reasoners than legislators has to be revised. Even if judges were better moral reasoners than legislators, that is, they had superior ability, if cognitive diversity matters, the superior individual ability does not automatically translate into superior institutional competence. This is precisely the point I wish to make here: I will argue that cognitive diversity gives a clear comparative advantage to legislatures over courts in the epistemic dimension of the institutional analysis.

When political theorists defend democracy on epistemic grounds, they usually skew the playing field against democratic governments. The question they address is not whether the rule of the many is better than the rule of the few, but whether the rule of many ordinary people is better than the rule of a few experts. The current literature on collective wisdom also takes many of its examples from areas where it is more or less clear who the experts are. The phenomenon that is called the wisdom of the crowds[60] proves that many ordinary people can sometimes outperform

[60] James Surowiecki, *The Wisdom of Crowds: Why the Many Are Smarter Than the Few* (Abacus 2005).

even a group of experts. What I want to emphasize is that in the present context the terms of the debate are significantly different. In the previous section, I argued that ability does not give an advantage to courts over legislatures. If this is the case, all I have to demonstrate here is that cognitive diversity matters.

My argument proceeds in three steps. First, I will say something about the general claim that cognitive diversity is an important epistemic asset. Second, I will address the question of how the insights about cognitive diversity are related to the specification of human rights. Finally, I turn to the empirical question whether legislatures are in fact more cognitively diverse than courts.

3.3.5.1 Why and how does diversity matter?

Many of us believe that diversity matters. Major corporations, universities and governments spend a lot of money and devote a lot of energy to increase diversity. Increasing diversity has been elevated to the level of official policy in the public sector of many countries. To give only one example that is highly relevant to our topic, increasing judicial diversity is a central concern and declared aim not only of the UK government but also the UK Supreme Court.[61]

However, it is important to see that diversity can be valued for different reasons and not all of them are relevant for our present analysis. Three justifications spring immediately to the mind. First, making an institution more socially diverse can increase its acceptance and legitimacy. If political institutions consist of people who are perceived to be markedly different from us, we are less likely to accept and respect them. Second, promoting diversity is often seen as a requirement of fairness, especially if it is related to the rectification of past injustices. Third, one might want to make the pool of potential candidates wider, but only to find the same qualities. If the pool of candidates is made wider, the competition becomes stronger, and that results in the increase of the average ability of successful applicants. While the above aspects of social diversity are important, what concerns us here is not social diversity as such, but cognitive diversity. Our question is not whether social diversity as such is a good thing, but whether increased cognitive diversity can increase the epistemic performance of our institutions.

---

[61] Rackley (n 59) 3.

I believe that the most important contribution to our understanding of why cognitive diversity matters comes from Scott E. Page.[62] According to Page, cognitive diversity means that we have different intellectual toolboxes. The toolbox of each individual comprises of perspectives, interpretations, heuristics and predictive models. *Perspectives* are 'representations that encode objects, events, or situations so that each gets its own unique name'.[63] To use some of the author's examples, in school we learn that the periodic table helps us to 'map' chemical elements or the base ten in mathematics helps us to organize numbers. The well-documented history of the clash between the geocentric and the heliocentric views of the universe illustrates that in the history of science, major breakthroughs are often related to the discovery of a new perspective that makes a hitherto difficult problem relatively easy.[64]

In addition to perspectives, we also use *interpretations* to understand the world. While a perspective provides us with a one-to-one mapping of reality,[65] we also employ general categories to lump together distinct objects and events. Two people who share the same perspective do not necessarily group together individual objects and events in the same way. Growing up in Hungary, I certainly did not use as many words for the different varieties of rain as British people do. I lumped together many forms of rain for which British people have distinct words.

Closer to our inquiry, legal education provides us with both perspectives and interpretations to locate legal problems and analyse and classify legal rules. As someone whose background is in the civilian tradition, a significant part of my conceptual map derives from medieval Roman lawyers. The importance of these conceptual tools becomes evident when someone encounters an entirely different legal system. My first encounter with the common law was painfully difficult not because I could not understand the individual rules, but because I did not have a proper map to impose structure on a body of rules.

Our intellectual toolbox also comprises *heuristics*, that is, methods and rules about how we should search for new solutions. Once again, people who see a problem the same way can have different heuristics to find a solution. Both legal practice and legal scholarship are the vast repositories of such problem-solving heuristics. For instance, the methods of statutory interpretation give us guidance how we should solve difficult

---

[62] Scott E Page, *The Difference: How the Power of Diversity Creates Better Groups, Firms, Schools, and Societies* (Princeton University Press 2008).

[63] ibid 25.

[64] ibid 24.

[65] ibid 75.

legal problems. Relying on comparative law, for instance, is one of those heuristics. Reading the decisions of relatively new European constitutional courts, one cannot help thinking that many of them used the heuristic 'look at what the German Constitutional Court did first'.

Finally, we also have *predictive models* in our intellectual toolbox. They create a link between the categories of our interpretation and future outcomes. In some cases, we simply rely on our everyday experience to make such predictions, other times we employ sophisticated theories. For instance, a lawyer can make predictions on the basis of her life experience how individual jurors will decide a particular case (slightly overweight, smiley middle-aged man will decide in favour of the poor defendant), but she can also use cutting edge psychology to choose the jurors who are likely to make a favourable decision for her client. Or a 'court watcher' might decide to use an interpretation that lumps judges together into two categories (let us say, conservative and liberal) and make predictions on that basis.

Page offers two absolutely crucial insights. The first is that in problem-solving, under certain non-unrealistic conditions, diversity is more important than ability. As the Diversity Trumps Ability Theorem says: 'a randomly selected collection of problem solvers outperforms a collection of the best individual problem solvers'.[66] But diversity may also trump ability, even if not all the conditions are met. In addition, if we have two groups of problem-solvers of equal individual ability, one of them is homogeneous, and the other is diverse, then the diverse collection will, on average, outperform the homogeneous collection.[67]

The logic behind this insight is that a group of homogeneous problem-solvers will be stuck at the same place, and, therefore, the group cannot perform better than the best individual in the group. By contrast, if people have different perspectives or heuristics, it is likely that they will come up with individually different optimal solutions. In that case acting together one can improve on the others' optimal solution. This improvement means that the group as a whole can perform better than the best member of the group.

The second insight is related to predictions. In that case, diversity cannot trump ability, but is as important as ability. Here the central point is that if people have different interpretations, that is they partition reality differently, and their prediction is based on different attributes of reality, then 'the correctness of their predictions is negatively correlated for

---

[66] ibid 162.
[67] ibid 157.

binary predictions'.[68] To put it otherwise, they will systematically cancel out each other's mistakes. That explains why their collective predictions will be more accurate than the average individual's predictions.

What we have to emphasize here is that Page does not offer empirical proof that a collection of random people outperforms the collection of the best people under certain conditions. Rather, his analysis provides a formal mathematical proof that his theorems apply to the mathematical representations of perspectives and heuristics.[69] Empirical research cannot be applied directly to cognitive toolboxes, but only to human beings who possess those toolboxes. For instance, we can assume that a group of people with different educational and professional backgrounds has more perspectives and heuristics at its disposal than a group of people who are coming from the same educational and professional background. That is, we can use educational and professional diversity as proxies to toolbox diversity. Keeping in mind this necessary 'translation', empirical research does show the benefits of diversity.

3.3.5.2 How is diversity relevant to the specification of constitutional rights?

The argument so far aimed to establish that cognitive diversity generally improves epistemic performance. At this point, one could object that even if cognitive diversity is important in many contexts, its relevance is far from clear for the specification of human rights. The examples the literature on collective wisdom provides are typically taken from areas where we can easily identify right and wrong answers, and distinguish success from failure. I believe that this is an important point that deserves careful consideration. So how is cognitive diversity relevant for the specification of human rights?

First, even if there were a disagreement between the advocates of constitutional review and me on meta-ethical questions, I believe that no one can dispute that constitutional arguments almost always contain empirical premises. When we defend a moral position, it usually can be dissected to moral and empirical components. For instance, the claim that the death penalty is justifiable because it prevents future crimes can be broken down to a moral proposition (the purpose of punishment is deterrence or prevention) and an empirical proposition (the death penalty can effectively prevent future crimes). To use another example, paternalistic legislation aims to prevent harm to the individual whose freedom is

---

[68] ibid 203.
[69] ibid 165.

restricted by the law in question. The justification of this type of legislation depends on our judgement about the probability of harm. In many assisted suicide cases, courts have balanced the individual's privacy interests against the potential abuses that would follow from the legalization of assisted suicide. In these cases, the accuracy of our predictions is vital, and, therefore, the diversity of our predictive models is directly relevant.

Second, I do not claim that solving a legal case is always an instance of problem-solving in the sense that Page uses the term. In some cases, the difference between judges boils down to a choice between fundamental values, and this choice cannot be characterized as an instance of problem-solving. However, in many cases, moral and constitutional dilemmas are not about choosing between ultimate values, but finding the means to agreed-upon aims. Means–end analysis is a vital part of judicial review: courts relatively rarely invalidate a piece of legislation on the basis that the government chose to pursue an illegitimate aim. More often, the question is whether the means that were chosen by the government are necessary and proportionate, and even if this inquiry cannot be always reduced to means–end analysis, means–end analysis is central to that inquiry. So my contention is that the above aspect of the specification of rights is problem-solving in the relevant sense and, therefore, cognitive diversity enhances the epistemic performance of the decision-making institution. Let me mention two subsets of cases that illustrate how different heuristics and perspectives can bear on the process in which courts specify the content of rights.

In one subset of cases, constitutional disagreements can be aptly described as disagreements about heuristics. Consider a landmark decision of the British House of Lords, *Pepper v Hart*.[70] Before *Pepper v Hart* British judges were not allowed to look at the parliamentary history of legislation (or as it is commonly called, Hansard) for the purpose of construing such legislation. The question that was raised by the case was whether this general prohibition can be relaxed to some extent, and the Law Lords answered the question in the affirmative. This seems to me a clear instance of problem-solving, where two heuristics clashed with each other. Consulting Hansard can result in a more accurate reconstruction of the intention of the legislature, but can also lead to errors and requires additional financial and intellectual resources. The question is whether the increase in accuracy can outweigh the error costs and decisional costs of determining the intention of the legislature. In addition, prediction also

[70] *Pepper (Inspector of Taxes) v Hart* [1993] AC 593.

had a pivotal role in this case, since the arguments revolved to a significant extent around the impact of the proposed change on the cost of litigation.

In another subset of cases, what makes a difference is not the predictive models or the heuristics of judges, but rather their perspectives and interpretations. Because of their different perspectives, they represent the problem differently. To give an illustration, many feminist lawyers argue that female judges would have decided many important constitutional cases differently from male judges.[71] I do not wish to make any essentializing claims and do not assume that all women experience the world similarly, or that their gender is the most important factor that influences them. I assume only that gender is one of the factors that shapes a person's experience and this experience can make a particular feature of a moral dilemma or a constitutional case salient. The difference of experiences can lead to different representations of the reality, or a different way of lumping together individual objects and events.

As Justice Ginsburg said, 'Even though a wise old man and a wise old woman will reach the same decision, there are life experiences a woman has that come from growing up in a woman's body that men don't have.'[72] In *Safford Unified School Dist. #1 v Redding*,[73] the US Supreme Court addressed the question whether the Fourth Amendment of the US Constitution prohibits school officials from strip-searching students suspected of possessing drugs in violation of school policy. Many commentators noticed that the judges had strikingly different attitudes towards the strip-search of a 13-year-old girl. Justice Ginsburg said about her male colleagues to *USA Today*, 'They have never been a 13-year-old girl. … It's a very sensitive age for a girl. I didn't think that my colleagues, some of them, quite understood.'[74] Lady Hale, the first and so far the only female judge of the UK Supreme Court, made very similar comments on a case in which the Supreme Court ruled against a disabled woman's appeal. The woman appealed against the withdrawal of night-time support by a local council since as a consequence of the council's

---

[71] Rosemary Hunter, Clare McGlynn and Erika Rackley (eds), *Feminist Judgments: From Theory to Practice* (Hart Publishing 2010).

[72] 'Ginsburg Wants Court to Add Second Woman' *The Columbus Dispatch* (11 April 2009).

[73] 557 U.S. 364 (2009).

[74] Joan Biskupic, 'Ginsburg: Court Needs Another Woman' *USA Today* (5 October 2009).

measure she was forced to wear incontinence pads.[75] Lady Hale added: 'It could be that the physical differences between men and women lead them [the male judges] to have different views of what dignity means in this context. So it is not surprising that women take a different view.'[76] To sum up my argument, even if cognitive diversity is not relevant for all aspects of legal decision-making, prediction and problem-solving are essential components of what judges are doing when they specify the content of human rights, and this makes cognitive diversity a major epistemic asset.

Let me conclude this subsection with a general comment on argumentative strategy. Cognitive diversity is, of course, relevant only in situations that have a cognitive dimension. The proponents of ethical non-cognitivism could argue that the specification of human rights has nothing to do with cognition and deny the relevance of cognitive diversity in the present context. However, this objection is hardly available to the advocates of strong judicial review. Without assuming that what judges are doing has a cognitive dimension, it is very difficult to make sense of constitutional interpretation.[77] Constitutional review would not have even initial plausibility if the choice between different value-laden interpretations of the constitution reflected only the personal dispositions and interests of judges.

3.3.5.3 Legislatures are more diverse than courts

If diversity is an important epistemic asset in general, and if the specification of rights is at least partly the kind of enterprise where diversity matters, then the remaining question is whether legislatures are cognitively more diverse than courts. Although a lot depends on the contingent features of each political system, I believe that it is safe to conclude that, as a general rule, legislatures are far more diverse than courts. There are three salient and systemic differences between courts and legislative bodies in terms of diversity. First, legislatures tend to be *socially* more diverse than courts. Although I am aware that social diversity in itself does not guarantee cognitive diversity, we can assume that the two are not entirely unrelated. As Bernard Manin has pointed out, election was traditionally considered as an aristocratic method of

---

[75] *R (on the application of McDonald) v Royal Borough of Kensington and Chelsea* [2011] UKSC 33; [2011] HRLR 36.

[76] Lee Moran, 'Britain's Highest Female Judge Blasts Secretive Men-Only Garrick Club for "Holding Women Back"' *Daily Mail* (15 October 2011).

[77] Sotirios A Barber and James E Fleming, *Constitutional Interpretation: The Basic Questions* (Oxford University Press 2007) 10–12.

choosing the rulers.[78] Therefore, we cannot automatically assume that citizens choose MPs who are 'just like them' and cannot assume that the legislature will reflect the diversity of the society. To use Hanna Pitkin's conceptual framework, legislatures are not necessarily good at descriptive representation.[79] Still, election creates a link between voters and legislators that does not exist in the judicial appointment process. Even if the representatives do not reflect the class composition of the society, it is unlikely that large ethnic, religious or linguistic groups would remain completely without representation in a legislative body.

Second, even if the social background of MPs were not very different from that of judges, the prospect of re-election gives a very strong incentive to MPs to understand the concerns and the perspectives of their constituencies. Judges' insulation from the political process has its price not only in terms of procedural fairness but also in terms of cognitive diversity.

Greater social diversity and the more direct link with the electors ensures that legislators can rely on a wider variety of experience than judges. The third difference is related not to everyday life experience, but training and professional qualifications: legislatures are professionally more diverse than courts. Even if the number of professional politicians is rising, the gap between courts and legislatures is still enormous in terms of professional diversity. To sum up the argument: cognitive diversity is a vitally important epistemic asset that can even trump ability under some circumstances. If someone is a moral cognitivist, at least some aspects of the specification of human rights are of such a nature that makes cognitive diversity relevant. Since legislative bodies are cognitively much more diverse than courts, cognitive diversity gives a clear edge to legislatures over courts.

3.3.5.4 The puzzle of diversity

Before moving forward to my next point, I wish to address an issue that I will call the puzzle of diversity. The puzzle is that many of those people who are the most outspoken champions of diversity as far as the judiciary is concerned do not attribute a significant role to diversity in the inter-institutional comparison between legislatures and courts. They firmly believe that although diversity matters, judges are better at specifying human rights in epistemic terms.

---

[78] Manin (n 24) 70.
[79] Pitkin (n 21) 60–91.

I think that the puzzle has four possible explanations. First, it might be the case that some proponents of constitutional review cherish diversity but not because of its cognitive dimension. As I argued, social diversity can be valued for a whole range of reasons and cognitive diversity is only one of them. However, it seems unlikely that at least some proponents of constitutional review would not value diversity for its cognitive potential.

The second possibility is that they value diversity for its cognitive potential, but reject the empirical claim that legislatures are cognitively more diverse bodies than courts. I do not believe that in a properly functioning democracy this position is plausible. In some countries, like the United Kingdom, this claim is bordering on absurdity.

According to the third explanation, these proponents of constitutional review value cognitive diversity and accept that legislatures are cognitively more diverse than courts but apply a rigid lexical ordering to the rival considerations of ability and diversity: diversity can never trump ability. Lexical ordering instructs us to take into account diversity only as a tie-breaker. We can choose between two candidates or two institutions on the basis of diversity only if they are equals in the dimension of ability. This seems to be the official position of the UK government as far as judicial appointments are concerned. Section 63(2) of the Constitutional Reform Act 2005 prescribed that judicial selection must be solely on merit. However, the Crime and Court Act 2013 inserted a new provision into the relevant section that says 'Neither "solely" in subsection (2), nor Part 5 of the Equality Act 2010 (public appointments etc), prevents the selecting body, where two persons are of equal merit, from preferring one of them over the other for the purpose of increasing diversity …'.

I will set aside that merit is a slightly broader concept than individual ability. The essential point is that as far as statutory interpretation is concerned, it can hardly be so broad as to include diversity. Otherwise, the amending provisions would be redundant. The point I want to make is that in light of the above analysis, this policy, judged by epistemic considerations, is straightforwardly wrong. It reflects the fallacy of composition and assumes that the best team is the collection of the best individuals. The paradox is that the policy that seems to prefer epistemic performance over considerations of justice and fairness cannot be justified by epistemic reasons. It could be justified only if one believed that the ability of individual justices creates an entitlement to get elected to the court, similarly, let us say, to a university admission procedure.

Let us imagine that Amy and Bella both apply to the same university. In addition, let us assume that Amy's grades are better than those of Bella, but Bella's admission would make the student body more diverse.

It certainly makes sense to argue that Amy is entitled to a place at the university. One could argue that, although a more diverse student body is preferable to a less diverse one, the admission procedure should also take into account fairness to individuals, and it would be unfair to Amy not to admit her. Therefore, we face a real dilemma here.

Now let us imagine that finally both of them are admitted, and now they both want to be members of the university's football team. There is a broad consensus that Amy is the better player overall, she is an excellent forward, and Bella is only a decent goalkeeper. However, the team has forwards who are even better than Amy, but they desperately need a goalkeeper. Although we could feel sorry for Amy, no one would say that it would be unfair for the manager to select the worse player, Bella, instead of Amy. A crucial difference between the two situations is that the university aims to train well-educated individuals, and the student body characteristically does not have to act as a unit. By contrast, the football team is considered as a unit and the task of the manager is to select the best possible team.

Although in a constitutional court there are no such distinct roles as in a football club, I would argue that we should look at the court as a unit and, therefore, the selection of judges should be more like the second scenario. Those who are responsible for the appointment should aim at selecting the best performing institution as opposed to the collection of the best individuals. Even if Amy were better on the basis of the merit principle than Bella, the appointment committee should choose Bella if that maximizes the epistemic performance of the institution. As a corollary of this point, Amy does not have an entitlement to be selected and cannot criticize the decision as unfair if Bella is selected. So the upshot of my argument is that the third approach that uses diversity only as a tie-breaker is suboptimal both for the purposes of judicial appointment and for the choice between courts and legislatures.

Finally, the fourth explanation also admits the importance of cognitive diversity. The proponents of this explanation go even further than those of the previous one and concede that there can be a trade-off between ability and diversity. However, applying this approach to the institutional choice we face, they believe that the result of the balancing is evident. The greater cognitive diversity of legislatures cannot compensate for the greater ability of the judges, either because judges are better moral reasoners, or because they are doing something fundamentally different than legislators when they specify human rights. This leads me back to the ability prong of my argument. Although individual judges have undoubtedly greater legal expertise than individual legislators, this is not the relevant comparison. I argued above that if we take into consideration

moral capacity, legal expertise and empirical knowledge, which are all relevant to the specification of human rights issues, legislative bodies are not worse off in the dimension of ability than courts. If courts do not score higher than legislatures in terms of ability, but the latter score much higher in terms of diversity, then overall legislative bodies are superior to courts in epistemic terms, provided that there is no other relevant dimension of epistemic performance that outweighs this advantage.

3.3.6 Numbers

We also have some reasons to believe that the number of decision-makers matters. The Condorcet Jury Theorem offers a well-known mathematical explanation of why this is the case. Very briefly, the theorem says that (1) if a group of voters have to choose from two options, (2) one of the options is correct, (3) the voters are sincere, (4) their votes are independent, and (5) the members of the group are more likely to be right than wrong, then as the number of the group increases, the chance of reaching the correct answer also increases. The debates revolve not around whether the theorem is correct, but whether it is applicable to our actual decision-makers.

The proponents of epistemic democracy, that is, those who defend democracy on epistemic grounds, are divided about whether and how often the above conditions are met in real-life contexts.[80] I tend to agree with Hélène Landemore on this issue, who argues that although these conditions are fairly robust, they do not make the theorem completely inapplicable.[81] My whole discussion here assumes some version of moral cognitivism, so I take (2) for granted. In addition, at least some questions that are addressed by the political process are certainly binary, so (1) is also met in some cases. We can also assume that at least in some cases voters are sincere (3). Therefore, the two crucial assumptions seem to be (4) and (5). Many objections to the relevance of the Condorcet Jury Theorem are based on the ignorance of ordinary citizens. However, in the present context, the theorem is not so vulnerable to this objection, since it is applied to legislators as opposed to ordinary citizens. So those who challenge the theorem along this line should argue that parliamentary voting is not more accurate than a random procedure in tracking the truth. I believe that very often this is not the case. In addition, I have also

---

[80] David Estlund, for instance rejects the relevancy of the Theorem. David M Estlund, *Democratic Authority: A Philosophical Framework* (Princeton University Press 2009) 223–36.

[81] Landemore (n 35) 147–56.

argued that ability does not give an advantage to courts. This leaves us with (4), the independence condition as the most critical point of the argument. Landemore convincingly establishes that (4) does not assume that voters cannot share information with each other and cannot discuss the issue; it excludes only blind deference to the opinion of others.[82]

However, there seems to be a major difficulty here. Although ordinary people might be less knowledgeable than their representatives, they are less likely to vote in blocks. Thus, block voting seems to undermine the relevance of the independence condition as far as legislators are concerned. However, I submit that this fact does not make the Condorcet Jury Theorem completely inapplicable to the political process. First, the independence condition is likely to be met in those situations where MPs are allowed to vote freely. Second, and perhaps more importantly, the conditions of the theorem seem also to apply to decisions that are made before the parliamentary procedure. The typical number of MPs in parliamentary groups is still significantly higher than the number of constitutional judges.[83] In addition, we cannot exclude the possibility of block voting among judges.[84] To sum up the argument: although we should proceed with caution as far as the Condorcet Jury Theorem is concerned, whenever the theorem is applicable, it provides us with an additional epistemic reason to prefer the political process to the adjudicative one.

3.3.7 Procedure

So far we have focused exclusively on the composition of institutions. However, the decision-making procedure of an institution can also be more or less conducive to epistemic accuracy. The most important argument of the opponents of constitutional review is that in the normal adjudicative process, judges see the underlying moral issue through the lens of two parties and in many instances are bound by arguments the parties raised during the procedure. As Adam Tomkins says, 'Neither the range nor the variety of argument in court is anything like as plural or as open as is the case with parliamentary decision-making.'[85]

---

[82] ibid 154.

[83] For instance, at present the British Conservative Party has 330, the German CDU/CSU has 311 and the French Socialist parliamentary group has 287 members.

[84] Vermeule (n 50) 354.

[85] Adam Tomkins, *Our Republican Constitution* (Hart Publishing 2005) 29.

On the other hand, the proponents of constitutional review argue that the distinctive features of the adjudicative process are among the factors that tip the scale in favour of courts in the debate about judicial review. As Aileen Kavanagh says:

> The narrow focus of the courts is only a problem if the task the courts have to perform is the same as that performed by the elected branches. But it is not the same. The courts do not have, and should not have, the power to design legislative schemes to regulate the various Convention rights. … The job of the courts is different. Judges are required to carry out the constitutional function of assessing the application of particular legislative provision to the facts of an individual case, in light of the (narrow) range of considerations and values presented to them in the ECHR. In carrying out this task and in discharging their 'ancient function of deciding as between two competing parties on which side the law should come down', their independence from normal politics and constituency pressures as well as their focus on the particular concerns of the individual in relation to that law, becomes an advantage rather than a disadvantage – they are qualities which help the courts to perform their *constitutional* functions. As such, the narrow focus of the courts is part of the argument in favour of constitutional review, rather than a point against it.[86]

I share Adam Tomkins's position on this issue. As a preliminary note, let me point out that the above paragraph refers to and derives part of its persuasive force from the fact that judges are insulated from the political process. Although this is a valid point that I will address in much more detail later, it is important to see that independence as such does not require the adjudicative process. We have many institutions that are independent of the political process, but have nothing to do with the bipolar adjudicative technique. The focus of my analysis here is strictly limited to the distinctive procedure that courts follow.

Let me concede one more point to narrow down the debate. I admit that, as reviewing bodies, the focus of constitutional courts is narrower than that of the legislative bodies. When enacting laws, compliance with human rights is only one of the considerations that a legislative body takes into account. A law can be good or bad in many other dimensions and it is the responsibility of the legislature to pay attention to all these evaluative criteria. By contrast, in the context of judicial review, courts are required to scrutinize a legal provision only from one perspective: whether it is compatible with the constitution. So Kavanagh is certainly right to claim that the two institutions have different functions.

---

[86] Kavanagh (n 26) 355–6.

The passage quoted above lends itself to two different interpretations. First, it can be interpreted as an argument from *specialization*. Since courts focus on a single issue, while legislators have to consider a whole range of problems, specialization gives an edge to the courts. This argument certainly has some plausibility. However, we should keep in mind that parliaments and governments are large and sophisticated institutions that themselves adapted or can adapt to the 'human rights revolution'. There is nothing in the nature of the political process that would make it impossible to strengthen the human rights awareness of governments and parliaments. Indeed, many governments and parliaments have developed specialized organs whose only or primary function is to make sure that a proposed bill is compatible with human rights. This is particularly true to those legal systems that are of special significance for the purposes of my book. Since pre-enactment review is a defining feature of what Stephen Gardbaum calls the New Commonwealth model, and it is also central to the practice of the Nordic countries, virtually all of these countries have made significant steps to raise the level of rights awareness within the elected branches.

More importantly, the argument from specialization leaves Tomkins's point intact. The argument from specialization says that, when making decisions, courts focus on a single issue, let us call it *A*. By contrast, parliaments also take into account additional considerations, like *B, C* and *D*. However, Tomkins's argument is that, because of the bipolar adjudicative technique, courts can rely on a limited pool of arguments even when they are dealing with the narrow issue, *A*, that is their exclusive focus. By contrast, when addressing the very same narrow issue of *A*, legislative bodies are not limited to the arguments that are raised by the bipolar adjudicative technique.

According to the second interpretation of the above quoted paragraph, what gives an edge to courts is not that they focus on fewer issues, but that their expertise and procedure is especially suited to the one that is relevant here. Courts have special expertise in applying general norms to particular fact situations and this is exactly what human rights adjudication is all about.[87] Although as a general proposition it is certainly true that courts have special expertise in applying general norms to particular fact situations, I find it difficult to accept that this is an accurate characterization of the question we have to address here. Since human rights provisions are highly abstract and open-ended, the reasoning

[87] For a similar argument, see Alison L Young, *Parliamentary Sovereignty and the Human Rights Act* (Hart Publishing 2009) 137–8.

process that applies a human rights norm to the facts of a case has to introduce many premises that mediate between the abstract legal provision on the one hand and the particular facts of the case on the other. This is why I referred in this book consistently to the *specification* as opposed to the application of human rights norms. The question has never been whether it is for courts or legislatures to apply human rights norms to the facts of a particular case. Rather, the question is whether judges should apply a human rights norm as its meaning is specified by the legislature, or we should leave the specification of norms entirely to the adjudicative process.

So why does the adjudicative process better suit the specification of human rights than the political process? What changes the limited focus of courts from an epistemic burden to an epistemic asset? I am aware of only one line of argument in the literature that seems to support this conclusion. The types of moral dilemmas we face in human rights cases, so the argument runs, are more colourful in the adjudicative process, since they are not yet detached from the particular facts of the case. As Michael Moore says, 'moral insight is best generated at the level of particular cases'.[88] In addition, judges are able to use the cases they encounter as the basis of moral thought-experiments.

However, in this form this is no more than an unsubstantiated claim. Without further arguments, it is difficult to see why the 'bottom-up' methodology of moral reasoning would be more suitable to spell out the content of abstract human rights provisions than an alternative approach that moves at a more general level. In an excellent article, Wojciech Sadurski convincingly points out that we have at least some reasons to believe that the opposite is true.[89] His most important argument is that human rights cases are usually pregnant with conflicts of principles. Seeing these principles through the lens of the parties (or very often one party) makes certain aspects of the dilemma salient. A more abstract approach, argues Sadurski, has the 'capacity to capture the conflicts between different moral principles that may not be detectable at the level of a particular personal experience, where such local experience is informed, often enough, by pressure from a single powerful value or principle'.[90]

To sum up my argument, even if it is true that it is the role of the adjudicative process to apply general norms to particular fact situations,

---

[88] Michael S Moore, 'Law as a Functional Kind' in Robert P George (ed), *Natural Law Theory: Contemporary Essays* (Oxford University Press 1992) 230.

[89] Sadurski (n 36).

[90] ibid 39.

this is not the relevant issue here. The relevant question for our purposes is whether the adjudicative or the legislative process is more suitable in epistemic terms for the specification of abstract human rights provisions. Since we do not have good reasons to accept the claim that the bottom-up form of moral reasoning is superior to a more abstract or general approach, we do not have reasons to consider the limited focus of the adjudicative process as an epistemic asset.

3.4 THE ARGUMENT FROM PUBLIC REASON

3.4.1 The Enlightenment View of Reason

The argument from public reason does not constitute a third type of reason besides epistemic and motivational considerations, but is a special case of the former. However, it is so central to my case against the New Constitutionalism that I decided to discuss it separately. I started the analysis of the epistemic argument with a claim made by Ronald Dworkin. Let me use the same idea again as the springboard for the discussion. Dworkin says, 'We should notice, but only to set aside, an epistemological answer to that question: that the majority is more likely to be right about which political decision the community should take than any other group is.'[91]

Dworkin's remark suggests that the truth of a moral proposition is independent of whether someone believes in it or not. To put it otherwise, moral truth is agent-neutral. It is true that London is the biggest city in the United Kingdom, whether Amy believes it or not. And since it is true, it must be true for everyone. Similarly, one could argue that the proposition that the 'death penalty is wrong' is true, whether Amy believes it or not. The proponents of what Gerald Gaus calls the Enlightenment View of Reason believe that reasonable people will converge on true propositions, since they all share the capacity of reason and the norms of good reasoning are the same for everyone.[92] Since it is true that London is the biggest city in the UK, if Amy thinks that this title goes to Aberdeen, she made a mistake somewhere in the reasoning process. Similarly, if the death penalty is morally wrong, but Amy believes that it is acceptable, her moral argument must be flawed somewhere. So even if Amy does not believe at this moment that London

---

[91] Dworkin (n 3) 331.

[92] Gerald F Gaus, *Contemporary Theories of Liberalism: Public Reason as a Post-Enlightenment Project* (Sage 2003) 3.

is the biggest city in the UK, or that the death penalty is unjust, since the norms of good reasoning are the same for everyone, these propositions are *justifiable* to her.

The rub of the matter is that, although we all have the capacity of reasoning, the free exercise of reason does not lead us to a set of moral beliefs that are equally justifiable to all of us. When we develop arguments to support a moral position, we try to make sense of that position in the wider web of our beliefs. However, this wider web of beliefs can differ from one person to another. While developing our position on a moral issue, we rely on our unique life experience, and therefore we might attach slightly different weight to conflicting moral considerations than others. As John Rawls says:

> To some extent (how great we cannot tell) the way we assess evidence and weigh moral and political values is shaped by our total experience, our whole course of life up to now; and our total experiences must always differ. Thus, in a modern society with its numerous offices and positions, its various divisions of labor, its many social groups and their ethnic variety, citizens' total experiences are disparate enough for their judgments to diverge, at least to some degree, on many if not most cases of any significant complexity.[93]

This idea leads us back to one of the cornerstones of my argument, the idea of reasonable pluralism. Even if *A* has sufficient reason to believe in the truth of *p*, a moral proposition, she may not have conclusive reasons to convince *B* of the truth of *p*, since there is no universal way to demonstrate the truth of *p*. *B*, arguing from her position, can still have reasons to believe that non-*p* is true and reject *p*.[94] So even if the truth of a moral proposition is agent-neutral, its justifiability is not.

Reasonable pluralism is a claim about moral epistemology; in itself, it does not say anything about political principles or institutional design. However, whether we believe in the Enlightenment View of Reason or use reasonable pluralism as our background, assumption can shape what kind of political theory is reasonable for us to endorse. The Liberal Principle of Legitimacy is predicated on the idea of reasonable pluralism and says that in order to be legitimate, a decision of the state has to be publicly justified or rely on a plausible interpretation of our publicly justified principles. By contrast, in the framework of the Enlightenment View of Reason, there is no conceptual space for the idea of public justifiability, at least not in the sense how I, following Rawls, use the

---

[93] John Rawls, *Political Liberalism* (Columbia University Press 1993) 53.
[94] Gaus (n 92) 14.

term here. If a proposition is true, and the norms of good reasoning are universal, then that proposition is justifiable to everyone, even if at present not everyone recognizes its truth. In that framework, one cannot say that a moral proposition is justifiable to some people, but not publicly justifiable.

The two rival views of justifiability, however, have implications not only for our theory of legitimacy but also for institutional design. I submit that even if the practice of the New Constitutionalism does not logically presuppose the Enlightenment View of Reason, it makes much more sense against this backdrop. And conversely, even if the rejection of constitutional review is compatible with the Enlightenment View of Reason, the argument against judicial review becomes much more robust if we take the fact of reasonable pluralism seriously.

3.4.2 The Role of the Arbitrator

In Book VI of *The Republic*, Plato compares the state to a ship. In his fiction, as he calls it, he refers briefly to the true pilot and draws an analogy between the pilot and the philosopher. Both are looking for something that is beyond the world of ordinary men. As the true pilot is looking up to the sky and pays attention to the seasons, stars and winds, so the philosopher is searching for true knowledge; 'he will not rest in the multiplicity of individuals which is an appearance only'.[95] Most proponents of the New Constitutionalism envisage a role for constitutional judges that is comparable to the role Plato assigns to the true pilot.

Constitutional judges have to look for something that is true irrespective of the beliefs of the citizens. Using the spatial metaphor that Plato's fiction offers, they are looking for something that is 'out there', or up there in the sky. From the vantage point of the Enlightenment View of Reason, this makes perfect sense. Since the norms of good reasoning are universal, if a judge arrives at a conclusion that is justifiable to her, it must also be justifiable to all members of the political community. It is certainly not unreasonable to think that highly trained, well-educated judges, whose daily job revolves around assessing and giving practical reasons, and who are not under the pressures of day-to-day politics, will have a better chance to identify justified moral beliefs than most of us, and definitely more chance than elected politicians. Although this idea is intuitively plausible, it can be challenged even if someone subscribes to the Enlightenment View of Reason. There was nothing in the argument of

---

[95] Plato, *The Republic* (Infomotions, Inc. 2001) 165, 490a–490b.

the previous section that is not compatible with the Enlightenment View. Still, the survey of the relevant epistemic considerations suggested that the intuitive view is not necessarily the correct one.

My contention is, however, that the equation changes dramatically if we give up the Enlightenment View of Reason and define the role of the arbitrator accordingly. According to the Liberal Principle of Legitimacy, the role of the arbitrator is to look for publicly justified beliefs. Even if certain moral questions do not have solutions that are publicly justifiable, they must be the good-faith interpretations of publicly justified principles. To track publicly justified principles means that the arbitrator does not have to look for principles that are 'out there', justified *irrespectively of* the belief systems of the citizens, but it has to track principles that are justified *within* the belief systems of citizens. Googlebot, Google's crawler that monitors the web, is a better analogy to describe the job of the arbitrator than Plato's stargazer.

3.4.3 The Principle of Burden of Proof

I have introduced the Principle of Burden of Proof in Chapter 2. Robert Dahl argues that this principle has a crucial role in the justification of democracy, since it creates the link between the principles of Equal Consideration and Equal Participation. The idea that we should give equal consideration to the interests of each citizen is not distinctive enough to justify democracy. The Principle of Burden of Proof is based on the assumption that each person is in a unique position to judge what her interests are and each individual has unique motivation to act upon those interests. Here I would like to defend a version of this principle. I will set aside the question of motivations and focus exclusively on the epistemological point. The modified version of the principle says that each individual is in a unique position to decide whether something is justified in her belief system or not.[96]

I do not deny that we have access to the belief systems of other people. Although I am not a vegetarian, I can put myself in the shoes of someone who is vegetarian and argue from her vantage point. I can make a distinction between what is justified to me and what is justified to her. Or to use Joseph Raz's more sophisticated example, a Catholic who is very knowledgeable about Judaism can give reliable practical advice to her less knowledgeable friend on how she, a Jew, should act in certain

[96] Gerald F Gaus, *Justificatory Liberalism: An Essay on Epistemology and Political Theory* (Oxford University Press 1996) 228–9.

situations.[97] What the argument suggests is not that we do not have access to the beliefs of others or those beliefs are completely incomprehensible to us, but that we have limited intellectual resources to put ourselves in the shoes of other individuals.

I think that there are two main reasons for that. The first relates to the Rawlsian idea of burden of judgement. As Rawls says, we evaluate evidence and assign a certain weight to the considerations that are relevant in a moral dilemma in light of our total experience, and this experience is different from one individual to another. I believe that Scott Page's conceptual framework, some building blocks of which I introduced in the last section, can be used to lend further support to Rawls's point. Thinking in terms of perspectives, interpretations, heuristics and predictive models, it is natural that our views on moral questions will differ. Since we have different toolboxes, it is not surprising that we will reach different conclusions on moral issues. Perhaps we can understand better the extent of our cognitive differences if I use one of Page's examples to illustrate my point.[98] So let us stick to the toolbox metaphor and assume that we can easily individuate and count the tools an individual possesses. Page asks us to imagine two boxes with 52 tools each, like the number of cards in a standard deck of playing cards. Let us stipulate that Bobbi chooses 20, while Carl chooses 15 tools from their respective toolboxes. Although it is difficult to say how we should individuate intellectual tools, this number seems to be extremely low, but that makes the illustration easier. Even in that case, Bobbi could acquire almost 126 trillion different combinations of tools. The same number in Carl's case is about four and a half trillion. Although Bobbi has much more combinations, the odds that he will possess all the tools that Carl owns is incredibly low: roughly one in three hundred million. It is true that, in reality, not all tools can be combined with all others. In addition, when we face a single moral dilemma, most of our tools are irrelevant. Both of these factors reduce the number of possible relevant toolkits. On the other hand, we can choose from much more intellectual tools than our fictitious agents, Bobbi and Carl. The example, of course, does not prove that Bobbi and Carl will disagree on moral questions. It was meant to illustrate only the magnitude of the possible combinations and the fact how diverse our intellectual toolboxes can be. If our toolboxes are so diverse, and it is so unlikely that one reasoner will possess all the tools

---

[97] Joseph Raz, *The Authority of Law: Essays on Law and Morality* (Clarendon Press 1983) 156.

[98] Page (n 62) 116–18.

that the other does, it should not be a surprise that they will disagree on complex moral issues. Even if Amy wishes to understand Bella's position on a moral issue, to acquire all the tools that Bella possesses, would require an enormous amount of intellectual resources from Amy.

Although John Stuart Mill was a proponent of the Enlightenment View of Reason, he was well aware of the bounded rationality of human beings. Mill's idea leads us to another source of reasonable disagreement. As Mill says:

> Ninety-nine in a hundred of what are called educated men are in this condition; even of those who can argue fluently for their opinions. Their conclusion may be true, but it might be false for anything they know: they have never thrown themselves into the mental position of those who think differently from them, and considered what such persons may have to say; and consequently they do not, in any proper sense of the word, know the doctrine which they themselves profess.[99]

Mill was also aware that 'throwing ourselves into the mental position' of other human beings is not a simple task. Even if moral truth is independent of our subjective beliefs, our reasoning capacity is not perfectly suited to reveal this truth. As psychologists have pointed out, we tend to seek and interpret evidence not simply in light of but also to confirm our existing beliefs. Intelligence, education or open-mindedness does not make us immune from the confirmation bias.[100] The defects of our reasoning capacity, documented by many psychological experiments,[101] have led some cognitive scientists to the view that if people are so bad at reasoning, that is, so bad at finding the truth, then finding the truth cannot be the primary function of reasoning.[102] Most of the biases and errors of our reasoning process make sense, however, if we recognize that reasoning evolved not to figure out the truth, but to support our views with arguments and convince others. From the perspective of what Hugo Mercier, Dan Sperber, Hélène Landemore and others call the argumentative theory of reason, the confirmation bias is not a flaw or an anomaly that prevents our reasoning process to fulfil its function properly but something that makes sense and could be expected. As Jonathan

---

[99] John Stuart Mill, *On Liberty. With an Introduction by WL Courtney* (The Walter Scott Publishing 1901) 24.

[100] Hugo Mercier and Dan Sperber, 'Why Do Humans Reason? Arguments for an Argumentative Theory' (2011) 34 *Behavioral and Brain Sciences* 57, 63.

[101] Mahzarin R Banaji and Anthony G Greenwald, *Blindspot: Hidden Biases of Good People* (Delacorte Press 2013).

[102] Landemore (n 35) 123–4.

Haidt says, '[The] confirmation bias is a built-in feature (of an argumentative mind), not a bug that can be removed (from a platonic mind).'[103] The confirmation bias does not only go a long way in explaining why people with different experiences are unlikely to come to an agreement by the use of reason, but lends further support to the importance of diversity. People who have views that are different from mine can more effectively counteract my confirmation bias than my own open-mindedness.[104] In addition, in a diverse environment, my confirmation bias contributes to the division of cognitive labour.[105]

3.4.4 Diversity, Once Again

If the arbitrator's job is to track the publicly justified principles of the political community, that is, principles that are justified not irrespective of, but in the belief systems of citizens, the arbitrator must be an institution that in some meaningful sense of the word is representative and diverse. The final element in the argument from public reason is the empirical claim that parliaments have a clear comparative edge in this dimension over courts. Since I have already substantiated this claim (see subsection 3.3.5), it is unnecessary to repeat that argument here. Instead, I wish to make two further comments on the relationship of the Enlightenment View of Reason and the New Constitutionalism.

Courts are so far from the ideal of a representative and diverse institution that we have no reason to assume that they aim to track publicly justified principles. It is more reasonable to believe that they are not failed attempts to approximate the ideal of moral arbitrator as it is defined in this book but pursue an altogether different ideal. That is why I wish to defend later the claim that the New Constitutionalism has a robust case only if we assume the correctness of either the declaratory theory of constitutional interpretation or the Enlightenment View of Reason. (At this stage, this argument is incomplete: there can be motivation-related arguments that tip the balance of arguments in favour of courts, even if they are not representative or diverse institutions.)

My hypothesis is further supported by a fundamentally important feature of the European legal order. In many countries, the domestic constitution is so strongly linked to the ECHR that the meaning of human rights is specified primarily not by domestic courts, but by the ECtHR.

---

[103] Jonathan Haidt, *The Righteous Mind: Why Good People Are Divided by Politics and Religion* (Allen Lane 2012) 105.

[104] Mercier and Sperber (n 100) 65.

[105] ibid; Haidt (n 103) 105.

Although I see the practical convenience of and the causal explanation for this practice, I find it difficult to identify a convincing political justification of that arrangement. I believe that the most straightforward justification of the practice is provided by the Enlightenment View of Reason. The main message of the present subsection was that if we take the idea of reasonable pluralism seriously, the arbitrator has to track what is publicly justifiable within the political community and it has to be a diverse and representative institution. No one can seriously claim, for instance, that a Russian or an Italian judge would be the ideal person to track what is justified in the belief system of, let us say, British or Dutch citizens. They cannot even pretend to scan the belief systems of British or Dutch citizens. Therefore, we should not interpret this practice at all in light of the idea of reasonable pluralism. It is not a miserably poor attempt to find a representative and diverse institution and to track publicly justified principles, but rather a good-faith attempt to identify principles that are universally justifiable. If the norms of good reasoning are universal, a well-educated Russian or Italian judge is supposed to reach the same conclusion as British or Dutch citizens or politicians on the specification of even domestic human rights.

3.5 THE INSULATION ARGUMENT

3.5.1 Political Malfunctions

If my analysis is so far correct, constitutional review is not supported by robust epistemic reasons. However, when the proponents of constitutional review insist that judges are 'better' at interpreting rights or principles than legislators, they might have in mind other considerations than epistemic reasons. I suggest that the most robust argument for judicial review is based not on the epistemic superiority of courts, but rather on the malfunctions of the political process. The central insight of this argument is that the political system gives such incentives either to elected politicians, or more broadly, to the citizens in general and operates in such a way that legislators cannot be expected to be the vigilant defenders of rights. Judges, who are insulated from the political process, are much better situated to fulfil this function.

I will call this idea the insulation argument. The insulation argument is appealing to all of those who have a realistic understanding of the political process and are familiar with the shortcomings of modern representative democracies. These deficiencies cannot be easily explained away. I concede that I cannot provide a knock-down refutation of the

insulation argument, and, therefore, will follow a more indirect strategy that circumscribes the implications of the argument.

In this subsection, I will address three malfunctions of the political system. Following Neil Komesar and John Hart Ely, I will call them the majoritarian, the minoritarian and the in/out bias.[106]

3.5.1.1 Majoritarian bias

The political malfunction that is most often associated with the need for constitutional review is the majoritarian bias. Therefore, I will subject this argument to a more sustained scrutiny than the other malfunctions, even though the argument is familiar to all scholars of constitutional law.

I will scrutinize two versions of the argument. The first, most radical version was put forward by Ronald Dworkin, who claims that rights by their very nature trump the interest of the majority, and, therefore, courts are in a better position to protect rights than majoritarian legislatures:

> An argument of principle does not often rest on assumptions about the nature and intensity of the different demands and concerns distributed throughout the community. On the contrary, an argument of principle fixes on some interest presented by the proponent of the right it describes, an interest alleged to be of such a character as to make irrelevant the fine discriminations of any argument of policy that might oppose it. A judge who is insulated from the demands of the political majority whose interests the right would trump is, therefore, in a better position to evaluate the argument.[107]

It is important to note that the above argument does not presuppose that the rights in question are the rights of some 'discrete, insular minorities'.[108] I will contend that even if rights are necessarily anti-majoritarian in one respect, they are not necessarily anti-majoritarian in the requisite sense. Therefore, Dworkin's institutional conclusion does not follow from his claim about the nature of rights.

Let us suppose that Amy has to consider the right to assisted suicide. Let us further assume that she is aware of the risks associated with the right in question; she knows that in some cases vulnerable people might be pressurized if assisted suicide were made legal, and she admits that the community as a whole has a strong interest in protecting the

---

[106] Neil K Komesar, *Imperfect Alternatives: Choosing Institutions in Law, Economics and Public Policy* (University of Chicago Press 1997) 75–84; John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* (Harvard University Press 1980) 106.

[107] Ronald Dworkin, *Taking Rights Seriously* (Duckworth 1977) 85.

[108] *United States v Carolene Products Co.*, 304 U.S. 144, 152 n 4 (1938).

vulnerable. However, Amy is not only a member of the collective whose interests are affected by the right to assisted suicide, but is also a right-holder. She would like to choose how to end her life. She might wish to live as long as possible, but she would like to have the possibility to make the decision for herself. To secure his conclusion, Dworkin has to assume that, when voting on the issue (or the parties that raised the issue), Amy, the defender of the collective interest, will always trump (or is at least likely to trump) Amy, the individual right-holder. However, this conclusion is far from inevitable. Amy, and all her fellow citizens, might or might not prefer the right in question to this narrowly constructed collective interest. If they do, the legislature will have strong incentives to protect the right to assisted suicide. Alternatively, Dworkin could argue that the legislature will act upon this narrowly constructed collective interest (in the example, the protection of the vulnerable) even when this is against the preferences of the majority (the right to assisted suicide). But it is highly implausible to claim that, as a general rule, the legislature would act contrary to the preferences of the majority in such situations. The upshot of the argument is that one cannot claim that political majorities have a built-in incentive to disregard rights as such. Whether they have such an incentive depends to a significant extent on the distribution of preferences.

Unlike Ronald Dworkin, therefore, most people do not assume a fundamental tension between majority rule and the protection of rights; they sign up only to a weaker version of the argument. According to this version of the argument, majority rule is antithetical not to rights as such, but only to the rights of minorities. For instance, Alison Young declares that courts are better at protecting the rights of minorities than legislatures and suggests that there is an inherent flaw in the democratic law-making institutions 'which favour majority as opposed to minority interests.'[109] But even in this weaker form, the argument begs for closer scrutiny.

My contention, similarly to the argument of the previous paragraph, is that majority rule is inherently related to the preferences of the majority and not to its interests. In order to have a real bite, the argument has to make two assumptions. First, it has to equate preferences with interests. Second, it also has to assume that when the majority acts upon its self-interest, this is always antithetical to the rights of the minority. (Or at least always antithetical, if there is a conflict of interests.) Neither of these two assumptions is self-evidently true.

---

[109] Young (n 87) 132.

Let me use a fictitious example to clarify my point. Let us imagine Amy, a lesbian woman who has six heterosexual neighbours. Let us also imagine that a referendum is going to be held soon on same-sex marriage in their country and the seven of them discuss the issue together. As heterosexuals, in a non-trivial sense of the word, all the six neighbours' interests are different from those of Amy. Let us call this the narrow conception of interests. Bella believes that homosexuality is wrong, but she is nevertheless ready to stand up for the rights of LGBT people. Chloe is also of the opinion that homosexuality is wrong, but she belongs to an unpopular ethnic minority and knows what it means and how it feels to belong to a vulnerable minority. Her compassion towards other minorities is stronger than her negative attitude to homosexuality. Daisy and Emily also support same-sex marriage, but they are not guided primarily by moral principles or compassion. Similarly to Bella and Chloe, Daisy feels offended by homosexuality and personally does not like Amy. However, they have many interests in common. Daisy is a passionate pet lover and knows that without Amy's support their own small community would not tolerate keeping animals on their property. In contrast to Daisy, Emily is a good friend of Amy, also enjoys the company of Amy's friends, and is proud of the broader community's tolerant atmosphere. Fiona has strong religious views and passionately opposes same-sex marriage. Finally, Gail is more or less indifferent to the issue, but, as often, she tends to follow the charismatic Fiona and votes against same-sex marriage.

If we aggregated only the votes of these seven people, this small community would have supported the proposal. The fictitious story suggests that the term 'interest' can be interpreted at least in three different ways. (1) According to the narrowest interpretation, the concept of interest is close to 'liking', or what we could call self-regarding interest.[110] (2) One can also equate interest with what is instrumentally rational for an individual to do. Instrumental rationality is agnostic about whether people choose self-regarding or other-regarding goals. It revolves around how people should act to achieve their objectives. If my goal is to spend more time with my children, I might go to a family movie, even if I am really bored by the film and would rather have chosen a very different kind of movie. In this situation, it is not unintelligible to say that I promoted my goal by acting against my own self-interest. What makes this claim intelligible is that in ordinary language sometimes we identify self-interest with our self-regarding goals. (3) According to the broadest

[110] Gaus (n 22) 31.

interpretation, we equate interests with preferences. In Scotland, everyone is entitled to free prescriptions. Since I need to take a certain medicine regularly, it would be against both my self-regarding interest and my broader goals to object to free prescriptions. However, if I had the possibility, I would vote against this policy because I find this way of spending public money unreasonable and unfair. That is, my preferences are different from what is instrumentally rational for me. And if majority rule is conceptually linked to something, it is linked to our preferences and not to our instrumentally rational acts or to our narrowly defined self-interest.

In our fictitious case, two people preferred a course of action that complies with the moral principles they wanted to respect even if this course of action was not instrumentally rational for them (Bella, Chloe). In addition, among those people who acted in an instrumentally rational way, Emily had goals that included the well-being of others. Daisy's goals were entirely self-regarding, but to best promote her self-regarding objectives, she chose to vote strategically. Her vote did not reflect her views on same-sex marriage. Only three people acted in accordance with their narrow conception of interests (Amy, Fiona, Gail).

There are two lessons that we can learn from the examples. First, if we define the concept of interest narrowly, there is no necessary relationship between the vote and the interests of the majority. By contrast, if we define the concept of interest broadly, there is a strong relationship between the votes and interests of the majority, but the argument loses its real bite: the interests of the majority are not necessarily in conflict with those of the minority. The upshot is that majority rule is not necessarily, but only contingently antithetical to the interests of minorities.

Second, the example also helps us to identify some reasons why people would act against their narrowly constructed self-interest. (1) In some cases, even people who have selfish goals have a better chance of realizing those goals by acting strategically, against their substantive views on the issue at hand. As many political scientists have pointed out, in most societies the political majority is far from homogeneous. In sociological terms, it is more appropriate to say that the majority is the coalition of minorities.[111] A politically organized minority has important bargaining power, and it could be useful for others to protect the rights of this minority for purely selfish reasons.[112] Moreover, there are infinite

---

[111] Bellamy (n 18) 43, 195–208.

[112] Bruce Ackerman, 'Beyond Carolene Products' (1984) 98 *Harvard Law Review* 713; Neil K Komesar, 'A Job for the Judges: The Judiciary and the

ways to classify people. Although most of these classifications are politically irrelevant, the different and politically relevant classifications can cut across each other and the same person can belong to the minority according to one classification and to the majority according to another one. Politically relevant, cross-cutting classifications mitigate the chance of belonging to a permanent minority, whose interests are systematically ignored. (2) In addition, a person who at present belongs to the majority can easily become a member of a minority group. Sheer bad luck can make someone disabled, terminally ill, poor or a suspect in a criminal case. (3) Furthermore, instrumental rationality is compatible with a broad range of goals, including the ones that incorporate the well-being of other human beings or animals. (4) Finally, at least in some cases we follow principles that are not instrumentally rational for us.

The argument so far established only that majority rule is not *necessarily* antithetical to rights as such, or to the rights of minorities. But we also have substantial evidence to support the empirical claim that people very often do not act upon self-regarding preferences.[113] However, the proponents of the New Constitutionalism could argue that it is sufficient for them to establish that majorities *tend to* give rights less protection than the judiciary. This more moderate argument certainly has merit. Discrete, insular minorities are particularly vulnerable to majoritarian pressure. Even if the 'per capita stakes' are much higher for the members of the minority, and a certain measure affects the minority disproportionately, the normal political process often ignores this disparity and, relying on the numerical majority, produces deeply unjust results.[114] This risk is higher if the membership in the class is based on characteristics that cannot be changed (eg race) or cannot be changed without very significant sacrifice (eg religion, nationality), or the membership is the consequence of the individual's bad decisions (eg prisoner status). In these cases, the members of the majority do not have to be afraid of the risk of ending up in the disadvantaged group.

It is also relevant how insular the minority is. Most disabled people, for instance, live with their healthy family members who care about their interests and who are directly affected by how disabled people are treated

---

Constitution in a Massive and Complex Society' (1987) 86 *Michigan Law Review* 657, 675–7.

[113] Samuel Bowles and Herbert Gintis, 'Social Preferences, Homo Economicus, and Zoon Politikon' in Robert E Goodin and Charles Tilly (eds), *The Oxford Handbook of Contextual Political Analysis* (Oxford University Press 2008).

[114] Komesar (n 106) 55.

in the community. If a minority is discrete and insular, the mistreatment of their members does not affect so directly the interests of people who belong to the majority and the latter will probably care less about the minority's interests.[115]

It is also important to note that the members of the majority are not necessarily motivated by malicious motives. One could argue that in the imaginary community I sketched above, neither of the two dissenters was motivated by sheer prejudice. Fiona did not merely dislike lesbians; she was convinced that homosexuality is morally wrong and sincerely claimed that her beliefs were rooted in her religion. Gail did not have strong prejudices; she was almost indifferent. Let us imagine a society that comprises two discrete and separate subgroups, the majority and the minority. Within the majority, Fiona's righteousness is the minority view, and Gail's indifference is the majority view. Since they are both different from the members of the minority, the Fionas and the Gails always vote together. Even if Fiona's views do not constitute a majority in the whole community, Gail's indifference and her acting together with Fiona are sufficient to systematically outvote the members of the minority.

3.5.1.2 Minoritarian bias

The political process is endangered not only by majoritarian but also by minoritarian bias. Effective political action requires information and organization. In many cases, a particular problem or decision affects the members of the public very differently. Using Komesar's terminology and example, we could say that the per capita stakes are distributed very unevenly.[116] Let us imagine that a factory causes pollution, but the effects of the pollution are not dramatic. For the polluter, the per capita stakes are high, since its profitability or its very livelihood is at stake. On the other hand, the pollution affects many people, but for them, the per capita stakes are or seem to be much lower. This disparity between the number of participants, on the one hand, and the per capita stakes on the other, can easily lead to the dominance of the minority. Since the stakes are higher for the minority, they have more incentives to acquire information and to organize political action. Because of their small number, they can also more easily organize themselves. By contrast, the members of the majority do not have sufficient incentives to engage in political action, and since they are the majority, coordinating their efforts is more difficult. This is especially the case if the members of the majority are

---

[115] Komesar (n 112) 675–7.
[116] Komesar (n 106) 14, 55.

dispersed and the majority is heterogeneous. For instance, racial groups might be geographically dispersed, but since race can be easily identified, and it has been a politically salient characteristic, the commonality of interests is long term and is not difficult to identify. By contrast, the consumers of a particular product are probably dispersed, it causes difficulty for them even to identify each other, and the commonality of their interests is short term and contingent. These factors make the organization of political action more difficult. In a nutshell, well-organized interest groups can have a disproportionately huge influence on the political process and determine the content of policy decisions, even if they do not constitute a numerical majority.

3.5.1.3 In/out bias

The first two biases have focused primarily on the incentives and motivations of citizens. The majoritarian bias does not presuppose that politicians are corrupt or follow their own self-interests, they can and often make decisions that disadvantage the minority, because they are responsive to public opinion. Minority bias can work more efficiently if politicians are corrupt and selfish: a well-organized minority can 'buy' decisions that do not serve the interest of the majority, for instance, by financing political campaigns or giving personal advantages to politicians. However, minority bias could work in many cases even if all politicians were spotlessly virtuous. If the per capita stakes for the members of the majority seem to be sufficiently low, and the underlying issue is complex, the members of the majority do not have sufficient incentives to invest time and energy even in understanding the issue; therefore cannot even recognize or articulate their interests.

The third malfunction, by contrast, focuses on the incentives of politicians. By the very nature of their profession, politicians want to grab power and keep power, and rights often hindrance this attempt. As Ely puts it, 'ins have a way of wanting to make sure that outs stay out'.[117] Although in a democracy staying in power requires the support of the majority, and we can assume that those whose rights are violated will have a strong incentive to vote against politicians who violated their rights, this does not necessarily mean that politicians do not have strong incentives to violate some rights. If we consider politicians to be rational actors who act instrumentally, and assume that their goal is to stay in power, they will have an incentive to violate rights if the overall balance

---

[117] Ely (n 106) 106.

of an action enhances the chance of grabbing or keeping power. (I do not say that they will always act on this incentive.)

We can identify a couple of familiar scenarios where these incentives are at work. First, in some cases there is a good chance that the actions of the government will remain unknown to the public. (Violating rights by surveillance, violating the rights of prisoners.) Those in power, therefore, often have a vested interest to retain information on their own activity if this decreases the chances of their re-election. Even if the activity in question itself does not violate rights, keeping something secret gives incentives to politicians to violate those rights that help people to get access to information.

Second, the rules of political competition are not neutral, but can favour one of the competitors. Those in power will have, therefore, significant incentives to bend the rules in a way that serves their interests. Rights that are closely related to the rules of political competition are especially vulnerable to the malfunctions of the political process.

Third, where minoritarian bias is at work, the minority can have strong incentives to compensate the numerical advantage of the majority by giving politicians some kind of advantage. For instance, let us imagine that a new factory engages in an activity that pollutes the environment. If the fact or possibility of the pollution were completely unknown to the population, the polluter should not worry about the violation of the population's interests. On the other hand, if the numerical majority strongly opposes the factory and is politically well organized, there is a significant chance that giving a licence to the factory will decrease the chances of re-election of those in power. Even in that case, a politician might side with the minority if (a) she considers her own economic advantage more important than being re-elected; (b) believes that although giving the license to the factory will decrease her chances of re-election, this is compensated by generous campaign financing, (c) her chances of re-election are so good, that she can take the risk of losing some voters. All the three alternatives assume that the minority compensates the politician in some way. However, the most likely scenario is that although the majority is not completely uninformed and unorganized, it is less informed and less organized than the minority with high per capita stakes. A politician can have many methods at her disposal to keep back relevant information from the majority or to make their political actions less effective.

Fourth, even if the legislative majority does not share the views of the popular majority, it can tolerate the violation of minority rights because of its self-interests. For instance, the popular majority might welcome the limitation of the rights of immigrants, prisoners and homosexuals, and

even if a politician does not share this sentiment, she has a strong incentive to act on the preferences of the popular majority.

3.5.2 Taming the Force of the Insulation Argument

Above I argued that although the majoritarian political process is not necessarily antithetical to the rights of minorities, it does indeed have serious malfunctions. I consider this as a common ground between the proponents of the New Constitutionalism and myself. However, the argument for judicial review is seriously incomplete in this form. To complete the argument, one has to answer three more questions. First, even if the political process has serious malfunctions, can the scope of these failures justify the scope of constitutional review that we find in modern democracies? Second, although the political process has serious flaws, it is not an option to compare the imperfect political process to ideal political principles. The question is whether courts can handle these malfunctions better than other institutions. Third, even if someone answers the second question in the affirmative, do the comparative advantages of the judiciary in the motivational dimension outweigh the shortcomings of the adjudicative process in other dimensions? The answer of the New Constitutionalists is a resounding yes to all the three questions. My answer is a fairly confident 'no' to the first question and an 'it depends on the context' to the second and third ones. The rest of this chapter will elaborate on these claims. In this subsection, I make only a couple of comments on the second and third questions that help me to tame the force of the insulation argument.

First, it might seem that to find the proper institutional framework of rights protection, we have to strike the optimal balance between the more democratic procedure of the legislature and the superior decision-making of the judiciary. However, the analysis above shows that this picture misrepresents the nature of the equation we face. Even if it were true that courts are superior institutions to handle the malfunctions of the political system, we have to pay a significant price for the insulation of the courts. More importantly, the trade-off is not simply between procedural and outcome-related reasons, but also between different kinds of outcome-related reasons. The insulation of courts from the citizenry has a significant price, not only in procedural but also in epistemic terms. In some cases, it is very clear that the same fact that suggests that there are strong biases at play also explains why courts have little expertise on the issue. National security is a classic example. Since national security by its very nature requires some secrecy, this gives politicians opportunity to avoid scrutiny and violate constitutional rights. However, the same

consideration that is at the root of political malfunctions is responsible for the epistemic superiority of the political branches. The significant deference that characterizes the activity of most courts in cases related to national security shows that sometimes it is still better to tolerate a risk of political malfunction than to make security-related decisions without adequate information.

Second, many proponents of constitutional review argue that constitutional courts track public opinion quite well; therefore, they are not countermajoritarian institutions. The argument is supposed to eliminate the countermajoritarian difficulty altogether, or at least to make it a side issue (see subsubsection 3.2.4.1). I believe that this line of argument overall harms and does not benefit the case for constitutional review. My reason for believing so is that this argument seriously undermines the outcome-related reasons for constitutional review without eliminating the comparative advantage of legislatures in the dimension of equal participation. I submitted that even if the evidence establishes that constitutional courts are more responsive to public opinion than is usually thought, this is not sufficient to eliminate the comparative advantage of legislative bodies in the procedural dimension.

To recap the gist of my position, if someone's interests are taken into account, but the person herself cannot have a say in the decision-making process, this undermines her status as an equal member of the community. No amount of benevolence on the part of an enlightened ruler changes someone from a subject to a citizen if the person does not have the right to participate in the political process. Therefore, this line of argument is incapable of compensating the comparative advantage of the legislature in the dimension of participation. The downside is that this strategy makes the strongest argument for constitutional review much less credible. The minoritarian and in/out biases often give incentives to legislative majorities to oppose the popular opinion. However, politicians rarely curtail the rights of minorities against the will of the popular majority. If political scientists were correct to claim that courts track public opinion as often, or to the same extent, as legislatures, one could not argue that courts are more supportive of the rights of minorities than legislatures. Let me make clear here that I do not build my position on the claim that this is actually the case. But even if courts are not as majoritarian as legislatures, the above argument indeed suggests that the comparative advantage of courts in the motivational dimension is much smaller than is usually assumed. The fact that the advantage of courts is relatively small in this dimension has to be taken into consideration in the final balance of the arguments.

Third, although we should admit that the political process is prone to malfunctions, it also has many built-in mechanisms to counteract these malfunctions. If we put constitutional review into proper institutional perspective, it becomes apparent that most institutional mechanisms to cope with the faults of the political process are actually political. It would be very difficult even to make sense of some of the central features of our constitutional design without considering them as institutional solutions to prevent or cope with those malfunctions.[118] I do not try to provide a full catalogue of these mechanisms since this is quite elementary; a couple of examples will suffice to illustrate the general point. (1) In modern democracies, MPs cannot be directly instructed by the members of their constituency and cannot be easily removed from their office. Although one could argue that this makes MPs less accountable, and probably enhances the chance of in/out bias, the purpose of the (admittedly relative) insulation of MPs is to protect them from direct populist pressure. We all know that the legislative majority sometimes does not reflect the popular majority. Although this discrepancy can stem from the self-serving measures of the political elite, in other cases it can be explained by the fact that MPs can indeed resist majoritarian pressure (and as Mazmanyan pointed out, courts can side with the popular sentiment[119]). (2) The parliamentary opposition has strong incentives and many legally protected possibilities to check and control the activity of the majority. With a well-functioning press, this is key to counteract all three types of bias. Although this watchdog function cannot prevent the majority from acting upon its majoritarian bias, it can be effective in coping with the minoritarian and the in/out biases. If the political process is transparent, and the popular majority becomes well-informed about practices that violate their interests, they have the numerical majority to outvote the legislative majority next time. (3) The horizontal division of power also has a pivotal role in addressing the three types of bias. If the president or the second chamber is supported by a different majority than the legislative body or the prime minister, they have not only constitutionally protected rights, but also strong incentives to control the latter. In addition, dispersing power among different temporal majorities is one way to prevent the abuse of power by the present majority. (4) One of the main purposes of federalism, devolution and the different territorial or cultural autonomies is also to cope with the malfunctions of the political

---

[118] Jon Elster, *Securities against Misrule: Juries, Assemblies, Elections* (Cambridge University Press 2013).

[119] Mazmanyan (n 14).

system. These methods, similarly to the horizontal division of powers, create incentives to check and balance other powers, especially if the majorities at the two levels of the government differ. In what is sometimes called post-conflict federalism[120] where the federated units reflect the national, linguistic, ethnic or religious composition of the state, the anti-majoritarian purpose of the federal structure is even more clear.

Finally, it is important to scrutinize a bit more carefully the nature of the arguments about the above-mentioned political malfunctions. When we try to understand how society works, we use explanatory models that make the actions of others intelligible to us. Although a good model can explain many aspects of empirical reality, it is always, by its very nature, a simplified representation of reality,[121] and, therefore, cannot account for all aspects of it. In addition, empirical reality underdetermines explanatory theories; different explanatory theories can provide us with equally plausible explanations of the same facts. The idea of homo economicus, for instance, helps us to understand how people usually act in the market. We all know that people often do not act accordingly, but since the model has enormous explanatory and predictive power, it gives us a handle on reality, and, as such, is immensely useful for us.

The analysis of political malfunctions helped us to understand why people in general and politicians in particular *tend to* behave in certain ways. However, having an explanatory mechanism and understanding what gives people an incentive to act in a certain way, does not mean that people will actually act the way the explanatory theory predicts. We should not confuse a plausible explanation of reality with reality itself. Even if we identified a mechanism that gives an incentive to someone to do *x*, we cannot be sure that *x* will happen, since there can be other mechanisms that give an incentive against doing *x*. If politicians never acted upon those incentives, we should dismiss the above theories of political malfunctions out of hand. We discuss these ideas because the political system does have malfunctions and these theories do give a very plausible explanation of the malfunctions of the system. However, the explanatory theory in itself does not explain how often the incentives we identified actually determine the actions of an agent, and how severe those malfunctions are.

---

[120] Sujit Choudhry and Nathan Hume, 'Federalism, Devolution and Secession: From Classical to Post-Conflict Federalism' in Tom Ginsburg and Rosalind Dixon (eds), *Comparative Constitutional Law* (Edward Elgar 2011).

[121] Segal and Spaeth (n 44) 44–8.

Even if all actual political systems show the signs of all the three malfunctions, it does not follow that they are equally severe everywhere. Even if the incentives, the theories of political malfunctions have pointed out, are present in all political systems, institutional design and the political culture can mitigate their force and in different political systems they mitigate this effect very differently. Although there are corrupt politicians both in Norway and in Russia, common sense suggests that the severity of political malfunctions is very different in the two countries. The proponents of constitutional review tend to stop at identifying political malfunctions in general and at understanding the mechanisms that explain these malfunctions. They are rarely interested in how severe these malfunctions actually are in a particular political system. This stance is understandable if one believes that the adjudicative process is superior to the political process in all the dimensions that are relevant for the debate about judicial review. However, if one believes that the arguments of the debate are closely balanced, and the weight of the insulation argument depends on the severity of political malfunctions, a more contextual analysis is called for. This is the subject matter of the next subsection.

3.5.3 The Historical Record

In the present subsection I will examine a couple of studies about the political and human rights performance of different countries. These studies can help us to address three questions: (1) If human rights are endangered primarily by the malfunctions of the political process, it is highly likely that there is strong correlation between the general shape of a political system and the respect for human rights. This information is necessary to make contextual judgements about the gravity of political malfunctions. (2) We can also try to evaluate directly the human rights performance of different states. (3) Finally, we should ask whether there is any correlation between the existence of constitutional review and (a) the general shape or (b) the human rights performance of a political system.

A number of methodological points arises from these questions. One could argue that raising the second question flies in the face of the methodological commitments of my book. Human rights performance is an output-based criterion, and I argued before that, if we take reasonable pluralism seriously, we cannot assess our institutions by one of the contested conceptions of human rights. However, I do not aim to judge different political systems by my own preferred specification of human rights. Rather, my contention is that taking into account a range of

reasonable interpretations of human rights, there is a relatively broad consensus about the human rights performance of different states and *whichever* plausible specification of human rights my opponent adopts, it does not establish a compelling case for strong judicial review. I am also aware that (1) and (2) are not entirely independent variables. Even minimal conceptions of democracy must include some political rights. In addition, many studies treat human rights performance as a criterion of a well-functioning political system.

While analysing political regimes, some scholars prefer to use a dichotomous approach that stipulates the necessary and sufficient conditions of democracy and classifies a political system as either democracy or dictatorship. This approach is followed, for instance, by Boix and his co-authors[122] and the Democracy and Dictatorship project.[123] These two studies also reach very similar conclusions about the distribution of democracies and dictatorships among contemporary states. On the basis of these two datasets, we can draw the conclusion that democracies are more likely to establish constitutional review than dictatorships. Out of the 117 countries that are democracies according to the Democracy and Dictatorship project, 111 have some kind of judicial review. That is close to 95 per cent. By contrast, of the 74 dictatorships only 63 have constitutional review (85 per cent).

Others prefer to score political regimes along a number of dimensions and use these scores as the basis for their classification. In my analysis, I have relied on three such classifications, those of the Polity IV project,[124] the Economist Intelligence Unit[125] and the Freedom House.[126] The first one divides political regimes into five, the second into four and the last one into three categories (full democracy, democracy, open anocracy, closed anocracy and autocracy; full democracy, flawed democracy, hybrid regime and authoritarian regime; free, partly free and not free). Strictly

---

[122] Carles Boix, Michael Miller and Sebastian Rosato, 'A Complete Data Set of Political Regimes, 1800–2007' (2013) 46 *Comparative Political Studies* 1523.

[123] José Antonio Cheibub, Jennifer Gandhi and James Raymond Vreeland, 'Democracy and Dictatorship Revisited' (2009) 143 *Public Choice* 67.

[124] Polity IV, 'Polity IV Project: Political Regime Characteristics and Transitions, 1800–2013' (2014) <http://www.systemicpeace.org/polity/polity4.htm> accessed 1 December 2015.

[125] The Economist Intelligence Unit, 'Democracy Index 2014, Democracy and Its Discontents' (2015) report <http://www.eiu.com> accessed 1 December 2015.

[126] Freedom House, 'Freedom in the World 2015' (2015) <https://freedomhouse.org/report/freedom-world/freedom-world-2015> accessed 1 December 2015.

speaking, the Freedom House's index is not about democracy but civil and political liberties. However, since it is often used by political scientists as a proxy for a democracy index,[127] I also took it into consideration.

Although I admit that the dichotomous classifications are more adequate for many purposes, in our case, the scoring method leads to more interesting insights. I assume here that the gravity of political malfunctions is closely related to the level of human rights protection, and both of these are a matter of degree. We are interested, therefore, not only in the question of whether a certain political system can be classified as a democracy, but also in the quality of democracy.

If we focus more closely on the broad category of dictatorship and use more fine-grained distinctions, it becomes clear that the lack of constitutional review is much more common in the most autocratic states, while it is much less common in the less authoritarian ones. For instance, using the classification of the Economist Intelligence Unit (hereinafter EIU), almost 24 per cent of the most authoritarian states lack judicial review (12 out of 51). By contrast, judicial review exists in all hybrid regimes.

Consulting scoring approaches instead of dichotomous classifications does not seem to lead to many new insights in the upper regions of the rankings, since all states, except the Netherlands and Switzerland, have judicial review.

However, I suggest that the picture becomes much more interesting if we do not rely exclusively on the presence or absence of judicial review, but also take into account the nature of this institution. I introduced the concept of weak judicial review in Chapter 1 and will explore that topic in more detail in Chapter 5. I claimed in the introduction that judicial review can deviate from the paradigmatic model that is exemplified for instance by the US Supreme Court or the German Constitutional Court in three dimensions and that we can lump together these cases under the umbrella concept of weak judicial review. Following this approach, judicial review is weak in Australia (limited), Canada, New Zealand and the United Kingdom (penultimate). The concept of deferential review is more fluid than the previous two reviews, but we have good reasons to class at least the judicial review of the five Nordic countries as deferential. These are nine countries altogether. If we add Switzerland and the Netherlands, the two mature democracies without constitutional review, to the nine countries listed above and assess the performance of the group

---

[127] William Roberts Clark, Matthew R Golder and Sona N Golder, *Principles of Comparative Politics* (2nd Edition, CQ Press 2012) 156–8.

of these 11 countries (I will refer to them as the group of 11), we can draw a couple of interesting conclusions.[128]

Although the list of countries without strong judicial review is not very long, it is long enough to change our perception significantly about the relationship between well-functioning democracy and constitutional review.

The more stringent a democracy index is, the more visible this change becomes. According to the Polity IV project, there were 34 full democracies in 2013. To illustrate the leniency of this standard, the Polity IV project awarded the highest score (10) among others to Cyprus, Greece, Hungary, Mongolia and Trinidad and Tobago. The Freedom House gave the best score (1) to 48 countries in both of its rankings in 2014. The EIU's scoring is the most demanding since it considers only 24 countries as full democracies. There are only 19 countries that make the top of the ranking on all the three lists. By examining these lists carefully, three observations are especially instructive for our purposes.

First, of these 19 countries, only nine have strong judicial review. This puts the relationship between judicial review and democracy in a very different light than the statement that there is constitutional review in 95 per cent of democracies.

Second, of the nine countries I characterized with weak judicial review, Iceland is the only one that does not make the top of all the three lists. However, this fact has a fairly straightforward explanation: the Polity IV project includes only countries with a population above half a million. Because of the fluidity of the concept of deferential judicial review, I cannot claim with confidence that all the countries with weak judicial review are among the 19 most democratic countries, but this observation certainly applies to the nine countries I classified above as instances of weak judicial review.

Third, of the three rankings, the EIU's one is particularly interesting for our purposes, not only because its criteria for full democracy are more demanding than the top marks of the Polity IV project or the Freedom House, but also because its scoring system is more fine-grained. That is, it is also possible to rank the countries within each category. It is instructive to see that the top ten performers are without exception countries without strong judicial review. That is to say, they all are

---

[128] One could argue, it is a mistake to classify the judicial review of Norway, Iceland and, albeit for different reasons, Canada as weak. By contrast, others would have also added Japan to the above list. Although the first objection would somewhat weaken my position, I believe, it would not affect the general validity of my argument.

members of the group of 11; the United Kingdom is the only one that does not make the top ten of the EIU ranking.

It is also almost impossible not to recognize the common historical trajectory that characterizes the past of these countries. According to Samuel Huntington, between 1828 and 1926, that is in the first wave of democratization, altogether 33 countries became proper democracies.[129] All of the 11 countries mentioned here belong to this group. What is perhaps even more important, on Huntington's account, there are only ten countries that have not experienced a major backlash ever since. With the exception of Ireland and the United States, all of these countries are from the group of 11. One could argue, challenging Huntington's historical account, that even the remaining three countries of the group, Denmark, the Netherlands and Norway, are not real exceptions, since the interruption in the functioning of democratic institutions was caused by external factors.[130]

I believe that in light of the above evidence, the case against the necessary relationship between well-functioning democracy and strong judicial review is overwhelming. The above rankings show that those countries that do not have strong judicial review are over-represented in two groups of countries. These two groups occupy the two ends of the democracy rankings: some of them belong to the most authoritarian states, some of them belong to the most stable democracies.

There is one well-known theory in political science that I am aware of that appears to contradict the claim I made above. In his classic book about majoritarian and consensus democracies, Arend Lijphart contends that the latter usually outperform the former.[131] If we add that judicial review is one of the ten defining features of the consensus model of democracy, Lijphart's theory seems to suggest that judicial review contributes to the superior performance of consensus democracies.

However, a closer reading of Lijphart's theory dissolves this appearance. Lijphart says that the ten differences between majoritarian and consensual democracies cluster in two separate dimensions, what he calls the executive-parties and the federal-unitary dimensions, respectively.[132] The presence of judicial review is related to the second dimension of the

---

[129] Samuel P Huntington, *The Third Wave: Democratization in the Late Twentieth Century* (University of Oklahoma Press 1991) 14.

[130] Boix, Miller and Rosato (n 122).

[131] Arend Lijphart, *Patterns of Democracy: Government Forms and Performance in Thirty-Six Countries* (2nd Revised edition, Yale University Press 2012).

[132] ibid 3.

majoritarian/consensus dichotomy. Although the tone of Lijphart's analysis indeed suggests the superiority of the consensus model, at some points the author qualifies his claim and says that his strongest thesis is a negative one: contrary to conventional wisdom, majoritarian governments are not more effective than consensual ones.[133] However, the essential point is that Lijphart's claim is limited only to the first dimension of the majoritarian/consensual distinction. Focusing on the executive-parties dimension, Lijphart concludes that concerning effective government, 'the overall evidence is therefore in favor of the consensus democracies – and disconfirms the conventional wisdom that majoritarian governments are the superior decision-makers'.[134] As judicial review belongs to the federal-unitary dimension of Lijphart's analysis, it has nothing to do with the above conclusion. In fact, the five Nordic countries, Switzerland and the Netherlands, that are all consensual in Lijphart's first dimension, contribute significantly to the better performance of consensus democracies. As far as the federal-unitary dimension is concerned, Lijphart concludes that 'with one minor exception, all of the relationships are extremely weak and statistically insignificant'.[135] In addition, Lijphart compared the performance of *countries* that can be classified as majoritarian or consensual. However, the fact that a county is classified as a consensual democracy in either or both dimensions Lijphart uses does not mean that it shows all the characteristics of the general model. Switzerland, Belgium and the Netherlands are the three countries that probably come closest to the ideal type of consensual democracy. Interestingly, two of them are the only major democracies that lack constitutional review. This shows that they perform well not because of judicial review but in spite of the lack of that institution. In a nutshell, Lijphart's analysis does not refute my previous claims about the historical record of the group of 11.

Since the studies I alluded to so far are about the general shape of a political system, it is also instructive to examine some other rankings that focus more closely on the rule of law and human rights. The World Justice Project has elaborated a list of criteria to measure the implementation of the rule of law and prepared a ranking of 102 jurisdictions.[136]

---

[133] ibid 273.
[134] ibid 268.
[135] ibid 272.
[136] World Justice Project, 'Rule of Law Index 2015' (2015) <http://worldjusticeproject.org/rule-of-law-index> accessed 1 December 2015.

Apart from the overall rule-of-law index, I have also paid special attention to one component of the index, the protection of fundamental rights.

The most comprehensive academic evaluation of the human rights performance of different countries I am aware of was published by David Law and Mila Versteeg.[137] The two scholars lumped together constitutional rights into 15 categories and examined to what extent individual countries live up to the promises they make in their constitutions, or to what extent they overperform, that is, give protection to rights that are not regulated in their constitutions. Although the details of these rankings differ to some extent from the above-mentioned democracy indexes, they do not change, but rather lend further support to my general conclusions (see Table 3.1). The same 11 countries are ranked high not only on general democracy indexes, but they also have high scores in the tests that focus more closely on the level of human rights protection. The two rankings of the World Justice Project that I alluded to are dominated by the Nordic countries. The ranking of Law and Versteeg is topped by New Zealand and the United Kingdom; both of them protect 14 rights out of the 15 fully and protect one more right partially. Fourteen rights are protected by ten countries, and six of them belong to the group of 11. That means that eight of the 12 top performers are coming again from the same group. Let me conclude this paragraph with Law and Versteeg's observation: 'The absence of a positive relationship between judicial review and constitutional compliance highlights the need for critical re-examination of widely held assumptions about the efficacy and necessity of judicial review.'[138]

How do the above empirical findings fit into the structure of the argument I have developed so far? My contention is that in mature democracies there is no compelling reason to introduce the strong form of judicial review. Although I admit that the political malfunctions that the proponents of judicial review have identified exist in all political systems, they do not pose the same challenge in all countries. It is simply implausible to claim that legislatures would be similarly motivated from Norway to North Korea. I consider it to be quite uncontroversial that the institutional context and the broader political culture give rather different incentives to legislators in different political systems. The implication of this is that the strength of the insulation argument is not constant but

---

[137] David S Law and Mila Versteeg, 'Sham Constitutions' (2013) 101 *California Law Review* 863.

[138] ibid 931.

Table 3.1 Weak judicial review and some political performance indicators

	Judicial review	EIU Democracy ranking	WJP Rule of Law ranking	WJP Fundamental rights-ranking	Law-Versteeg Rights performance points (ranking)
Australia	limited	9	10	10	14 (3–12)
Canada	penultimate	7	14	15	14 (3–12)
Denmark	deferential	5	1	2	14 (3–12)
Finland	deferential	8	4	1	14 (3–12)
Iceland	deferential	3	NA	NA	14 (3–12)
Netherlands	none	10	5	7	12.5 (25–26)
New Zealand	penultimate	4	6	9	14.5 (1–2)
Norway	deferential	1	2	3	14 (3–12)
Sweden	deferential	2	3	4	13.5 (13–19)
Switzerland	none	6	NA	NA	13 (20–24)
United Kingdom	penultimate	16	12	14	14.5 (1–2)

depends on the nature of the political system. In a mature, well-ordered democracy the strength of the insulation argument is weaker than in a flawed democracy. This also implies that the balance of arguments will vary from one political system to another. In those countries where the insulation argument is relatively weak, it has to give way more easily to the countervailing considerations. As I admitted, I do not have a precise calculus to determine when exactly the insulation argument should give way to other considerations. However, I believe that even a cautious balancing exercise justifies the rule of thumb I put forward above.

If countries without strong constitutional review have a comparable democratic and rights performance record to the most democratic countries with strong constitutional review, the insulation argument is not strong enough to outweigh the combined effect of the argument from equal participation, the epistemic argument and the public reason argument. If the 11 countries lumped together above outperformed the most highly ranked countries with strong constitutional review, that shows that their political system is healthy enough to handle the motivational problem of the political system rather effectively. They score as high as

the most democratic countries with strong judicial review in one dimension (the level of human rights protection) but score higher in another dimension (equal participation).[139]

A further possible objection to my argument is that even the most highly ranked countries on these lists could handle the motivational failures of the political system better if they introduced strong constitutional review. Although they have a good human rights record, there is no guarantee that this will always be the case. I am not saying that this scenario is not possible, and the human rights record of these countries cannot deteriorate. However, this objection misses the point. The objection would be correct if building further veto points into the political system in the form of strong constitutional review would not have any moral costs. In that case, I would agree with Aileen Kavanagh, who suggests that 'we should err on the side of vigilance rather than complacency when it comes to designing institutions to uphold rights'.[140] My point is that rejecting constitutional review is not necessarily the sign of complacency. It can be the outcome of a careful balancing exercise. Introducing constitutional review is hardly without costs. On the contrary, we have to pay a high price for it. The danger of serious human rights violations in these countries is speculative, and the improvement achievable by the introduction of strong constitutional courts seems to be marginal. The sacrifice of the principle of equal participation, by contrast, is direct, systematic and imminent if strong judicial review is introduced. So the argument in these countries is not that political malfunctions could not be handled even better by establishing strong constitutional review. Rather, the claim is that the price we should pay for this marginal improvement is too high.

I admitted that I cannot offer a knock-down refutation of the insulation argument. My argument based on the empirical evidence cited above does not refute the insulation argument, but only limits its applicability. Although the limitation I suggested applies only to a handful of countries, that is, full democracies, the message it conveys poses an important challenge to the New Constitutionalism. It could not be portrayed any

---

[139] My position here is very similar to that of Jeremy Waldron. However, Waldron, defending the core of the case against judicial review, uses the criterion of well-ordered democracy as an assumption that delimits the validity of his argument (the core case). Jeremy Waldron, 'The Core of the Case against Judicial Review' (2006) 115 *Yale Law Journal* 1346, 1359–62. By contrast, the quality of democracy in my argument is not an initial assumption, but part of the balancing process.

[140] Kavanagh (n 26) 362.

longer as the only available decent constitutional alternative. The deviation from the New Constitutionalism would be considered not heretical, but normal.

3.6 THE MISMATCH ARGUMENT

3.6.1 The Question of Fit

I have developed three lines of argument against constitutional review so far but admitted that I cannot offer a knock-down refutation of the insulation argument. I certainly believe that the combined force of the three arguments is sufficient to challenge the dominance of the New Constitutionalism; I am not aware of any transparent balancing process that would demonstrate that the case for strong constitutional review is compelling. Instead of offering a direct refutation of the insulation argument, or relying on sheer intuition that the three arguments somehow outweigh the insulation argument, I started to circumscribe the latter argument. I suggested that in those countries where the democratic process is robust and the political institutions are in good shape, the case against strong constitutional review is stronger than the case for it. It is the purpose of this subsection to offer further reasons against the insulation argument. I will follow an argumentative strategy that I will call the mismatch argument. The mismatch argument is primarily not about the weight or the strength of the conflicting reasons for and against judicial review. Rather, it scrutinizes the scope of those arguments and the internal coherence of the New Constitutionalism. My contention is that the arguments for the New Constitutionalism, including the insulation argument, are either overinclusive or underinclusive or inconclusive and, therefore, do not match the institutional framework favoured by the New Constitutionalists.

Modern constitutional democracies that comply with the New Constitutionalists' institutional template employ a complex and sophisticated decision-making process. To develop my argument, let me distinguish three levels of this process. At the highest level, the rules of the constitution, including the provisions about fundamental rights, are laid down (let us call this *Level One* decision-making). However, since these norms are fairly abstract and value-laden, they have to be specified before they can be applied to more concrete legal disputes (*Level Two*). Finally, the rules laid down at Level One and specified at Level Two impose limits on the ordinary political process. However, they also leave

ample room for discretion. Decisions that are made exercising this discretion belong to the third level of the decision-making process (*Level Three*).

For the purposes of my argument, I will assume that the supporters of the New Constitutionalism subscribe to three tenets, corresponding to each level of decision-making. (1) Fundamental rights should be incorporated into the constitution by the decision of a constitution-making body, and this process requires broader consensus than ordinary legislation. Let us call this requirement the *democratic pedigree of the constitution*. (2) The power to specify the meaning of fundamental rights should be conferred on strong constitutional courts. This is the claim that the previous sections have revolved around. (3) The first two levels should leave open a wide enough area of discretionary power and the most important political decisions within this discretionary area should be made by the elected branches of the government. The New Constitutionalists insist that although courts have an important function in our societies, this role is supplementary and does not lead to the kind of juristocracy the critics of constitutional review often envisage. Let us call the third tenet the *primacy of the legislature*.

The difficulty we face here is that the most plausible justifications of judicial review do not have built-in boundaries that would automatically limit the validity of those considerations to Level Two, the specification of human rights, and the advocates of judicial review do not give us guidance on the precise scope of those considerations. To illustrate the general thrust of my argument, the New Constitutionalists often claim that courts are better at protecting long-standing principles than legislatures.[141] For the sake of argument let us grant this point. However, if protecting long-standing principles is important, the scope of the argument is clearly not limited to the specification of constitutional rights. We would be surely better off, if the constitution-making process or ordinary legislation also respected long-standing principles. I will not attempt here to draw the precise boundaries of how far similar arguments lead us. I will paint with a broad brush and try to establish only that all the plausible arguments for constitutional review are either significantly overinclusive and undermine either/both (1) or/and (3), or are underinclusive and give only partial support to (2). The second prong of the mismatch argument suggests that the most robust arguments of the New Constitutionalism are also inconclusive: a reason against the legislature is not necessarily a reason for a constitutional court.

---

[141] Young (n 87) 135.

3.6.2 Overinclusive and Underinclusive Arguments

3.6.2.1 The argument from the declaratory theory of interpretation

I am aware of only one line of argument that fits neatly with all the three tenets mentioned above, and this is the argument from the declaratory theory of interpretation. The advocates of the New Constitutionalism could contend that the authority of the constitution, including the bill of rights, derives from a democratic decision made by a constitution-making body. So the argument complies with (1), the democratic pedigree of the constitution. According to this theory, judges only declare what is already in the constitution. If this is so, they are not moral arbitrators, and, therefore, the justification of judicial review is rather unproblematic (2). Finally, as the constitution itself imposes only side constraints on political decision-making and leaves ample discretionary power to the legislature, the most important political decisions of society are indeed made by the elected branches. Hence, the argument is also compatible with (3), the primacy of the legislature. Unfortunately, this strategy presupposes that judges only declare what is already in the constitution, and constitutional reasoning primarily requires technical legal expertise. I aim to demonstrate in the next chapter that this position is untenable. Therefore, we should examine how the other justifications for judicial review fare on this test.

3.6.2.2 Superior rights-related moral expertise

There is another line of argument that, although it does not fit as neatly with the three tenets as the above one, nevertheless has some initial plausibility. This strategy suggests that there is a subset of moral decisions that are better made by judges than legislators. According to this view, the adjudicative process has unique epistemic qualities to develop rights-related moral arguments. I have argued above that this claim is unwarranted. However, let us grant that I was mistaken and this argument justifies (2). However, if judges have superior expertise on rights, it is not clear why we insist on conferring Level One decisions (at least the power to lay down constitutional rights) on a political body, even if it has special legitimacy. Thus, the argument from rights-related moral expertise seems to undermine the democratic pedigree of the constitution. In addition, this argument would also radically narrow down the discretionary power of legislatures, since the argument implies that ideally all rights ought to be determined by judges. This conclusion could be only avoided if the special expertise of judges were limited to constitutional rights as opposed to rights in general. However, I cannot

see any plausible reason that would justify the 'epistemic exceptionalism' of constitutional rights.

3.6.2.3 Superior principle-related moral expertise

Others put forward a related, but slightly different argument. Their operative distinction is not the one between rights-related and other moral arguments, but the distinction between principles and policies. We are told that judges are better at making decisions about principles while legislatures are better at making decisions about policies. I will not challenge here the conceptual distinction between principles and policies. Even if there were a clear-cut dividing line between the two types of considerations, few proponents of judicial review would argue that legislatures should make only policy-related decisions. Taxes, for instance, can promote some policy goals, but they also reflect our principles about distributive justice. There are many fields of law that can be as plausibly rationalized in terms of principles than in terms of policies. To argue that all these laws should be made by courts rather than legislatures would fundamentally challenge the primacy of the legislature (3). In addition, just like the previous argument, this one also undermines (1) since the constitution itself lays down general principles.

3.6.2.4 Superior moral expertise

Both the argument from rights-related moral expertise and the argument from principle-related expertise are of limited usefulness to the New Constitutionalists because they are hopelessly overinclusive and are inconsistent with both the democratic pedigree of the constitution and the primacy of the legislature. However, if there is no relevant epistemic difference between rights/principles-related moral reasoning and other instances of moral reasoning, as I believe is the case, the adherents of constitutional review need to subscribe to the even broader proposition that holds that judges are, in general, better moral reasoners than legislators. If that is the justification for judicial review, the strength of the argument can be hardly limited to the specification of human rights. In the absence of some countervailing considerations, we should also confer the authority (or at least as much authority as possible) to make Level One and Level Three decisions to the judiciary and that would undermine both the democratic pedigree of the constitution and the primacy of the legislature.

3.6.2.5 The systemic failure theory

Does the insulation argument fit better with the institutional framework of constitutional democracies? The advocates of constitutional review

develop the insulation argument at different levels of generality. However, it is instructive to distinguish two ideal types of the general argument; the two versions have different views about the severity of political malfunctions. I will call them the systemic failure and the blind spot theories respectively. Some proponents of constitutional review believe that there is a fundamental difference between courts that are neutral, deliberative and contemplative, and the hurly-burly world of politics that are guided by the passions and the interests of politicians. Let us assume that this diagnosis is correct. However, if that is the case, the argument, similarly to the epistemic arguments above, cannot be limited to the specification of fundamental rights. The systemic failure theory cannot explain why most Level Three decisions should be made primarily by legislatures. Even if one accepts that the inherent limitations of judicial capacity impose a strong upper limit on the number of issues judges can handle, we should at least try to give more law-making power to them.

But it is also doubtful whether in that case there would be any good reason to confer the authority to make Level One decisions on a political body. Although the constitution-making body differs from ordinary legislation, it is still a political body, and more prone to political malfunctions than courts. If the motivational bias is a decisive factor for conferring Level Two decisions on courts, we would also be better off if constitutional rights were laid down by judges in the first place. Jeremy Waldron has developed a particularly forceful version of the mismatch argument. He claimed that, by pointing out the malfunctions of the political system, many proponents of constitutional review assume the predatory nature of human beings. This would undermine not only the democratic pedigree of the constitution, as my argument asserts, but is also inconsistent with the very anthropology the idea of rights rests upon.[142]

3.6.2.6 The blind spot theory

A more moderate reading of the insulation argument suggests that the above sharp contrast between deliberative courts and hurly-burly legislatures is no more than a rhetorical exaggeration. According to the moderate version, the political process is not inherently corrupt; the malfunctions are, at least in consolidated democracies, sporadic rather than pervasive. Therefore, the court's function is supplementary and corrective. Since this argument poses a more serious challenge to my

---

[142] Waldron (n 31) 221–3.

position than either the epistemic arguments for judicial review or the systemic failure version of the insulation argument, it deserves a more sustained scrutiny.

I submit that, even in this moderate form, the argument seems to be overinclusive. To back up my claim, I will focus on the strongest component of the insulation argument: the majoritarian bias. The problem with the argument is that if a political majority is hostile to minorities, there is no reason to believe that it will not violate their rights at Level One, that is, when the provisions of the constitution are laid down. Although an entrenched constitution gives extra protection to some minorities and mitigates the chance of rights violations, it cannot protect all vulnerable groups, simply for numerical reasons. Some minorities are too small to block the constitution-making or constitution-amending process. Some other vulnerable groups did not or do not have political standing at all. In many countries, prisoner voting rights are seriously limited. Immigrants, asylum seekers and the mentally handicapped do not have the right to vote. My point is not that these limitations on the right to vote cannot be justified (I want to leave this question open), but that the minorities in question are not in the position to prevent such restrictions.

Examples abound: as is well known, the US Constitution tolerated slavery before the Civil War. Women did not have the right to vote before the twentieth century. Many constitutions define marriage as the union of a male and a female, excluding the possibility of same-sex marriage. Other forms of discrimination are more subtle. Many constitutions declare the unity of the nation, and thereby deny the collective agency of national minorities. Assertive secularism puts different burdens on religious and non-religious people. The upshot of these observations is that if the possibility of political malfunction is a conclusive argument for conferring the role of moral arbitrator on the judiciary, then we have no reason to endorse the principle of democratic pedigree and would be also better off by vesting the constitution-making power in the judiciary.

I have found all the arguments above overinclusive. However, the blind spot version of the insulation argument is not only overinclusive but also underinclusive. Even if we admit that political malfunctions exist, and this consideration trumps all contrary reasons, it is simply not broad enough to cover all rights. Let us imagine that both the citizens and the political parties are divided on the issue of abortion. Some political parties prefer a relatively liberal, while others prefer a more conservative, position. Although we can concede that MPs are responsive to the preferences of the citizenry, this becomes problematic only if we further assume that citizens, unlike legislators or judges, are always guided by

their passions or their narrow self-interests. If the responsiveness to public opinion were a problem in itself, the blind spot theory would collapse into the systemic failure theory. Do we have reasons to assume that the bias of MPs is somehow more limited and circumscribed? MPs can be certainly biased if by that we mean that they have a strong opinion on the issue at hand. However, if that is what we mean by bias, judges are probably as biased as legislators. I suggest that we do not have robust motivation-related arguments to believe that legislatures are systematically biased concerning abortion. Even if there are more subtle motivation-related arguments to that effect, I cannot see how they could outweigh the fairly robust arguments of equal participation and public reason that give an edge to the legislature.

Although one could argue that abortion raises a unique moral issue, it does not follow that abortion is unique as far as the motivational structure of legislators is concerned. I suggest that many rights issues are relatively similar in that respect.

I am ready to admit that there are other rights disputes where the incentives of the legislature seem significantly different from the abortion debate. If the government of the day wants to keep secret some aspects of its activity, one can assume that the legislature is not unbiased in the conflict between freedom of speech and secrecy. If the legislature enacts a new law on the rules of election, one can plausibly claim that judges are better positioned to judge the fairness of the new regulations than the majority, who have vested interests in staying in power. Since these issues are directly related to the retention of power and we can safely assume that legislators want to stay in power, it is reasonable to conclude that the judges' relative insulation from politics is an advantage in the articulation of those rights.

The above analysis leads me to a thesis that has a central role in my case against strong judicial review. The proponents of strong constitutional review assume that there is a strong link between constitutional rights and political malfunctions, let us call this the Correspondence Thesis. My contention is that there is no inherent or necessary link between constitutional rights and political malfunctions, and the two categories are not coextensive. As I argued above, in some cases the specification of constitutional rights is not corrupted by political malfunctions, or at least the existing malfunctions are not severe enough to outweigh the force of the procedural and epistemic arguments against constitutional review. In other cases, we can easily identify political malfunctions in areas that have nothing to do with constitutional rights.

This discrepancy between the scope of constitutional rights and political malfunctions cannot be unexpected to anyone who has a rough

understanding of how constitutions are made. In most cases the bill of constitutional rights is borrowed from international human rights documents or other constitutions without reflecting upon the malfunctions of the particular political system that the constitution regulates.[143] The proliferation of human rights often shows the aspirations of a given society and the drafting process is not informed or motivated primarily by how political malfunctions could or should be addressed.

3.6.3 Restoring the Equilibrium: Juristocracy

I contended above that most arguments that support the justification of judicial review are overinclusive: pushed to their logical conclusion, they go much beyond the justification of judicial review. They seem to be incompatible with both the democratic pedigree of the constitution and the primacy of the legislature. The advocates of the New Constitutionalism can restore the equilibrium between their justificatory principles and their suggested institutional design in two ways: the first is that they endorse the radical implications of their arguments and drop the democratic pedigree of the constitution and/or the primacy of the legislature. The second is that they stick to their principles of institutional design but reconsider the strength of their justification. I will address these two options in turn.

There is a term that often surfaces in the discourse about constitutional review: government by judges. Let me make clear that, taken literally, this scenario is unrealistic. The capacity of courts has inherent limits and the judiciary, as we know it today, is simply unsuitable to take over the functions of the elected branches.[144] However, one could still argue that, within these hard limits, we should give as much power to the judiciary as possible. I will use the term juristocracy as a shorthand to refer to an institutional design that drops the democratic pedigree of the constitution and/or the primacy of the legislature. I use the term with the caveat that, because of the limits of judicial capacity, it is unrealistic to assume that judges could be the primary decision-makers in a quantitative sense. However, if courts are the best institutions to define rights, to identify the long-term principles the society should follow or to make moral decisions in general, it seems logical, even considering the limited capacities of courts, to confer the constitution-making power on courts.

---

[143] David S Law and Mila Versteeg, 'The Evolution and Ideology of Global Constitutionalism' (2011) 99 *California Law Review* 1163.

[144] Andrew B Coan, 'Judicial Capacity and the Substance of Constitutional Law' (2012) 122 *Yale Law Journal* 422.

There is nothing logically incoherent in the concept of juristocracy. However, the institutional design of juristocracy is fundamentally at odds with the principles of our contemporary constitutional democracies. Such a radical change puts the onus of justification on the proponents of the New Constitutionalism. The argument of the previous subsection was an *argumentum ad absurdum*. I assumed that juristocracy would be undesirable. Therefore, there must be something wrong with the justification that has such far-reaching ramifications. However, some advocates of constitutional review would be probably not frightened by such a radical shift in our institutional set-up and would accept the institutional implications of their justificatory principles.

To substantiate the claim that this scenario is not entirely far-fetched, it is important to identify a couple of developments in constitutional law that, although falling short of the implementation of juristocracy, go beyond the role the New Constitutionalism traditionally assigns to courts.

3.6.3.1 Basic-structure review

The principle of the democratic pedigree of the constitution confers the constitution-making and amending authority on the political process. However, a constitution is a complex system of norms. It can happen that some provisions sit uneasily with the most general principles of the constitution. Although the danger of this inconsistency is not unreal, in most countries constitutional amendments cannot be challenged by courts on the ground that they are inconsistent with the fundamental principles of the constitution. Many constitutions have so-called eternity clauses that declare some provisions of the constitution unamendable.[145] But the basic structure doctrine, pioneered by the Indian Supreme Court, goes even further and gives judges the power to challenge the constitutionality of constitutional amendments despite the lack of explicit eternity clauses.[146] Some other countries followed suit, and Joel Colón-Ríos has already suggested that we should create a new typology of judicial review that accommodates these recent developments and considers these courts as instances of a distinctive type of constitutional review.[147]

---

[145] As of December 2015, there are 78 constitutions that contain such eternity clauses. See <https://www.constituteproject.org> accessed 1 December 2015.

[146] *Keshavanand Bharati v State of Kerala* (AIR 1973 SC 1461).

[147] Joel I Colón-Ríos, 'A New Typology of Judicial Review of Legislation' (2014) 3 *Global Constitutionalism* 143.

3.6.3.2 The certification of the constitution

With the development of constitutional review, it can be expected that some constitutional courts will be asked to play an active role in the constitution-making process itself. The precedent was created by South Africa, where the interim constitution, adopted in 1994, laid down some general principles, and it was the task of the constitutional court to check whether the new constitution, adopted two years later, complied with those principles.[148]

3.6.3.3 Common law constitutionalism

Perhaps the most radical challenge to the traditional institutional design comes from a particular version of common law constitutionalism.[149] Common law constitutionalism, as it is understood here, claims that although courts have good reasons to take the text of the constitution seriously they should not regard it as absolutely binding. This means that the force of the text will be determined by judges applying the constitution, so in one sense, judges become the co-authors of the constitution.[150]

3.6.3.4 Unenumerated rights

Many constitutions have an open-ended provision about unenumerated rights. This means that even if constitutional courts cannot literally take away anything from the constitution, for all practical purposes, they can add something to it.[151]

3.6.3.5 The final arbiter of reasonableness

All the four points above show that courts are involved in the constitution-making or amending process to some extent, and all hedge and qualify the democratic pedigree of the constitution. My final point here, by contrast, is related to the primacy of the legislature. Let us imagine a circle that represents all the decisions made by public authorities. By using this spatial metaphor, we can say that constitutional rights do not cover the whole circle, but only a very small part of it. In most cases, the purpose of authoritative decisions is not to promote or maximize rights, but a whole array of other considerations, like solving

---

[148] See Heinz J Klug, *The Constitution of South Africa: A Contextual Analysis* (Hart Publishing 2010) 93–100.

[149] David A Strauss, 'Common Law Constitutional Interpretation' (1996) 63 *University of Chicago Law Review* 877.

[150] See also subsection 4.1.8.

[151] See also subsection 4.1.9.

coordination problems, preventing crimes, allocating resources and providing services. Although constitutional rights are quite pervasive in the sense that almost all fields of human activity are somehow related to them, they do not occupy the whole logical space of practical reasonableness. Both individuals and the state pursue many other goals, but by pursuing other goals they have to take into consideration the limits set by rights. In that sense, rights behave as side constraints.

However, there are some constitutional doctrines that do not sit easily with this description. The right to equality, especially if the constitution does not provide a closed list of protected characteristics, is my primary example.[152] By their very nature, rules are general prescriptions. They always apply to classes of events or people and classifying means making distinctions between groups of people. If that is the case, the question can be always raised whether the classification of a rule is based on rational criteria. Applying this broad concept of equality makes courts the final arbiters of reasonableness, not only in a couple of well-defined cases but potentially in every single case where a rule applies to a category of people. This does not cause a serious problem if the court applies a very lenient, almost nominal test like the rational relationship review in the United States. However, some courts apply a more stringent scrutiny.[153] Even if these cases, taken individually, have a low profile, they transform rights from side constraints to omnipresent considerations.[154]

3.6.4 Restoring the Equilibrium: The Backdoor Entry for Procedural Fairness

The other possibility for the proponents of the New Constitutionalism to restore the balance between their preferred institutional framework and their justificatory principles is that they reconsider the strength of their

---

[152] Tamas Gyorfi, 'From Equal Treatment to the Prohibition of Arbitrariness: An Analysis of the General Right to Equality' (2012) 6 *Vienna Journal on International Constitutional Law* 65.

[153] Susanne Baer, 'Equality: The Jurisprudence of the German Constitutional Court' (1999) 5 *Columbia Journal of European Law* 249; Tamas Gyorfi, *Az Alkotmánybíráskodás Politikai Karaktere: Értekezés a Magyar Alkotmánybíróság Első Tíz évéről* (Indok 2001).

[154] The general right to liberty can have a very similar function. Analysing the jurisprudence of the German Constitutional Court, Edward Eberle concludes that the court 'has set up itself as a comprehensive censor of the reasonableness of governmental action'. Edward J Eberle, 'Human Dignity, Privacy, and Personality in German and American Constitutional Law' (1997) 1997 *Utah Law Review* 963, 990.

arguments. If judges have superior expertise in moral reasoning, or if they are better than legislators at articulating rights or the long-term principles of the society, or they are the ones who are capable of defending the interests of the minorities, and despite all (or any of) these arguments someone still thinks that it would be somehow improper to confer the constitution-making authority on judges, it indicates that there must be some other considerations that tip the balance in favour of democratic decision-making. The most plausible explanation of such an 'inappropriateness' is that the principle of equal participation has inherent value and should be balanced against the aforementioned reasons.

The New Constitutionalists seem to claim that: (1) the adjudicative process is superior to the political process in epistemic and/or motivational terms; (2) in spite of (1), we should confer Level One and Level Three decisions on the political process because equal participation outweighs those epistemic and/or motivational considerations.

To remind the reader, when addressing PEP, the advocates of constitutional review follow either of two argumentative strategies. Some of them suggest that when we make an institutional choice about who should make Level Two decisions, we have no procedural reason at all to confer this authority on the legislature, since a more sophisticated concept of democracy cancels the procedural argument. Alternatively, others concede that procedural fairness lends support to the opponents of judicial review but maintain that this argument is overridden by outcome-related considerations. However, if someone endorses the democratic pedigree of the constitution despite courts being superior in the outcome-related dimension, it clearly shows at least that PEP is not cancelled.

But the above position also raises serious doubts about the balancing version of the New Constitutionalist position. If procedural fairness is an independent consideration, a consideration that is strong enough to override epistemic and motivational factors when Level One and Level Three decisions are made, why do the New Constitutionalists believe that it is convincingly outweighed by outcome-related reasons at Level Two?

To reiterate, I do not claim that there are no differences, or even significant differences between the three levels of decision-making. But determining the content of moral principles is central to the decision-making process at all the three levels. In light of this fundamental similarity, the onus of proof is on the proponents of constitutional review to explain why they strike a different balance at the three levels. In my view, the very different treatment of Level Two decision-making would be justifiable only if specifying the content of rights would be an altogether different kind of activity from Level One and Level Three decisions, and Level Two decision-making would be subject to very

different types of evaluative criteria. This would be the case, for instance, if specifying the content of human rights judges only required to declare what the law is. This way our reasoning has come full circle: it seems that the only argument for judicial review that is not vulnerable to the objection from overinclusiveness assumes the declaratory theory of constitutional interpretation.

3.6.5 Inconclusive Arguments and the Limits of Constitutional Imagination

The insulation argument provides strong reasons against conferring the role of moral arbitrator on legislatures. So far I have offered three strategies to circumscribe the argument. First, I submitted that the systemic failure theory is implausible, and if it were plausible, it would undermine the New Constitutionalism itself. Second, I argued that the force of the insulation argument is very much context-dependent; it is contingent, among other things on the nature of individual rights. Even if it is compelling in some cases, it certainly does not apply equally to all rights. The blind spot theory, therefore, can give only a partial justification of the present practice of constitutional courts. Third, I contended that the force of motivational argument depends very much also on the general features of the political system and in mature, well-ordered democracies it is outweighed by other considerations. So the above considerations warrant both a geographical and a subject-matter limitation on the scope of the insulation argument.

However, there is a further, more general problem with the insulation argument, and it follows from how the debate about constitutional review is generally framed. If we pose the question as a choice between courts and legislatures, an argument against the latter is also an argument for the former. However, if the options are not limited to these two alternatives, an argument against the legislature is not necessarily an argument in favour of courts.

Let us grant for the sake of argument that the insulation argument is compelling and the malfunctions of the political process are so severe that this consideration outweighs the advantages that the legislative body has in the procedural and epistemic dimensions. However, if the strongest argument for the New Constitutionalism is rooted not in the epistemic credentials of courts, but in the malfunctions of the political process, courts are not in a unique position when we face the relevant institutional choice. It is not impossible to imagine institutions that, similarly to courts, are relatively insulated from the political process. But why would anyone contemplate finding other or inventing new institutions when we

already have well-established bodies that are immune from the malfunctions of the political process?

The answer is that although courts score high in one dimension (the insulation from politics), the lack of diversity and the possibility of correlated bias that also characterize courts are major shortcomings: they make courts very unlikely candidates if what we are looking for is an institution that tracks public justification. There are no a priori reasons to believe that the twin demands of independence and diversity cannot be better met by other institutions.

One could argue, for instance, that an upper chamber with appointed members, something like the British House of Lords, combines independence and diversity better than courts. I am not saying that this is necessarily the case, but the example illustrates that independence is not necessarily linked to the lack of diversity and the House of Lords offers a different trade-off between the two virtues than courts and elected legislative bodies. Even if the Lords are less independent than judges, they are not subject to the same political pressure as the members of the House of Commons and the institution as a whole is clearly superior to courts in terms of social and professional diversity.

Some countries have been also experimenting with citizen panels to address questions that raise complex policy issues. Citizen panels are temporary bodies that consist of lay people who, informed by expert advice, discuss a particular policy issue.[155] Since the members of the panel are not elected, appointed or delegated by political parties or interest groups, and not accountable to anyone, they are insulated from the pressures that ordinary politicians are subject to. Access to expert knowledge gives the chance of channelling this expertise into the deliberative process and into the formation of preferences. As the composition of the panel 'resembles' the composition of the citizenry (much better than the composition of actual legislative bodies), it represents the diversity of social perspectives present in the society. To use Hannah Pitkin's terminology, the panel 'stands for' the society at large.[156] Similarly to an unelected second chamber, citizen panels strike a balance between the relevant epistemic and motivational considerations that is different from the balance struck by courts or legislatures.

---

[155] Mark B Brown, 'Survey Article: Citizen Panels and the Concept of Representation' (2006) 14 *Journal of Political Philosophy* 203, 203.

[156] Pitkin (n 21) 59.

Both unelected second chambers and citizen panels raise many legitimate concerns.[157] Therefore, it is important to emphasize here that my position is not that, all things considered, they are better at specifying constitutional rights than our elected legislators. First, my argument is conditional: it is addressed to those who are of the opinion that the insulation argument clearly outweighs the principle of equal participation. The argument is that even if the insulation argument trumped equal participation, it would not follow that courts are the most optimal institutions to specify the content of constitutional rights. Second, at present both the British House of Lords and citizen panels have a supplementary function compared to elected legislative bodies and are not meant to replace the latter.

Let us take stock. The central claim of this chapter has been that in mature democracies the case for a strong constitutional court is not compelling and, as a general rule, the power to specify the meaning of abstract human rights provisions should be conferred on the legislature. However, this does not imply that other institutions cannot have an important role in the specification of rights or that legislative bodies are perfect as they are. My position is compatible with a more decentralized or fragmented allocation of authority. Let me sketch very briefly such an institutional framework. (1) Human rights legislation must raise the general level of rights awareness and make the protection of human rights a collaborative enterprise in which both the executive and the legislature have responsibilities. Many countries reacted to the challenges of human rights protection by strengthening the pre-enactment review of legislation. They have created specialized institutions whose job is to make sure that the considerations of human rights are properly taken into consideration in parliamentary decision-making.[158] (2) My argument is directed against the strong form of constitutional review, but leaves open the possibility that courts play a significant role in the protection of human rights. The way courts and legislatures can cooperate will be explored in more detail in the remaining chapters of the book. However, whatever form judicial review takes, the foregoing analysis has a clear institutional implication for the judiciary. Since diversity often trumps ability, diversity should not be used only as a tie-breaker in the judicial appointment process. Rather, ability (or merit) should be used as a threshold criterion. In addition, since merit is a socially constructed

---

[157] Brown (n 155); Nadia Urbinati, *Democracy Disfigured: Opinion, Truth, and the People* (Harvard University Press 2014) 112–15.

[158] Murray Hunt, Hayley Jane Hooper and Paul Yowell, *Parliaments and Human Rights: Redressing the Democratic Deficit* (Hart Publishing 2015).

category, it should be determined in a way that itself is compatible with diverse interpretations.[159] (3) My arguments leave open the possibility that some of the fundamental constitutional issues be decided by referendums. Although I argued that the principle of equal participation gives a clear edge to legislatures over courts, referendums are clearly superior to both courts and legislatures in that respect. When the conditions of meaningful deliberation can be met, referendums can supplement representative democracy.[160] (4) The position defended here is also compatible with an institutional framework in which non-elected upper houses, like the British House of Lords, or citizen panels play a supplementary role in human rights protection. (5) The insulation argument is the most compelling when it relies on the majoritarian bias of the political process. However, it can be argued that at least some of the minority rights, especially the rights of ethnic and linguistic minorities are most effectively addressed not by removing them from the political arena altogether, but by giving some form of autonomy to the affected minorities. (6) Finally, in political liberalism, unlike in PEP, there is a conceptual space for civil disobedience or even stronger forms of opposition, since it imposes substantive limits on the range of legitimate collective decisions. When a collective decision cannot be understood as a good-faith interpretation of our publicly justified principles, it is not worthy of our respect even if it was enacted in a procedurally impeccable way. The resistance of citizens against such decisions might give more effective protection to human rights in some cases than the reliance on judges.

---

[159] Kate Malleson, 'Rethinking the Merit Principle in Judicial Selection' (2006) 33 *Journal of Law and Society* 126.

[160] Stephen Tierney, *Constitutional Referendums: The Theory and Practice of Republican Deliberation* (Reprint edition, Oxford University Press 2014).

4. Constitutional interpretation

4.1 A MORAL READING OF THE CONSTITUTION

4.1.1 The Objectives of the Chapter

The present chapter has three main purposes. First, my argument so far assumed that the judges of constitutional courts are indeed moral arbitrators. However, many people believe that constitutional review is legitimate not because judges are better *moral* reasoners than legislators, but because they have superior *legal* expertise. According to this view, judges do not adjudicate between moral views, but simply interpret and apply a legal document, the constitution, and declare what the law is. I have also claimed that the declaratory theory is the only justification of constitutional review that fits in neatly with the democratic pedigree of the constitution and the primacy of the legislature. Whether or not the argument from legal expertise is compelling depends on the character of constitutional interpretation. To put it otherwise, the crucial question is whether judges can avoid the moral reading of the constitution. The declaratory theory of legal interpretation is so central to the view of many academics and judges and is so ingrained in the popular image of courts that one cannot afford not to tackle it directly.

Second, as the introductory chapter demonstrated, by today, the New Constitutionalism has become the orthodoxy in constitutional theory. As a matter of institutional choice, my book seems to defend an already lost cause. (I see nothing wrong with this: sometimes even a lost cause is worth defending.) However, I believe that my analysis is also relevant for those countries that have already made constitutional courts the final arbiters of the meaning of the constitution. Each constitution allocates legal authority among the different institutions of the state. However, by choosing a particular method of interpretation, and not another one, judges fine-tune the primary allocation of constitutional authority. Their options are, of course, much more limited than those of a constitution-making body; nevertheless this freedom is far from marginal. The institutional analysis of the previous chapter has clear implications for constitutional interpretation, too, and since judges have considerable

freedom in choosing their own approach to constitutional interpretation, they can make better or worse choices judged from the vantage point of the foregoing institutional analysis. The present chapter spells out these implications and offers the outline of a theory of how judges should interpret a constitution.

Third, the present chapter introduces the idea of judicial deference and thereby also prepares the ground for the next chapter. In that chapter I will argue that the distinction between strong and weak judicial review should be revisited and the idea of deference has a pivotal role in my account of weak judicial review.

4.1.2 From *the* Moral Reading to *a* Moral Reading of the Constitution

Our immediate concern is the question of whether judges can escape the moral reading of the constitution. Ronald Dworkin is well known among constitutional scholars as the pre-eminent voice for the moral reading of the constitution, and it is from his theory that I will begin to explore the domain of constitutional interpretation.[1] Dworkin coined his theory '*the* moral reading of the constitution' (emphasis added), and although the definite article suggests that rival theories are committed to a form of amoral or neutral interpretation (I will use the two terms interchangeably), this is not the case. I suggest that it is useful to break down Dworkin's stance on constitutional interpretation into three logically independent claims. The three theses are as follows: (1) while interpreting the constitution, judges cannot avoid making controversial value judgements; (2) the abstract norms of the constitution have to be interpreted as moral principles; therefore, the interpreter must decide how an abstract moral principle is best understood, morally speaking; (3) when deciding a case, judges must give full weight to what they understand to be the best moral reading of the constitution. The first thesis is a negative claim about the nature of constitutional interpretation. The second one puts forward a general positive claim about how the constitution should be interpreted. Finally, the third thesis makes an institutional claim about how the authority to define the meaning of the constitution should be allocated between the different branches of government.

I will address the second and third claims in greater detail later, but for now, the essential point is that one can accept the first thesis without

---

[1] Ronald Dworkin, *Freedom's Law: The Moral Reading of the American Constitution* (Oxford University Press 1996) 1–38.

committing to the second and third tenets. In other words, one can accept Dworkin's negative thesis and reject the possibility of an amoral reading of the constitution without endorsing Dworkin's positive views on constitutional interpretation. One can argue for *a* moral reading of the constitution without subscribing to *the* (Dworkinian) moral interpretation of the constitution. This is the position I wish to defend in the present subsection.

To substantiate the claim that judges cannot avoid a moral reading of the constitution, I will first discuss some features of judicial decision-making that at least strongly suggest the presence of moral considerations in constitutional reasoning (subsection 4.1.3). Second, I will explain why it is natural to expect the occurrence of such moral considerations (subsection 4.1.4). Third, I will provide a more systematic account of how, or at what points, moral arguments figure in constitutional interpretation (subsections 4.1.5–4.1.9). Finally, I will use a case study to illustrate my general argument (subsection 4.1.10). Although I believe that many of the arguments developed here apply both to the organizational/structural and the rights-related provisions of a constitution, my argument will focus on the latter since this is where the moral aspects of constitutional interpretation are more evident.

4.1.3 Some Revealing Signs

4.1.3.1 Judicial self-understanding

Even without relying on a sophisticated theory of constitutional interpretation, there are certain revealing signs that indicate or suggest the presence of moral considerations in constitutional reasoning.

First, we do not have to unravel or unmask a well-kept secret; although some judges claim to rely exclusively on legal arguments, others are quite explicit about the role of moral considerations and reject flatly the declaratory theory. In a famous exchange between Justice Scalia and Justice White, the former articulated a particularly explicit formulation of the declaratory theory of judicial decision-making:

> So also, I think, '[t]he judicial Power of the United States' conferred upon this Court and such inferior courts as Congress may establish, Art. III, § 1, must be deemed to be the judicial power as understood by our common law tradition. That is the power 'to say what the law is,' Marbury v. Madison, 1 Cranch 137, 5 U. S. 177 (1803), not the power to change it. I am not so naive (nor do I think our forebears were) as to be unaware that judges in a real sense 'make' law. But they make it as judges make it, which is to say as

> though they were 'finding' it – discerning what the law is, rather than decreeing what it is today changed to, or what it will tomorrow be.[2]

In his sarcastic challenge, Justice White pointed out the hypocrisy of the declaratory theory.

> Even though the JUSTICE is not naive enough (nor does he think the Framers were naive enough) to be unaware that judges in a real sense 'make' law, he suggests that judges (in an unreal sense, I suppose) should never concede that they do, and must claim that they do no more than discover it, hence suggesting that there are citizens who are naive enough to believe them.[3]

In an oft-quoted paragraph, one of the most influential British Law Lords, Lord Reid, also admitted the creative role of judges by calling the declaratory theory a fairy tale:

> There was a time when it was thought almost indecent to suggest that judges make law – they only declare it … But we do not believe in fairy tales any more. So we must accept the fact that for better or worse judges do make law, and tackle the question how do they approach their task and how should they approach it.[4]

4.1.3.2 The correlation between political preferences and judicial decisions

According to the mainstream view of political scientists, the political preferences of judges provide the key to understanding, explaining and predicting judicial decisions.[5] Although many cases would do as an illustration, perhaps *Bush v Gore*[6] is an especially convincing example to support the claim that moral and political considerations colour judicial opinions. What makes this case in which the United States Supreme Court resolved the dispute surrounding the presidential elections in 2000 highly instructive for our purposes is that the votes of the judges reflected their political preferences very well.[7] The obvious objection to using

---

[2] *James M. Beam Distilling Co. v Georgia* 501 U.S. 529, 549 (1991).

[3] ibid 546.

[4] Lord Reid, 'The Judge as Law Maker' (1972) 12 *Journal of the Society of Public Teachers of Law* 22.

[5] Jeffrey A Segal and Harold J Spaeth, *The Supreme Court and the Attitudinal Model Revisited* (Cambridge University Press 2002).

[6] 531 U.S. 98 (2000).

[7] Although Justice Stevens was appointed by a Republican president, his overall judicial profile is much closer to the liberal than to the conservative pole. For the ideological profile of US Supreme Court justices, see Jeffrey A Segal,

cases like *Bush v Gore* to support the general claim that the moral reading is inevitable is that there are constitutional courts that are considerably less politicized than the US Supreme Court. Even the US Supreme Court is much less divided in the majority of cases. So *Bush v Gore* seems to be a rather exceptional case and one cannot jump to sweeping generalizations from such exceptional, high profile cases.

However, I submit that cases like *Bush v Gore* lend stronger support to my position than this objection suggests. For the purposes of my analysis, the significant fact is not that in *Bush v Gore* the judges of the US Supreme Court actually acted upon their political preferences but that constitutional interpretation is open-ended enough to make this possible. One can criticize the judges in *Bush v Gore* for being partisan, or for providing sloppy arguments, but it is much harder to claim that what they were doing did not qualify as constitutional interpretation.

Let us imagine a hypothetical *Bush v Gore*, where the justices use the very same arguments that were used in the actual case, but the votes do not correlate so evidently with the political views of the judges. Our hypothetical *Bush v Gore* decision would not prove that moral considerations are not present in legal reasoning. Since legal reasons did not determine the result, the judges were required to fill the gaps in legal arguments with value judgements that can be contested. Since the arguments in our fictional *Bush v Gore* are, *ex hypothesi*, the same as in the actual decision, moral considerations colour the two decisions to the same extent. What is different in the actual and the hypothetical case is not that in the former the judges appealed to moral considerations, while in the latter they simply applied the law, but that in the former their positions strongly correlated with their political views. However, my claim is not that the value judgements that judges rely on in hard cases always correlate with their partisan political preferences, but that moral considerations feature in the argument. To put it otherwise, the essential point is not how judges exercise their discretion, but the sheer fact that they have discretion. The objection that says that other judiciaries are less politicized than the US Supreme Court would be relevant only if in those jurisdictions the canons of constitutional interpretation were significantly

---

Lee Epstein, Charles M Cameron and Harold J Spaeth, 'Ideological Values and the Votes of U.S. Supreme Court Justices Revisited' (1995) 57 *The Journal of Politics* 812; Andrew D Martin and Kevin M Quinn, 'Dynamic Ideal Point Estimation via Markov Chain Monte Carlo for the U.S. Supreme Court, 1953–1999' (2002) 10 *Political Analysis* 134.

different and prevented judges from using moral arguments.[8] However, this is not the case. The real difference between the American and, for instance, the much less politicized British judiciary, is not that the canons of constitutional interpretation impose much stronger limits on British judges, but that their more homogeneous social background and the depoliticized appointment process makes a similar strong correlation between judicial decisions and political preferences less likely.[9] In addition, the lack of political influence does not prove that British judges are not influenced by other than political values and preferences.[10] Cases like *Bush v Gore* just make visible what is less obvious in other cases, that is, that judges often use moral considerations when they decide constitutional cases.

4.1.3.3 Dissenting opinions

Third, the sheer fact of judicial disagreement reflected in concurring and dissenting opinions also suggests that moral considerations play a significant role in legal decisions. Although judges can also disagree on technical legal issues, it is highly unlikely that all of their disagreements are of such nature. Since landmark constitutional cases that address controversial moral issues produce dissenting opinions in above average proportion,[11] it seems likely that at least some of the disagreements have something to do with the underlying moral issues that these cases raise.

4.1.4 Postponing Constitutional Choices

The occurrence of dissenting opinions and the strong correlation between political preferences and the votes of judges suggest, and at least some judges explicitly admit, the use of moral considerations in constitutional reasoning. In the present subsection, I will turn to a crucially important mechanism that explains why it is natural to expect that judges infuse moral considerations into constitutional interpretation.

---

[8] However, the US Supreme Court is hardly unique in that respect. Current research suggests that the political preferences of judges also have a very strong explanatory force in other jurisdictions. See Christoph Hönnige, 'The Electoral Connection: How the Pivotal Judge Affects Oppositional Success at European Constitutional Courts' (2009) 32 *West European Politics* 963.

[9] See Chris Hanretty, 'The Decisions and Ideal Points of British Law Lords' (2013) 43 *British Journal of Political Science* 703.

[10] Rachel J Cahill-O'Callaghan, 'The Influence of Personal Values on Legal Judgments' (2013) 40 *Journal of Law and Society* 596.

[11] András Jakab, Arthur Dyevre and Giulio Itzcovich (eds), *Comparative Constitutional Reasoning* (Cambridge University Press forthcoming).

Constitutions do not only create institutions or protect individual rights but are also 'mission statements' that define the primary values and principles of a political community. They often refer to the source of political authority and define the symbols of the state, performing an important legitimizing or integrative task. In addition, almost all written constitutions are entrenched, that is, they require a considerably broader consensus than the enactment of ordinary laws.

The aforementioned functional and procedural requirements have far-reaching implications for constitutional interpretation. In order to fulfil its integrative role reasonably well and meet the procedural requirements of entrenchment, the provisions of a constitution must be acceptable to the vast majority of citizens. In a pluralistic, divided political community this agreement is limited only to highly abstract principles. Analysing deeply divided societies, Hannah Lerner observed that these communities often use constitutional techniques that help to mitigate the effects of disagreement.[12] Israel, for instance, postponed constitution-making altogether in the 1940s, since the debate between the secular and religious Jews touched upon the very nature of the political community. Other deeply divided societies, like India or Ireland, used abstract, vague principles or incorporated contradictory provisions into the constitution. I suggest that we can generalize Lerner's insight and make the stronger claim that these techniques characterize not only those societies that are usually considered deeply divided ones, but belong to the toolkit of every pluralistic political community.

Even in modern pluralist societies, most people agree on the protection of human dignity, equality or freedom of speech. However, citizens tend to disagree on the exact scope of these rights and will strike a different balance between the right in question and competing considerations, like the public interest. To use a well-established distinction, many people will agree on the *concept* of dignity, equality or free speech without agreeing on a particular interpretation or *conception* of any of these general concepts.[13] The constitution-making process generally abstracts away from the details of particular conceptions that would alienate a significant segment of the community. However, since in most controversial cases the outcome of the case will depend on which conception of the general concept judges prefer, they have to inject meaning into the abstract concept and spell out the precise implications of general

---

[12] Hanna Lerner, *Making Constitutions in Deeply Divided Societies* (Cambridge University Press 2011).

[13] Ronald Dworkin, *Laws Empire* (Fontana Press 1986) 70–72.

principles. That is, judges have to specify the content of rights in the process of application, partly *because* the process of constitution-making abstracted away from the details of particular conceptions.

To sum up, the paradox is that most often constitutional rights cannot be entrenched in the constitution-making process if the framers do not abstract away from the details that rival interpretations add to the general concept. However, those rights cannot be applied to individual cases if judges do not specify them first, that is, do not complement the general concept with more precise rules and principles. The very nature of entrenched constitutions explains why it is reasonable to expect that moral considerations will infiltrate into constitutional interpretation. However, this mechanism, in itself, does not clarify at what points of the reasoning process this infiltration happens. This is the question I will turn to next.

4.1.5 Disagreements Relating to the Application of Interpretative Criteria

I will assume first that the text of a constitution imposes strict limits on constitutional interpretation and, therefore, all interpretative debates remain within the boundaries set by the text. That implies that even if a particular interpretation is not the most plausible or natural one, it must still be a possible interpretation of the text. However, since the text does not always provide a definitive answer to constitutional issues, there are other interpretative criteria, like the purpose of a constitutional provision or the intention of the authors, that are also extensively used by judges.[14] The concept of interpretative criterion makes it possible to identify three different types of disagreement among judges. First, they can disagree on which interpretative criteria are relevant and legitimate and how they have to be balanced against one another when they are in conflict (let us call this Type I disagreement). Second, they can also disagree on the precise nature of an interpretative criterion (Type II disagreement). Finally, even if the judges agree on both questions, they can still disagree on how the agreed-upon criterion has to be applied (Type III disagreement). I will discuss the second and the third types of disagreements together in the present subsection and will devote the next subsection to the first type of disagreement.

---

[14] For a comprehensive typology of constitutional arguments, see Jakab, Dyevre and Itzcovich (n 11).

One can argue that many of the standard theories of constitutional interpretation (eg originalism, textualism and structuralism) reject the Dworkinian negative thesis because they claim to impose sufficiently strong constraints on the discretionary power of judges.[15] Understood this way, the core thesis of the 'amoral approaches' of constitutional interpretation is that judges are constrained by criteria that are in a significant sense objective or neutral, and external to them. I will use originalism to illustrate my general point, but the same logic would also apply to many other approaches. As Justice Scalia put it, originalism 'establishes a historical criterion that is conceptually quite separate from the preference of the judge himself'.[16] One implication of this idea is the sharp distinction that exists between legal and moral (or political) decision-making. Also, constitutional interpretation can claim to be a form of *legal* decision-making only if judges are sufficiently constrained by criteria that are objective and external to them. Robert Bork's views on neutrality nicely illustrate this point:

> The Court can act as a legal rather than a political institution only if it is neutral as well in the way it derives and defines the principles it applies. … The philosophy of original understanding is capable of supplying neutrality in all three respects – in deriving, defining, and applying principle.[17]

Although the application of all interpretative criteria calls for some kind of judgement, I will grant to the proponents of neutral interpretation that the application of an interpretative criterion does not necessarily invite moral judgement in the requisite sense. If, for instance, linguistic conventions control the meaning of the term 'search', the semantic criterion does not require the moral reading of the constitution. What I claim at this stage is that most interpretative criteria do not provide judges with sufficiently precise guidance and, therefore, do not impose strong enough constraints on judicial discretion.

---

[15] For an overview of such theories, see Sotirios A Barber and James E Fleming, *Constitutional Interpretation: The Basic Questions* (Oxford University Press 2007).

[16] Antonin Scalia, 'Originalism: The Lesser Evil' (1988) 57 *University of Cincinnati Law Review* 849, 864.

[17] Robert H Bork, *The Tempting of America: The Political Seduction of the Law* (Sinclair-Stevenson 1990) 146.

4.1.5.1 Text

All plausible theories of constitutional interpretation agree that the text of the constitution matters. However, the provisions that define constitutional rights usually use fairly abstract language, so every constitutional right has many interpretations that are compatible with the text, but do not necessarily follow from it. When judges determine the scope of a constitutional right, they have to choose between the rival interpretations of the text and linguistic conventions are most of the time just not determinate enough to eliminate the interpreter's discretion. When judges disagree on what human dignity requires, whether a certain form of differential treatment violates constitutional equality, or self-determination is part of the right to private life, they do not disagree on what the dictionary says about human dignity, equality or privacy. Linguistic arguments are used surprisingly rarely in landmark rights-related cases, and they almost never determine the outcome of the decision.[18] As Aileen Kavanagh puts it, interpretative disagreements about the meaning of constitutional rights are often 'linguistically irresolvable'.[19]

One could argue at this point that my account exaggerates the uncertainty of human rights adjudication, since there are many cases where reasonable people agree on the conclusion of the case. Although it is certainly true that we can find many cases even in human rights adjudication that are not particularly controversial, it is important to see why this is the case. Most often, the explanation is not that people apply the same amoral criterion, for instance, the settled linguistic convention. Rather, the explanation is that, although all interpreters use moral criteria, there is a substantial overlap between their moral views.[20] For instance, even if we have an amoral criterion to define what 'speech' is, some forms of speech do not enjoy even a prima facie protection under most constitutions. Therefore, already the question about the scope of freedom of speech requires moral arguments. We all agree that criticism of the government is protected by freedom of speech. This agreement is not

---

[18] Tamas Gyorfi, 'The Supreme Court (House of Lords) of the United Kingdom' in András Jakab, Arthur Dyevre and Giulio Itzcovich (eds), *Comparative Constitutional Reasoning* (Cambridge University Press forthcoming).

[19] Aileen Kavanagh, 'The Elusive Divide between Interpretation and Legislation under the Human Rights Act 1998' (2004) 24 *Oxford Journal of Legal Studies* 259, 263. The same argument applies to originalism, if by originalism someone refers to the idea that gives primacy to past linguistic conventions.

[20] See Dworkin's distinction between semantic and interpretative claims. Dworkin (n 13) 71.

explained by the fact that we use the same linguistic criterion to define speech, but by the fact that the different moral justifications of freedom of speech overlap considerably on what kinds of speech should be free, and all cover political speech.

4.1.5.2 Purpose

When the text is indeterminate, judges quite often evoke teleological arguments in their reasoning. However, purposive interpretation invites, rather than constrains, moral judgement. To use our previous examples, human dignity, equality or privacy are value-laden terms and the purpose of those constitutional provisions that protect these values cannot be defined without making value judgements. Since the judge is looking for the purpose of something that is external to her preferences, she, of course, cannot attribute any purpose to the text, the purpose has to fit the interpretative data.[21] However, in most cases the dimension of fit will underdetermine what purpose one can reasonably attribute to the text.

4.1.5.3 Intention

The intention of legislators seems to be a more promising criterion for the proponents of neutral interpretation. What the authors of a constitutional provision intended is independent of the preferences of the judge who applies the text and is external to her. Let us suppose that we want to collect information about the *expectations* of the framers. Although this evidence is sometimes inconclusive, I will assume that the expectations of the framers can be in principle reconstructed. However, as Ronald Dworkin and others have pointed out, the concept of intention can be reconstructed at different levels of abstraction. It is not self-evident that by intention we have to mean the specific expectations of the framers.[22] So although it is a matter of fact what the framers expected by enacting a constitutional provision, it is a matter of argument whether we should equate intention with the specific expectations of the framers, or with something more general and abstract; this choice is not governed by empirical considerations. Thus, the decision about the nature of intention must precede the empirical research that aims to establish the intention. Even if we agreed on what the specific expectations of the framers were (there is no Type III disagreement), we might disagree on what qualifies as intention (Type II disagreement).

---

[21] ibid 66.

[22] Ronald Dworkin, *Taking Rights Seriously* (Duckworth 1977) 132–7.

4.1.5.4 Structure

Structural arguments aim to ensure the coherence of the legal system. However, since coherence can be aimed at or established in different ways and at different levels of generality, structural arguments take more than one form. For instance, a certain interpretation can be coherent with the more immediate legal environment of a rule, but incoherent with the underlying principles of a branch of law. Structural arguments can, therefore, give rise to both Type II and Type III disagreements.

4.1.6 Disagreeing on the Choice of Interpretative Criteria

The argument so far has established only that the application of relevant interpretative criteria, taken separately, *often* require judges to make value judgements. It does not prove that every single case requires such judgement, but since judges regularly face hard cases where the interpretative criteria underdetermine the outcome of the case, no judge can consistently avoid the moral reading of the constitution.

It is needless to say, however, that in reality, in every single case more interpretative criteria are available and, therefore, they cannot be analysed separately. Sometimes they will pull in the same direction and strengthen each other; sometimes they will lead to conflicting conclusions. In such cases, judges do not have agreed-upon priority rules to choose from the different methods of interpretation.

It is true that many legal systems have some characteristic priority rules, favoured or unfavoured methods.[23] For instance, we know that originalism is much more influential in the United States than in many other constitutional democracies; legal doctrine is more important in Germany than in the United Kingdom; British judges are quite reluctant to refer to the parliamentary records in order to determine the meaning of the text. These priority rules and the list of favoured and unfavoured methods and sources, however, do not impose sufficiently strong limits on interpretation to eliminate judicial discretion. Different judges within the same legal system can follow different priority rules, and even the same judge often follows different methods in different cases. Analysing the jurisprudence of the British House of Lords, David Robertson argued that: 'The same judges can often maintain ideological consistency over different cases precisely by switching backwards and forwards between

---

[23] See Jeffrey Goldsworthy, 'Conclusions' in Jeffrey Goldsworthy (ed), *Interpreting Constitutions: A Comparative Study* (Oxford University Press 2006).

restrictive and expansive interpretation.'[24] So even if a particular method of interpretation would be able to significantly narrow down judicial discretion, the possibility of choice between the relevant criteria of interpretation is always present. In addition, even when the interpretative criteria do not conflict, judges have to have some view on what interpretative criteria are relevant in the first place.

The foregoing analysis has established that judges often follow different priority rules. However, this does not mean that they should do so. A normative theory of interpretation could prescribe relatively clear priority rules to judges. Some theorists suggest that, even if judges often make a moral judgement when they face Type II or Type III disagreements, their preferred theory would narrow down significantly the discretionary area of judgement by eliminating Type I disagreements. For example, many originalists would admit that originalism does not provide a clear-cut answer to all constitutional questions, and in this sense, judges are required to make moral judgements.[25] Nevertheless, judges should be originalists and enforce the original intention of the framers or the original meaning of words so far as possible because the choice between originalism and its rivals is not based on moral judgement but is dictated by conceptual arguments. Some originalists, for instance, argue that the idea of a written constitution itself commits us to originalism.[26] Others follow a different line of argument and claim that the very concept of interpretation requires us to be originalists.[27]

However, I believe that the Dworkinian moral reading of the constitution, the different versions of originalism, and the Thayerian clear-mistake rule,[28] to name a few options, all have some initial plausibility and none of them are excluded from the range of possibilities by conceptual arguments. So even if a particular method of interpretation would be able to narrow down significantly judicial discretion, the choice

---

[24] David Robertson, *Judicial Discretion in the House of Lords* (Clarendon Press 1998) 101.

[25] See Keith E Whittington, 'The New Orginalism' (2004) 2 *Georgetown Journal of Law & Public Policy* 599, 611: '[O]riginalists should explicitly admit: interpretation requires judgment. It is not a mechanical process, and interpretative results cannot be rigidly determined.'

[26] For a criticism of this argument, see Andrew B Coan, 'Irrelevance of Writtenness in Constitutional Interpretation' (2009) 158 *University of Pennsylvania Law Review* 1025.

[27] See Whittington (n 25) 612. For a contrary position, see Bork (n 17) 177; Scalia (n 16) 862.

[28] James B Thayer, 'The Origin and Scope of the American Doctrine of Constitutional Law' (1893) 7 *Harvard Law Review* 129.

between the rival approaches to interpretation makes sense only against the backdrop of a value-laden constitutional theory, even if this theory remains implicit. If originalism, for instance, is more attractive than its rivals, that is so not because it is required by the very concept of interpretation, but because it is attractive in light of some constitutional values. Thus, constitutional interpretation is an inescapably moral exercise in the sense that the set of relevant interpretative criteria and the relationship between them must be informed by a background constitutional theory.

4.1.7 Disagreeing on the Balancing Procedure

Older constitutions tend to use an absolutist language in their rights-related provisions and are silent about the question whether and how constitutional rights can be limited. By contrast, newer constitutions use a less absolutist language and define broadly the circumstances under which the limitation of a certain right is permitted; many of them even have a general limitation clause.[29] However, regardless of the text of the constitution, constitutional rights are rarely, if ever, absolute. As a consequence, the reasoning process, which is conveniently called constitutional interpretation, can be, at least as far as human rights are concerned, analytically broken down into two stages. In the first stage of the analysis, the interpreter has to decide whether certain operative facts should be classified as an instance of the constitutional right in question. To put it otherwise, whether the scope of the relevant right is broad enough to cover the operative facts. If the answer is in the affirmative, the right in question is interfered with. However, the argument does not stop here. Since the right in question most of the time is not absolute, the limitation of the said right will be considered legal if it is justified. I share Stephen Gardbaum's opinion, who says that 'the reality is that all modem constitutional systems, including the United States, engage de jure or de facto in the same two-stage structure of rights analysis'.[30]

This process of justification has generated a voluminous amount of literature and doctrinal scholarship offers an increasingly sophisticated account of how this process works or should work. Although this literature is certainly relevant for the better understanding of how exactly judges review the limitations on human rights, I think that the central

---

[29] The most elaborate general limitation clause is probably Article 36(1) of the Constitution of South Africa.

[30] Stephen Gardbaum, 'Limiting Constitutional Rights' (2007) 54 *UCLA Law Review* 789, 808.

point I wish to make does not hinge on the details of these doctrinal debates. No one can seriously claim that the balancing process that is needed to decide whether the limitation of a constitutional right is justifiable does not call for value judgement. Even if there are significant differences in how the balancing exercise that courts engage in is conceptualized and labelled in different legal systems, I will assume that this reasoning process has some common elements. I will identify three such core elements.

First, when the government interferes with a human right, the interference should have at least a *legitimate aim*. To distinguish legitimate aims from illegitimate ones certainly requires value judgement. The presence of value judgements is even more obvious when judges are required to distinguish a compelling state interest from simply legitimate interests.

Second, judges are required to make a decision on whether the benefits of an interference with a right are proportionate to the costs of the interference. If, for instance, the government interferes with the right to private life in order to provide an adequate level of security to its citizens, judges should compare the benefits (increase in national security) with the costs of the regulation (decreased level of privacy). Following Tom Hickman, I will call this component of the balancing exercise the *overall proportionality* prong of the proportionality test.[31]

Third, courts are also required to scrutinize how the measure chosen by legislators compares to the alternatives open to them. Even if the applicable legal test instructs legislators to choose the least restrictive measure, this is hardly a mechanical test. Since a less restrictive interference with a right is very often also less effective in promoting some important state interest, in practice the least restrictive criterion is not understood literally. Rather, it is understood as a *relative proportionality* test, that is, a test that reviews the proportionality of a measure compared to other available options.[32] That leads us to the conclusion that all the three components of the above balancing exercise require value judgements and different judges are likely to differ on those issues.

---

[31] Tom Hickman, *Public Law after the Human Rights Act* (Hart 2010) 190–91. What I call here overall proportionality is often called proportionality in the strict sense, or the *fair balance* test.

[32] This is often called the *minimal impairment* test. Those who are familiar with the proportionality analysis of constitutional courts might notice that I did not mention the *rational relationship* prong of the test. In my view, this prong of the test is entailed by the minimal impairment requirement.

Let me add one further complication to the issue. The proportionality test applied by most constitutional courts is often portrayed and understood as a single test. If that is the case, when judges disagree on the outcome of the balancing exercise, they simply reach different conclusions by applying the same test. However, when clarifying the nature of the proportionality test, I am inclined to agree with those commentators who suggest that proportionality inquiry should be understood as a general method of human rights adjudication rather than a single test. As Aileen Kavanagh says, proportionality inquiry defines the questions one has to ask, but it does not define the intensity of the review. When we seek to answer the questions posed by the proportionality inquiry, the test we apply can be more or less demanding, depending on the context.[33] If that is the case, choosing the intensity of review injects a further complication and discretionary element to human rights adjudication.

4.1.8 Disagreeing on the Authority of the Text

So far I have assumed that the text of the constitution lays down the external limits of constitutional interpretation. Even if judges using other interpretative criteria deviate from the most natural interpretation of the text, the alternative interpretations must be still linguistically possible. This respect for the text is predicated on the assumption that the authority of the constitution can be traced back to the authority of the framers. The text is important because the framers chose exactly those words and enacted the constitution in a particular way. I will call this idea the *enactment theory*. The enactment theory is not a full-fledged theory of interpretation; rather it is a claim about the authority of the text and as such is compatible with a broad range of approaches, from Scalia's originalism to Dworkin's moral reading. However, there is a descriptively highly accurate and normatively challenging alternative to this theory that suggests that, although the text of the constitution matters, it is less important than the enactment theory assumes. The *common law theory of constitutional interpretation*, articulated masterfully by David Strauss, claims that the authority of the text does not derive from its enactment, but from two other interrelated reasons, traditionalism and conventionalism.[34] *Traditionalism* requires us to attach some weight and give serious consideration to the decisions of past generations because our intellectual

---

[33] Aileen Kavanagh, *Constitutional Review under the UK Human Rights Act* (Cambridge University Press 2009) 237.

[34] David A Strauss, 'Common Law Constitutional Interpretation' (1996) 63 *University of Chicago Law Review* 877.

resources are limited, and we cannot make every decision afresh.[35] *Conventionalism* requires us to respect the text because the text settles some practical issues and in many cases it is more important to resolve an issue than to solve it in the best possible way, provided that the settlement remains within the range of reasonable alternatives.[36] Traditionalism and conventionalism can account for why the text should play a crucial role in constitutional adjudication, but they can also justify the occasional deviation from the text. I do not have to take a side in the debate between common law constitutionalism and the enactment theory. There are two important lessons to be drawn. First, if the common law theory is a plausible contender, judges face an additional choice when interpreting the constitution, and the choice between the rival theories about the authority of the text introduces a further uncertainty to the process. Second, the common law approach openly requires moral judgements from judges, since they have to decide whether the reasons to deviate from the text are strong enough in the case at hand.

4.1.9 Unenumerated Constitutional Rights

Many constitutions have provisions that give additional discretionary power to judges by declaring that the rights that are constitutionally protected are not limited to those that are explicitly mentioned in the text of the document. This is not surprising in light of the widely accepted view that human rights are not created but are rather recognized by positive law. The most well known of these provisions is the Ninth Amendment of the US Constitution.[37] However, several other countries have similar rules.[38] In addition, many constitutional courts, even in the absence of such a general empowering provision, treat certain constitutional rights as the source of residual or unenumerated liberties.[39] To a certain extent, this is how the US Supreme Court uses the Due Process Clause of the Fourteenth Amendment. The German Constitutional Court uses Article 2.1 of the German Basic Law to derive liberties where other

---

[35] ibid 891.

[36] ibid 907.

[37] 'The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.'

[38] This is the general rule, for instance, in Latin America. See Allan R Brewer-Carías, *Constitutional Protection of Human Rights in Latin America* (Cambridge University Press 2009) 21.

[39] In addition to the examples provided below, Article 1 of the Spanish and Article 2 of the Italian constitutions have similar function.

more specific rights do not protect the individual.[40] In similar situations, the Hungarian Constitutional Court appeals to the right to human dignity.[41] The fact that these three courts use rather different provisions to perform roughly the same task shows how weak the constraints imposed by the text on interpretation actually are. As a general characterization of the nature of constitutional interpretation, my position is not very far from that of David Robertson. Robertson says that:

> To say that these constitutional review bodies 'interpret' the constitution is largely empty. It is easier to think in terms of their trying to answer questions posed to them by others by looking at these documents. … The judges are required to weave the bullet points into a coherent and cohesive ideology for their contemporary world. It is in this sense that constitutional judges are applied political theorists, and their job is unavoidably creative.[42]

4.1.10 A Case Study: The Right to Human Dignity

I will use a case study to exemplify many of the general points made in the previous subsections. Perhaps there is no other concept that encapsulates better the noble aspirations of the New Constitutionalism than human dignity. Although human dignity was mentioned in some constitutions before the Second World War, its central place in contemporary constitutionalism can hardly be understood without the horrors of the war. The Universal Declaration on Human Rights and the German Basic Law epitomize a new generation of international human rights documents and domestic constitutions, respectively, that define dignity as the ultimate justifying value behind human rights. In a seminal article on human dignity, Christopher McCrudden explains convincingly why this concept was considered the 'Holy Grail of human rights' in the post-war period.[43] The gist of his argument is that the idea of human dignity was able to transcend significant religious, cultural and philosophical differences and, therefore, was particularly well suited to serve as a basis for consensus. The core idea of human dignity was not 'based on any set of religious

---

[40] BVerfGE 6, 32. For a comparative overview of the American and German jurisprudence, see Edward J Eberle, *Dignity and Liberty: Constitutional Visions in Germany and the United States* (Praeger 2002).

[41] 8/1990. (IV. 23.) AB hat.

[42] David Robertson, *The Judge as Political Theorist: Contemporary Constitutional Review* (Princeton University Press 2010) 32–3.

[43] Christopher McCrudden, 'Human Dignity and Judicial Interpretation of Human Rights' (2008) 19 *European Journal of International Law* 655, 677.

principles or beliefs but is nevertheless consistent with them'.[44] People with different moral traditions and moral outlooks could identify with human dignity because it reflected and represented their own moral tradition.

What is important for our purposes in this explanation is the complexity of the concept; how the concept facilitates consensus without eliminating disagreement. Human dignity could serve as a basis of consensus because people could agree on the surface, but agreement on the surface was only possible because it accommodated their disagreements regarding the details. McCrudden concludes that 'human dignity is used as a linguistic-symbol that can represent different outlooks'.[45] However, he retreats from calling human dignity an 'empty placeholder' because it certainly carries semantic information. Like McCrudden, I think that the Dworkinian concept–conception distinction provides the best framework to capture the complexity of similar moral ideas.[46] By applying the Dworkinian distinction to human dignity, we can say that, although there is a broad consensus on the abstract concept of human dignity, the content of the concept is fleshed out by different moral theories differently, that is, the concept of dignity has different conceptions.

The core idea of human dignity is probably the claim that every human being possesses intrinsic worth merely by being human.[47] However, people who agree on this general claim can still disagree on the justification of the claim and in many cases the different justifications have different implications. To exemplify this situation, it is instructive to use a couple of examples from the jurisprudence of the German Federal Constitutional Court (hereinafter FCC). It is easy to identify at least two different conceptions of human dignity in the relevant decisions. Some cases show a very strong Kantian influence, putting the emphasis on personal autonomy. In the *Life Imprisonment* case,[48] the FFC highlighted the spiritual-moral nature of human beings endowed with the freedom to determine and develop themselves. The freedom to develop one's personality presupposes the capacity for moral autonomy. According to the FCC's reasoning, life imprisonment without at least the chance to regain one's freedom violates human dignity.[49] By contrast, another landmark

---

[44] ibid.
[45] ibid 678.
[46] Dworkin (n 13) 70–72.
[47] McCrudden (n 43) 679. McCrudden calls this the *ontological* claim.
[48] BVerfGE 45, 187.
[49] BVerfGE 45, 187, 227–8.

decision of the court, *Abortion I*,[50] is inspired by the Christian natural law tradition and puts the emphasis on human life as such. 'Wherever human life exists, it merits human dignity; whether the subject of this dignity is conscious of it and knows how to safeguard it is not of decisive moment.'[51] Although the two justifications lead to the same conclusion in many cases, the tension between them can be hardly denied.

Judges and commentators contest not only the grounds of human dignity, but also the content of the right. I will use Neomi Rao's account to illustrate my point because her approach fits particularly well with my narrative, but my general point does not presuppose that hers is the only or the best way to distinguish between different conceptions of dignity. Rao argues that it is possible to distinguish at least three different conceptions of human dignity in the jurisprudence of leading constitutional courts.[52] The first can be called dignity as autonomy, the second as the substantive approach to dignity and the third one can be dubbed dignity as recognition.

If human beings have intrinsic worth because they are rational creatures, or at least have the potentiality to become such creatures, then this capacity deserves special protection. If they have agency, that is, they are capable of acting upon reasons and making decisions, then these choices should be respected by the law. Not because these choices are always wise, but because they express the moral agency of human beings. This conception of human dignity revolves around the autonomy of the individual. Even if the autonomous decisions of human beings have to give way to other considerations, this limitation has to be always justified.

However, the concept of dignity does not necessarily revolve around autonomous choices. Dignity can also refer to a certain conduct or state of affairs. According to the substantive conception of dignity, people can behave in an undignified way or can lead or have an undignified life. Many people think that prostitution always objectifies women and is incompatible with human dignity whether it was the agent's choice to become a prostitute or not. Others make similar claims about women wearing a headscarf. As Andre Gerin, a French Communist MP, put it, 'To me, the full veil, the covered face, it's a woman in a portable

---

[50] BVerfGE 39, 1.

[51] BVerfGE 39, 1, 41. The translation is taken from Donald P Kommers, *Constitutional Jurisprudence of the Federal Republic of Germany* (Duke University Press 1990) 338.

[52] Neomi Rao, 'Three Concepts of Dignity in Constitutional Law' (2011) 86 *Notre Dame Law Review* 183.

coffin.'[53] People who argue for the legalization of assisted suicide say that people cannot live a dignified life under certain medical conditions.

While the first conception puts the emphasis on the quality that is common to all human beings, the third conception, dignity as recognition focuses on our differences. Our identity, so the argument runs, is constituted by our bonds and place in society. One is not treated with dignity if others do not recognize and value the community or the group one belongs to.[54]

I hope that even this brief sketch is sufficient to illustrate that the different conceptions of human dignity put the emphasis on different aspects of the general concept and therefore can have different practical implications. In some cases, they pull in the same direction, but in other cases there can be tension or even outright contradiction between the different conceptions. One could argue, for instance, that substantive dignity and dignity as autonomy are both reasons for the legalization of assisted suicide. Terminally ill people who have to rely on the help of others might prefer to die (dignity as autonomy) and their life is considered by many people undignified (substantive dignity). In other cases, a particular type of conduct comes under the protection of one of the three conceptions but remains unprotected by the others. If the law creates a legal category, usually called civil partnership that is very similar to marriage, dignity as autonomy arguably does not require more. However, dignity as recognition suggests that simply by creating a separate category, the state denies proper recognition from homosexuals. Finally, there can be an outright contradiction between two conceptions of dignity. If the individual chooses a course of action that is incompatible with a certain conception of dignified life, dignity as autonomy and the substantive conception of dignity are going to clash. 'Dwarf throwing', wearing a headscarf or being a prostitute violate some people's substantive conceptions of dignity.[55] However, if they are the result of autonomous choices, they would be under the protection of the first conception.

The above analysis of dignity was meant to illustrate that the concept of human dignity is not determinate enough to give us guidance in most of the cases when the concept is evoked. I wish to draw the attention to three ideas here. First, those who disagree on the implications of the

---

[53] 'Behind France's Islamic Veil', *BBC News Channel* (8 April 2010) <http://news.bbc.co.uk/1/hi/world/europe/8607802.stm> accessed 1 December 2015.

[54] Rao (n 52) 244.

[55] ibid 226–9.

concept do not disagree on the dictionary meaning of the word. The linguistic conventions that we have about dignity are simply not deep enough to choose between the rival conceptions. Before judges can derive a specific conclusion from the general provision of human dignity, they have to invest or inject meaning into the abstract norm. When someone wants to spell out the implications of human dignity, she has to add controversial empirical and moral premises to her argument to choose between the rival interpretations. Second, the history of the right to human dignity, which we can learn from McCrudden's account, gives an excellent illustration of the mechanism of postponing constitutional choices. Judges have to flesh out the concept and infuse moral arguments to constitutional interpretation partly because the enactment procedure required the framers to abstract away from the rich details of particular conceptions. Third, although other constitutional rights might be less abstract than human dignity, and their semantic content might be thicker, I claim that the difficulties that are raised by them are in principle very similar to the ones raised by human dignity. Therefore, I submit that the structure of the debate about human dignity illustrates the *paradigmatic case* of constitutional interpretation. If I am right about the nature of paradigmatic cases, moral questions belong not to the periphery, but to the centre of human rights adjudication.

4.2 REFRAMING THE DEBATE

4.2.1 Against Hercules

I believe that the case against the declaratory theory of constitutional interpretation is overwhelming. But if the moral reading of the constitution is inescapable, how should judges interpret the constitution? Before I spell out in more detail my own answer to this question (Section 4.3), I wish to say more about the character of an adequate theory of interpretation and introduce some important concepts that help me to develop my own position.

It is a truism that the purpose of constitutional interpretation is to establish what the constitution means. This statement also seems to imply that a theory of constitutional interpretation revolves around the question of how the constitution should be interpreted. Addressing this issue, many scholars of constitutional law assume that the 'how-question' can be analytically separated from the 'who-question': 'How should the constitution be interpreted?' seems to be clearly different from 'Who should interpret the constitution?'.

Ronald Dworkin, for instance, suggests that a constitutional theory should clearly separate the enactment question (Who should make the constitution?), the jurisdictional question (Which institution has authority to decide what the constitution requires?) and the legal question (What does the constitution require?).[56] He adds that: '*Marbury v Madison* settled the second, jurisdictional question, at least for the foreseeable future: the Supreme Court, willy nilly, must itself decide whether the Constitution prohibits states from making abortion criminal in particular circumstances.'[57]

In short, the above passage suggests that the who-question does not figure in, but rather precedes the how-question. But there is an even clearer proof of how sharply Dworkin separates those two issues and brackets the institutional context of constitutional interpretation. He makes clear that we need an ideal theory of interpretation that abstracts away from the imperfections of real-life judges by creating a superhuman judge, Hercules, for the purposes of constitutional analysis.[58] The message is that, although the real-life interpreters of a constitution are less perfect than Hercules, by addressing first the question of how Hercules should interpret the constitution, we will have an ideal at our disposal that real-life judges then can try to approximate. To use an analogy, one could say that Hercules is to Dworkinian constitutional theory like the perfect market is to economics. Even if we are aware of the limitations of the model, it has immense explanatory power and, therefore, enjoys analytical primacy.

Although my commitment to a version of the moral reading makes my approach Dworkinian in one respect, it is markedly anti-Dworkinian in another respect. I believe that focusing on Hercules is not only of limited usefulness for practical purposes, but is also flawed theoretically. The central claim of this section is that the how- and the who-questions are intrinsically intertwined.

4.2.2 Second-Best Strategies

Let us concentrate first on a single institution, a constitutional court. My claim is that even if one concedes that *x* is the best interpretative strategy for Hercules, it does not follow that it is also the best strategy for a court

---

[56] Dworkin (n 13) 370.
[57] ibid.
[58] Dworkin (n 22) 105.

staffed by fallible, flesh and blood judges.[59] Let us assume that we all agree that when the text of the constitution is not clear, *the best decision* is the one that identifies the intentions of the legislature, since the authority of the text derives from that of the legislature. Let us call this *I*, the intentionalist criterion. Let us imagine further that the law was enacted by a legendary king of the realm, called Lawgiver. This simplification helps us to avoid all the conceptual problems that are associated with the identification of group intention. Since Hercules is a superhuman judge, he has infinite intellectual resources to consult the history of the statute in question. It is not a problem for him that Lawgiver's extensive notes and diaries were written a long time ago in a language that is now mostly unknown and is considered archaic. Therefore, *the best interpretative strategy* for Hercules is to track *I*, the intentionalist criterion, directly, and to collect all the relevant information that is available to reconstruct the intention of the legendary king. Let us call this the intentionalist strategy, *i*.

Now let us turn to our real-life judges. They all agree, *ex hypothesi*, that the best decision is *I*, the one that reconstructs the intention of Lawgiver most faithfully. However, they hardly understand the archaic language of Lawgiver and are not confident in figuring out the complicated metaphors of the king that were rooted in a culture very different from theirs. They believe that they simply do not have enough time to carry out the proper historical research. In addition, even if they could live up to the task, this practice would significantly raise the costs of litigation.[60] Most importantly, they believe that they would do many errors by trying to figure out Lawgiver's intent. On the other hand, they are convinced that the literal meaning of the text is an acceptable proxy for the king's intentions. Taking into account all these considerations, they might conclude that they will track the intention of Lawgiver better by not trying to figure it out directly, but by relying on the text of the statute.

To sum up, Hercules and our humble judges agree on the criterion of the best decision, but they might have to follow different strategies to make the best decisions. Given the infinite intellectual resources of Hercules, he is right to pursue the intentionalist strategy. By contrast, our

---

[59] The example was inspired by Adrian Vermeule, *Judging under Uncertainty: An Institutional Theory of Legal Interpretation* (Harvard University Press 2006) ch 4.

[60] This was a vitally important consideration in *Pepper (Inspector of Taxes) v Hart* [1993] AC 593, a case that addressed to what extent judges can rely on the reports of the parliamentary debates (Hansard).

real-life judges might come closer to the actual intention of Lawgiver by following a second-best strategy, textualism, instead of intentionalism. It is important to note that intentionalism was only meant to be an illustrative example; the same argument could be applied to many other interpretative theories as well. The lesson is that what is a good theory for Hercules is not necessarily a good method for real-life judges. Therefore, we simply cannot abstract away from the capacities of the interpreter.

4.2.3 Deference

So far we have focused on the capacities of a single institution, the court. However, modern constitutional courts are part of a complex institutional setting. Hence, when we make judgements about institutional capacities, we should not analyse one institution in isolation, but have to take into account the broader institutional context as well. Although in the process of constitutional adjudication it is the judges who interpret the constitution, it does not necessarily follow that their own opinion should control the outcome of the case. Dworkin is right to point out that in the United States the Supreme Court has *jurisdiction* to interpret the constitution, but it does not follow that it is always wise or desirable for the court to rely on its own judgement. A central assumption of my argument is that the question of jurisdiction and the issue of institutional capacities are analytically distinct.[61]

The fact that I have the right to smoke does not imply that I should smoke. Similarly, the fact that the court has jurisdiction to decide a certain case does not mean that judges are in the best position to make a decision. The former is a relatively clear-cut legal question, and the answer to that question is most of the time clear: courts do have jurisdiction to interpret the constitution. By contrast, the issue of whether judges should rely on their own judgement when deciding a case is not a clear-cut legal question. The answer to the latter question depends on what one thinks about the capacities and the legitimacy of our political institutions. Let me illustrate my point with the judicial practice of the Nordic countries. Although courts have the power to disapply unconstitutional statutes in each Nordic country, due to institutional reasons, they rarely exercise this power. Even if this practice is rather exceptional today, there is nothing self-contradictory or unintelligible in it.

---

[61] For a clear distinction between these two questions, see *Regina (Nicklinson) and another v Ministry of Justice and others (CNK Alliance Ltd and others intervening)* [2014] UKSC 38; [2015] AC 657, [58].

Since the idea that a court can rely on someone else's judgement when making a decision might sound counter-intuitive to some of my readers, let me spell out this idea in a little bit more detail. Relying on the judgement of others is a well-known phenomenon in everyday practical reasoning. When I go to see a doctor, I act upon her advice because I believe that I make the best decision concerning my own health not by relying entirely on my own judgement, but by taking into consideration the doctor's advice. I believe that this phenomenon can be best analysed by the distinction between first-order and second-order reasons, introduced in legal theory first by Joseph Raz.[62] As Raz explains, when we make practical decisions, we usually consider the reasons for and against a certain action (that is first-order reasons) and try to act on the balance of reasons.[63] In some situations, however, there are additional reasons that do not apply directly to the situation at hand but to our first-order reasons. According to Raz, 'second-order reasons are reasons to act on or refrain from acting on a reason'.[64]

Raz's analysis has focused on a particular type of secondary reasons, namely *exclusionary reasons*, which, as the name suggests, exclude certain first-order considerations from the deliberation. For instance, when a soldier tries to solve a problem on the ground, he considers the possible courses of action and balances the advantages and disadvantages of those actions. However, when his superior gives him an order, the order excludes the existing reasons from the deliberation and replaces them; the soldier is simply required to obey the order.

Exclusionary reasons are not the only type of second-order reasons. As Stephen Perry has pointed out, we can generalize the Razian idea and conceptualize exclusionary reasons just as a special case of the general category of second-order reasons.[65] According to Perry's revised account, 'a subjective second-order reason is a reason to treat a reason as having a greater or lesser weight than the agent would otherwise judge it to possess in his or her subjective determination of what the objective balance of reasons requires'.[66] To distinguish the general category from Razian exclusionary reasons, Perry labels the former as *reweighting reasons*. For instance, a judge might think that a case has two plausible

---

[62] Joseph Raz, *Practical Reason and Norms* (Princeton University Press 1990) 36.

[63] ibid 25–8.

[64] ibid 36.

[65] Stephen R Perry, 'Second-Order Reasons, Uncertainty and Legal Theory' (1989) 62 *Southern California Law Review* 913, 932.

[66] ibid.

solutions, *x* and *y*, and on the balance of substantive reasons she would prefer *x*. However, let us suppose that *y* is supported by a precedent; therefore the judge finally opts for *y*. In that case, the precedent did not exclude the reasons for *x* or *y* altogether from the deliberation, but gave extra weight to the arguments that supported *y*, and this tipped the balance of arguments in favour of *y*.

The above analysis helps me to introduce the concept of deference. I believe that the most sophisticated analysis of deference in the context of public law has been developed by Aileen Kavanagh. Therefore, I will use her definition as the starting point of my analysis. According to Kavanagh, 'judicial deference occurs when judges assign varying degrees of weight to the judgments of the elected branches, out of respect for their superior expertise, competence or democratic legitimacy.'[67] While unpacking her definition, Kavanagh explains that, when making decisions, judges should evaluate two kinds of considerations. They have to assess both the merits of the substantive legal issue and questions of relative institutional competence.[68]

As it turns out from the definition, Kavanagh's approach is much closer to Perry's revised account than to the original Razian position. Clarifying her own position, she emphasizes that when judges defer to the elected branches, their substantive views 'are not displaced by the contrary view of public officials', but the latter is 'weighed into the balance of overall reasons'.[69]

As a preliminary comment, let me note that, in my view, analysing deference in terms of practical reasons is a huge advancement over those approaches that define the concept in terms of judicial attitudes, like submission, respect, servility or civility.[70] However colourfully we try to describe the attitudes of judges, the attitude-based approach cannot match the analytical precision of the reason-based approach. Although I find Kavanagh's definition very illuminating, I suggest that we should tweak it on a number of points.

According to Kavanagh, deference cannot mean that judges displace their opinion by that of the other branches. This would change appropriate or due deference to the abdication of judicial duty and would blur the

---

[67] Aileen Kavanagh, 'Defending Deference in Public Law and Constitutional Theory' (2010) 126 *Law Quarterly Review* 222, 223.

[68] ibid 230.

[69] ibid 231.

[70] For a mixed approach, see Alison L Young, 'In Defence of Due Deference' (2009) 72 *The Modern Law Review* 554.

line between the concepts of deference and justiciability. I suggest that we should drop this qualification from the definition, for two reasons.

First, Kavanagh assumes that judges treat the views of other branches either as exclusionary or as reweighting reasons. However, drawing again on Perry's theory of practical reasoning, one could argue that these two second-order reasons do not exhaust the logical possibilities. As Perry points out, some reasons are best characterized neither as exclusionary, nor as reweighting, but *epistemically bounded reasons.* An epistemically bounded reason is a second-order reason which requires a person to defer to another's practical judgement only up to some specified epistemic threshold.[71] Let us imagine that a judge defers to the decision of other branches if the decision is not clearly mistaken. Epistemically bounded reasons, like reweighting reasons, indeed impose limits on deference. In the above example the judge scrutinizes the judgment of the other branch: if it is filtered out by the clear-mistake rule, the judge will not defer to it. However, if the decision of the other institution meets the aforementioned threshold criterion, the judge does not only weight the opinion of the other branch into the balance of reasons, but does displace her judgment with that of the other body. As the above argument shows, judicial scrutiny is not necessarily incompatible with the idea of a judge's opinion being *displaced* by the practical judgements of others.

Second, and more importantly, the reasoning process in human rights cases can be almost always broken down into more elementary steps. The conclusion of a complex argument typically requires the establishment of several legal, moral and factual premises. Suppose that a complete argument can be broken down into four premises: *a*, *b*, *c* and *d*. Although Kavanagh is right to claim that judges do not displace their views on the overall issue with that of the other branches, I do not see why they could not treat some reasons as reweighting and others as exclusionary or at least epistemically bounded reasons within one complex argument. In principle, a judge can completely displace her own judgment with someone else's on *a* (exclusionary reason), weight the view of someone else's view into the balance of reasons on *b* (reweighting reason), displace her view with that of someone else's on *c* if the latter view is not clearly mistaken (epistemically bounded reason) and rely on her own judgment on *d*.

In addition, giving exclusionary status to the views of others is not only a logical possibility. My contention is that the normal or typical way of using the superior expertise of others is to give it exclusionary status

---

[71] Perry (n 65) 942.

in our deliberation. In this context, reweighting has both high decisional and error costs. One of the reasons for having experts is that relying on their knowledge saves time and energy for us. Reweighting assumes that we form an independent judgement on the subject matter, and, therefore, give up one of the advantages of having experts. More importantly, I will be usually better off by not trying to second-guess an expert's judgement. Even if the person with superior expertise can make mistakes, because her expertise is, *ex hypothesi*, superior to mine, I will probably make more mistakes by trying to find out whether she made a mistake than by following her advice blindly. If expertise is one of the justifications for deference, it is unreasonable to rule out categorically the possibility that in some cases the best practical judgement for a judge is to give exclusionary status to the views of the other branches.

In light of my justificatory theory, I would also characterize the relevant deliberative process somewhat differently from Kavanagh. In her view, when judges make decisions, they should take into consideration two kinds of reasons: they are asked to balance first-order substantive reasons and second-order institutional reasons against each other.[72] I believe that under the circumstances of reasonable pluralism, this reasoning process gives unfair privilege to the judge's moral views. Let me use an example to illustrate my point. Let us suppose that, as a judge, Amy has to make a decision on abortion. Her first-person singular view on the issue is that women should be allowed to make reproductive decisions for themselves. But she also knows that this is a controversial issue and, therefore, is ready to balance institutional considerations against what she believes to be the correct solution. This balancing exercise, however, still gives an unfair weight to Amy's first-person singular point of view. Her pro-choice position is the default view against which institutional considerations will be balanced.

However, if we take reasonable pluralism seriously, we need a fair procedure to choose from the competing moral views, and cannot privilege one of the rival positions. What we need most of the time is not balancing first-order substantive reasons against second-order institutional reasons, but striking a balance between second-order institutional reasons. The relevant question is this: which institution is in a better position to make the collective decision? If the different institutional considerations, like procedural fairness, epistemic accuracy and motivational malfunctions pull in different directions, we should balance them against each other. If the balance of second-order considerations suggests

---

[72] Kavanagh (n 67) 230.

that overall the legislature is in a better position to make a certain decision, we should accept the legislature's decision and let the chips fall where they may. If the same considerations show that judges are better suited to decide the case, we should give full weight to what the judge thinks about the merit of the issue. That is, most often institutional considerations should not be balanced against the substantive views of judges. Rather, they should be used (if needed, also balanced against each other) to decide whose opinion should prevail in the case of interpretative disagreements.

The concept of deference gives us a crucial analytical tool to understand how the reasons put forward by the other branches can feature in a court's deliberation. The foregoing analysis, however, leaves open the question whether judges *should ever* defer to the elected branches. The crucial point I wanted to make here is that the jurisdictional issue does not answer the question of whether and under what circumstances it is wise for judges to rely on the judgments of others. Dworkin rejects the idea of judicial deference (or passivism as he calls it) because he thinks that the whole idea is based on a fundamental misunderstanding:

> Passivism says the Court must exercise that power [the power of judicial review] by adopting the legislature's answer as its own, but that advice is sound only if it follows from the right answer to the third, legal question. If the right answer to that question is that the Constitution does forbid states to make abortion criminal, then deferring to a legislature's contrary opinion would be *amending* the Constitution in just the way passivism thinks appalling.[73]

Dworkin's conclusion would indeed follow if we had an agreed-upon measure to define right answers to constitutional issues. However, deference is not about giving the permission to judges to deviate from an antecedently established correct answer but is part of a rival approach as to what counts as the correct answer in a complex institutional setting, or putting it more modestly, how we should look for the correct answer.

4.2.4 Institutional Considerations in Constitutional Theory

I have claimed above that the how- and who-questions are inextricably linked in constitutional theory. Since the who-question is about the legitimacy and capacity of our institutions, no theory of constitutional interpretation can escape confronting those issues. But I would also risk

---

[73] Dworkin (n 13) 370.

the stronger claim that a great deal of what has been written about the how-question can be recast or even better understood as an answer to the who-question. Of course, no theory of constitutional interpretation can be complete without some ideas about how the meaning of a text can be established. However, if disagreement is such a pervasive feature of constitutional interpretation as I have suggested in Section 4.1, it is not surprising that our debates often gravitate around how interpretative authority should be allocated: when the constitution has different interpretations, whose interpretation should prevail?

There are some theories of constitutional interpretation that fit very neatly with the claim I made above. James Bradley Thayer's clear-mistake doctrine, for instance, is not a theory about what the constitution actually means, but much more a theory about the proper allocation of interpretative authority.[74] Thayer's doctrine assumes that judges can make a distinction between those decisions of the legislature that are optimal, and those that are not optimal, but are nevertheless plausible, and are within the range of acceptable decisions. The core of the clear-mistake doctrine is that when legislators remain within the range of plausible interpretations, their view should prevail, regardless of whether judges agree with it or not. The judges' opinion trumps that of the legislators only in those cases when the legislature's decision cannot be considered as a reasonable attempt to interpret the constitution.

Judicial minimalism, advocated by Cass Sunstein, is also sensitive to the allocation of decision-making authority.[75] A minimalist judge can be sympathetic to Dworkin's views on the moral reading of the constitution and still reject a Dworkinian judge's decision. She would consciously back up her decision by an admittedly shallow and narrow justification, even if she believes that a deeper and wider justification along Dworkinian lines is also available.

There are certainly other approaches that do not seem to fit so neatly with my attempt to recast the debate in institutional terms. Originalists, for instance, might assert that their theory focuses entirely on the how-question and their disagreement, for instance, with Dworkin is clearly about what the constitution means. If one contends that the central thesis of originalism is the conceptual claim that the very idea of interpretation or the nature of 'writtenness' commits the interpreter to an originalist understanding of the constitution, we can hardly escape this

---

[74] Thayer (n 28).

[75] Cass R Sunstein, 'Foreword: Leaving Things Undecided' (1996) 110 *Harvard Law Review* 4; Cass R Sunstein, 'Burkean Minimalism' (2006) 105 *Michigan Law Review* 353.

conclusion. Yet, if one understands originalism not as a conceptual approach, but as a political thesis, my emphasis on the who-question will immediately make sense. This being the case, originalists have to concede that other, non-originalist interpretations of the constitution are also possible. According to the latter understanding of originalism, originalism is a doctrine that instructs judges to subordinate their personal views about the meaning of a text to the original understanding of the same text on political grounds. One could say, using Joseph Raz's terminology, that originalism provides the judge with an exclusionary reason to replace his own interpretation with that of the framers.

As is well known, Ronald Dworkin argues that we can be faithful to the original intention of the framers in two different ways.[76] We can ask what the abstract concepts of a constitution, like equal protection, due process or the prohibition of cruel punishment really mean and act upon the best interpretation of those concepts regardless of what the framers had in mind when they incorporated those words into the constitution. By contrast, we can be faithful to the more specific intentions of the framers, that is to say, to the way the framers expected the terms of the constitution to be applied.

Originalists might argue that although Dworkin is right to emphasize the framers' desire to enact abstract moral concepts as opposed to more precise conceptions, and it is of crucial importance as to what these abstract concepts indeed require, the problem is that we do not have direct access to the real meaning of these abstract concepts. All we have is our own controversial interpretations or conceptions of these concepts. Therefore, the real choice is not between the framers' conception and the abstract concept, as Dworkin claims, but between the framers' conception and someone else's conception. Contrary to what Dworkinians sometimes claim, originalism does not necessarily presuppose that the framers were infallible, or that their saying so constitutes what is morally right.[77] Originalists could claim that they adhere to the original understanding not because they prefer the framers' conception to the constitution's concepts, but they prefer the framers' conception to that of unelected judges. While I do not claim that this particular argument will be successful in the final analysis, I suggest that originalism can be successfully defended only as a political position, and this is the *kind* of argument that might work for its proponents.

---

[76] Dworkin (n 22) 132–7.
[77] Barber and Fleming (n 15) 29.

Like originalism, Ronald Dworkin's approach appears to defy my theoretical framework. It is tempting to say that Dworkin completely fails to address the who-question, in the context of constitutional interpretation, as something that is separate from the jurisdictional question. Yet, his theory implicitly answers the who-question. He assumes that when there is a disagreement about the meaning of the constitution, the judges' interpretation should prevail. At certain points, this position seems to follow from a prior institutional decision,[78] but we can safely claim that the same position is preferred by Dworkin on normative grounds as well. The idea that judges are required to give full weight to their own interpretation of the constitution is deeply rooted in and derives from Dworkin's substantive conception of democracy and the role judges are charged to play in this conception.[79] According to Dworkin's conception of democracy, courts are the forums of principle and are better suited to make judgements on the interpretation of abstract moral rights than legislatures.[80]

The upshot of my argument is that each theory of constitutional interpretation at least tacitly presupposes a particular view about the proper allocation of decision-making authority. Each approach is rooted in a given analysis of how our disagreements about the meaning of the constitution should be managed. Although the foregoing survey of different interpretative approaches is far from exhaustive, I believe that the examples given above illustrate the three pure alternatives we have to handle moral disagreement in the context of constitutional interpretation. If there is a disagreement about what an abstract concept of the constitution indeed means, we can give primacy to the view of present-day legislators (like the clear-mistake approach), the view of the framers (like originalism) or the view of judges (like Dworkin).

---

[78] Dworkin (n 13) 370.

[79] Ronald Dworkin, 'Equality, Democracy, and Constitution: We the People in Court' (1990) 28 *Alberta Law Review* 324; Dworkin (n 1); Ronald Dworkin, 'The Partnership Conception of Democracy' (1998) 86 *California Law Review* 453.

[80] Ronald Dworkin, 'The Forum of Principle' (1981) 56 *New York University Law Review* 469.

4.3 AN OUTLINE OF A DEFERENTIAL APPROACH TO CONSTITUTIONAL INTERPRETATION

4.3.1 The Allocation of Interpretative Authority: The Default Position

The previous section demonstrated that the questions of legitimacy and institutional capacity should not be considered as preludes to the theory of constitutional interpretation properly so called, but form an integral part of such a theory. Given the pervasive nature of moral disagreements in constitutional interpretation, I have also claimed that constitutional theory should gravitate not around the how-, but the who-question. If that is so, the institutional arguments advanced in Chapter 3 are clearly relevant for and should be part of a theory of constitutional interpretation. The very same considerations that are pertinent to the question of the legitimacy of judicial review have a bearing on how judges should decide constitutional cases. The essential difference is that judges address the who-question not at the level of institutional design, but at the level and in the context of constitutional adjudication, and in this context, it is up to them to allocate decision-making authority between themselves and other relevant persons or institutions. My task here is therefore to draw out the implications of the analysis carried out in the previous chapter. However, this section can lay down only the broad outlines of a theory of constitutional interpretation; I do not pretend that my analysis gives a detailed blueprint for judicial decision-making.

My argument proceeds in three steps. In the first step, I claim that, as a default position, judges should defer to the views of elected branches while specifying the content of human rights. Second, I suggest that a more robust judicial scrutiny is justified only when the political process is prone to well-identifiable malfunctions. Since the general thrust of the argument I advance in the first two subsections seems to be compatible with originalism, I need to also clarify why I reject the originalist approach. This is the task of the final subsection of the present chapter.

The idea of deference that I introduced in subsection 4.2.3 has received considerable attention recently in British public law scholarship, and this discourse gives me a convenient starting point to locate my position on constitutional interpretation.[81] (It is itself of some significance that while

---

[81] TRS Allan, 'Human Rights and Judicial Review: A Critique of "Due Deference"' (2006) 65 *Cambridge Law Journal* 671; TRS Allan, 'Deference, Defiance, and Doctrine: Defining the Limits of Judicial Review' (2010) 60 *The University of Toronto Law Journal* 41; Alan DP Brady, *Proportionality and*

in many other countries the discourse on constitutional interpretation is often dominated by the debates about what kind of arguments should be used by judges,[82] the British discourse on the interpretation of the HRA gravitates primarily around institutional questions.[83])

Apart from the conceptual issues that I have already touched upon in subsection 4.2.3, the debate about deference also raises at least three additional questions. (1) The first one concerns the legitimate grounds of deference; (2) the second one considers how much weight judges should give to institutional considerations; (3) the third one is about whether judges should weigh the relevant considerations on a case by case basis, or should they follow a more rigid rule-based approach when they factor in institutional considerations. Although it is probably the third question that has generated the most intense debates, I will focus on the first two issues, since these are the ones that are more pertinent to my inquiry.

As far as the first question is concerned, there is a broad consensus that expertise and competence are proper grounds for deference. However, the participants of the debate are divided on whether judges should ever defer to the elected branches on 'democratic grounds', that is, whether they should give some weight to the views of the legislature just because

---

Deference under the UK Human Rights Act: An Institutionally Sensitive Approach (Cambridge University Press 2012); Richard Clayton, 'Judicial Deference and "Democratic Dialogue": The Legitimacy of Judicial Intervention under the Human Rights Act 1998' [2004] *Public Law* 33; Richard A Edwards, 'Judicial Deference under the Human Rights Act' (2002) 65 *The Modern Law Review* 859; Murray Hunt, 'Sovereignty's Blight: Why Contemporary Public Law Needs the Concept of "Due Deference"' in Nicholas Bamforth and Peter Leyland (eds), *Public Law in a Multi-Layered Constitution* (Hart Publishing 2003); Jeffrey Jowell, 'Judicial Deference and Human Rights: A Question of Competence' in Paul Craig and Richard Rawlings (eds), *Law and Administration in Europe: Essays in Honour of Carol Harlow* (Oxford University Press 2003); Jeffrey Jowell, 'Judicial Deference: Servility, Civility or Institutional Capacity?' [2003] *Public Law* 592; Jeff A King, 'Institutional Approaches to Judicial Restraint' (2008) 28 *Oxford Journal of Legal Studies* 409; Lord Steyn, 'Deference: A Tangled Story' [2005] *Public Law* 346; Young (n 70); Alison L Young, 'Deference, Dialogue and the Search for Legitimacy' (2010) 30 *Oxford Journal of Legal Studies* 815.

[82] For an approach that revolves around the types of arguments that are used in constitutional reasoning, see Jakab, Dyevre and Itzcovich (n 11).

[83] My understanding is that rights-related interpretative debates in the UK tend to gravitate around three questions: (1) how much weight should UK courts assign to the jurisprudence of the ECtHR?; (2) when is it appropriate for courts to remove an incompatibility with Convention rights by interpretation?; (3) how much weight should courts give to the views of the elected branches?

the latter has stronger democratic legitimacy. Some commentators, like Jeffrey Jowell,[84] and some judges, like Lord Steyn, believe that deference on democratic grounds would undermine the protection of human rights and to defer to the stronger democratic legitimacy of the legislature is a kind of category mistake once we understand the nature of constitutional democracy. As Lord Steyn puts it: 'If valid, this reason is self sufficient and controlling. If this reasoning were to be extended to Convention rights, courts would be required automatically to defer, on constitutional grounds, on any occasion on which a qualified Convention right was claimed to be defeated by a particular public interest.'[85]

The present question is directly related to the Cancellation Thesis I introduced in subsection 3.2.2. Jowell's position is clearly plausible if one believes that, once we subscribe to constitutional democracy, PEP is not only overridden but cancelled. According to this interpretation, in constitutional democracies human rights delimit the area of legitimate majoritarian decisions. It is up to the judges to determine the content of rights and hence the proper role of majoritarian decision-making, and although PEP remains a relevant political principle, it is relevant only *within* the limited territory left open by human rights. In this framework, saying that PEP is an important consideration in the specification of human rights is a sign of misunderstanding the very nature of constitutional democracy. The following paragraph from *RJR-MacDonald Inc. v Canada (Attorney General)*, a Canadian Supreme Court case, formulates the core idea with exceptional clarity:

> Parliament has its role: to choose the appropriate response to social problems within the limiting framework of the Constitution. But the courts also have a role: to determine, objectively and impartially, whether Parliament's choice falls within the limiting framework of the Constitution. The courts are no more permitted to abdicate their responsibility than is Parliament. To carry judicial deference to the point of accepting Parliament's view simply on the basis that the problem is so serious and the solution difficult, would be to diminish the role of the courts in the constitutional process and to weaken the structure of rights upon which our constitution and nation is founded.[86]

This neat division of labour between human rights and majoritarian decisions would be attractive if human rights could somehow mysteriously execute themselves. However, in our imperfect world the limits of

---

[84] For an illustration, see Jowell, 'Judicial Deference: Servility, Civility or Institutional Capacity?' (n 81) 597.

[85] Steyn (n 81) 358.

[86] [1995] 3 SCR 199, 1995 [136].

majoritarian decisions always reflect the views of someone, and if they are based on the moral judgement of someone, it is not self-evident that they should reflect the views of judges. The primacy of human rights does not entail the primacy of judicial interpretation of human rights; the latter has to be established separately. If human rights are subject to reasonable disagreement, we need additional principles to decide whose moral judgement should prevail in case of disagreement. Since equal participation is a relevant consideration and is not cancelled by other arguments, it remains part of the equation. Saying that procedural fairness is a legitimate ground for deference does not mean that it will determine the outcome of a case. It implies only that PEP is one of the considerations that has to be taken into account in the allocation of interpretative authority, but that leaves open how much weight judges should assign to it.

Turning now to the second and central question, how much weight should we give to the different institutional factors, and how should we balance them? Although there are significant disagreements on many aspects of deference, I believe that it is fair to say that according to most participants of the debate judges are better qualified or situated to decide rights-related moral issues than legislators. For the proponents of the mainstream view, the default position is that judges should give full weight to what they think to be the best interpretation of a human right. Deference is a deviation from the default position. As Murray Hunt puts it, deference should be *earned* by the other branches from the courts.[87] Judges should defer to the opinion of the elected branches only if it is established that they have special expertise or competence on a certain issue.

The institutional considerations that I have developed in the previous chapter lead me to a very different conclusion. Even if procedural fairness is not a conclusive reason for deferring to the legislature's interpretation, it must be always considered part of the institutional equation, and PEP gives a systematic advantage to the legislature. In addition, the review of epistemic considerations suggests that the legislature also has an edge in the epistemic dimension. If the arbitrator needs to track publicly justified principles, a homogeneous judiciary is a less than ideal bet, to say the least. Although I admitted that the political process is prone to malfunctions, and in some cases judges are well

---

[87] Hunt (n 81) 340; Kavanagh (n 67) 227.

situated to correct those malfunctions, I maintained that, in a well-ordered democracy, these malfunctions should be considered blind spots rather than systematic failures.

From that vantage point, I suggest that we should turn the mainstream position on deference on its head. In the mainstream theory, motivational considerations do not play a part in the finer calibration of the judicial role. Rather, they are already built into the default position and give the moral high ground to judges. The fine-tuning of the judicial role is based primarily on epistemic considerations: courts should occasionally defer to the legislature if it is likely that the latter has superior expertise. According to the approach I propose, the fine-tuning of the judicial role should be based primarily on motivational considerations. The rather constant and systematic advantages of the legislature in the procedural and epistemic dimensions suggest that, in the absence of political malfunctions, courts should generally defer to the legislative body. To put it in other words, the default position I propose here is broadly Thayerian in spirit: the judicial specification of human rights should trump that of the legislature only if the latter is manifestly unreasonable. What needs special justification is not deference, but rather the robust intervention of courts. Occasionally, subject-matter expertise can add further complexities to this fine-tuning process. However, this does not affect the broad outlines of my position.

I will use a recent, high profile British case to illustrate my position. In *Nicklinson*, the UK Supreme Court had to decide among other things whether the law of England and Wales relating to assisting suicide infringed Article 8 of the ECHR.[88] The judges agreed that they have the constitutional authority to make a declaration of incompatibility on that question. However, they were deeply divided on whether the court is institutionally competent to make a decision on the issue. Five justices argued that the fact that assisted suicide raises difficult moral questions on which reasonable people can disagree does not mean that the court would not be the proper institution to form such a judgement. Lord Kerr's opinion articulates perhaps most clearly the view that Parliament is not better suited to make controversial value judgements.

> The need for a particular measure may not be susceptible of categorical proof. This is especially true in the realm of social policy where the choice between fiercely competing and apparently equally tenable opinions may be difficult to make. In those circumstances a more nuanced approach is warranted to the

---

[88] *Regina (Nicklinson) and another v Ministry of Justice and others (CNK Alliance Ltd and others intervening)* [2014] UKSC 38; [2015] AC 657.

> question of whether the interference is proportional. This should not be confused, however, with deference to the so-called institutional competence of the legislature. The court's approach in these difficult areas may call for a less exacting examination of the proffered justification. But this more generous attitude is not based on the view that Parliament is better placed to make a judgment on the need for the measure than is the court or that the court should therefore regard itself as inept to conduct an assessment of the incompatibility of the measure. Rather, it reflects the reality that choices in these areas are difficult to make and that it may not be easy to prove that the right choice has been made.[89]

Lord Kerr's opinion reflects a profound belief in the Enlightenment view of reason. If there is a right answer to a moral question, it is certainly plausible to claim that judges are as well suited to find it as legislators. However, where we have reasonable disagreements, judicial opinions are much less likely to reflect all the reasonable positions that are present in society. The rival position that was put most forcefully perhaps by Lord Sumption builds directly on this idea:

> The question whether relaxing or qualifying the current absolute prohibition on assisted suicide would involve unacceptable risks to vulnerable people is in my view a classic example of the kind of issue which should be decided by Parliament. There are, I think, three main reasons. The first is that, as I have suggested, the issue involves a choice between two fundamental but mutually inconsistent moral values, upon which there is at present no consensus in our society. Such choices are inherently legislative in nature. The decision cannot fail to be strongly influenced by the decision-makers' personal opinions about the moral case for assisted suicide. This is entirely appropriate if the decision-makers are those who represent the community at large. It is not appropriate for professional judges. The imposition of their personal opinions on matters of this kind would lack all constitutional legitimacy.[90]

In *Nicklinson*, it is Lord Sumption's opinion that exemplifies best the approach that my institutional analysis endorses, but his emphasis is slightly different from mine. I wholeheartedly agree with Lord Sumption's observation that the assisted suicide case calls for value judgement and the assessment of complex empirical issues. The representative character of the legislative body and its superior fact-finding process make the legislature better situated to make such decisions. The point I wish to make is that these considerations do not make the assisted suicide case unique, or exceptional. Although other human rights cases

---

[89] ibid [348].
[90] ibid [230].

might be less dramatic, most of the aforementioned factors are relevant in all complex human rights cases. Almost all cases require moral judgement. Representativeness and superior fact-finding procedure give systemic edge to the legislative body that does not need to be (re-)established on a case by case basis. This is exactly why I suggest that the default approach of courts in human rights adjudication should be deferential. What makes the legislature the more optimal institutional choice *overall* in that case is not the presence of the procedural and epistemic features emphasized above but the absence of well-identifiable political malfunctions.

Although some of the people whose right to private life is interfered with are vulnerable, the group as a whole can be hardly considered a 'discrete and insular minority'. The judgment does not indicate the existence of any severe political malfunctions in the legislative process. (This is not surprising, since the mainstream position assumes the general presence of political malfunctions in human rights cases.) However, this is exactly what my approach would require to justify robust judicial scrutiny.

Although arguing for the contrary position, Lord Neuberger's opinion refers to the insulation of judges from the political process, his remarks remain entirely general: he does not substantiate why the insulation argument is particularly relevant in the instant case.[91] His position reflects rather the constitutional orthodoxy that assumes the intimate link between rights and political malfunctions, and, therefore, also assumes that the insulation of judges is a major advantage across the board in the specification of human rights.

One of Lord Mance's comments is also worth a special mention in this context. He refers to another landmark decision of the court, *A v Secretary of State for the Home Department*[92] to support the rejection of Lord Sumption's deferential approach. The point I wish to make is how insensitive Lord Mance's argument is towards the motivational considerations that play a central place in my argument. In *A v Secretary of State for the Home Department*, a case about the lawfulness of indefinite detention of foreign prisoners without trial, the government acted under significant political pressure, and the discriminatory rule signalled out a discrete and insular minority. Neither of these circumstances was present in the assisted suicide case. Although I have to admit that my theory does not give precise guidance to judges to identify the cases where political

---

[91] ibid [104].
[92] [2005] 2 AC 68.

malfunctions are at play, the two decisions mentioned here are as close to being paradigm cases as possible. From the fact that deference was not justified in *A v Secretary of State for the Home Department*, it does not follow that it was also unjustified in the assisted suicide case. There are crucial differences between the two cases but they are related not so much to the epistemic performance of legislatures in the two cases, but to the likelihood of the occurrence of political malfunctions.

4.3.2 From Thayer to Ely

If the political process is indeed prone to serious malfunctions, we should not dogmatically exclude the possibility that occasionally the insulation argument can override procedural and epistemic considerations. These are the situations in which courts can deviate from the default position and engage in a more thorough scrutiny.

This idea brings my position very close to John Ely's representation-reinforcing theory.[93] I certainly agree with the main thrust of Ely's argument. If I had to elaborate on the precise implications of my theory of interpretation and give examples when it is legitimate for judges to go beyond the deferential approach, I would definitely use his examples as my starting point. Instead of crafting an alternative catalogue of proper and improper judicial interventions, I wish to make a few general points where Ely's theory has to be revised in light of subsequent critiques.

First, Ely thought that in drawing the fundamental dividing line between legitimate and illegitimate judicial intervention we should be guided by the process/substance distinction. While judges are well suited to police the fairness of the political process, it is not for them to assess the outcome of political decisions. However, as the critics of Ely have pointed out, Ely's distinction between process and substance is highly problematic.[94] When judges are invited to decide, for instance, which minorities are discrete and insular, they definitely have to engage with substantive issues that call for value judgement. Perhaps more importantly, even if the political process suffered from serious malfunctions, it does not necessarily follow that the enacted law itself is unjust or unfair. Therefore, even if the more robust scrutiny of judges is triggered by a failure of the process, judges must necessarily make value judgements on

---

[93] John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* (Harvard University Press 1980).

[94] Laurence H Tribe, 'The Puzzling Persistence of Process-Based Constitutional Theories' (1979) 89 *Yale Law Journal* 1063; Ronald Dworkin, *A Matter of Principle* (Harvard University Press 1985) 58–69.

substantive issues. However, this line of criticism does not affect Ely's fundamental negative claim: where there are no well-identifiable political malfunctions, judges should not override the substantive value judgements made by legislators.

Second, Neil Komesar is right to criticize Ely for providing a 'single-institutional' analysis and focusing almost entirely on the malfunctions of the political process. Komesar's central methodological message, that I fully embrace, is that institutional choices should be based on comparative analysis.[95] Even if the political process suffers from malfunctions, we cannot automatically jump to the conclusion that the decision should be made by courts. The judicial process also has its own weaknesses. The insulation of courts from the political process that can be a major advantage in one respect is a serious weakness in another respect. The presence of political malfunctions, therefore, does not carve out the precise scope of where a more robust judicial review is justified; it shows only the outer theoretical limits of such judicial intervention.

Third, Ely's theory is sometimes read as an attempt to make the conflict between democracy and the protection of rights disappear, an attempt to make the political process more democratic by limiting democracy.[96] It is important to admit at this point that even if political malfunctions can occasionally justify robust judicial intervention, by this we compromise the principle of equal participation. Even if it is possible to argue that robust judicial review improves democracy in one dimension, it definitely makes the political process less democratic in another dimension.

The theory of constitutional interpretation I have outlined here is admittedly sketchy and leaves many questions open. However, already this sketch has sufficiently strong contours to contrast the interpretation I propose with the practice of most constitutional courts and many influential theories of constitutional interpretation. My primary aim here was not to spell out the implications of a Thayerian theory (corrected partially by the insights of Ely) in detail, but to explain why this is the most attractive approach in light of the institutional analysis offered in Chapter 3.

---

[95] Neil K Komesar, 'A Job for the Judges: The Judiciary and the Constitution in a Massive and Complex Society' (1987) 86 *Michigan Law Review* 657, 699–721.

[96] Stephen Gardbaum, *The New Commonwealth Model of Constitutionalism: Theory and Practice* (Cambridge University Press 2013) 72.

4.3.3 Why Not Originalism?

A theory of constitutional interpretation has to clarify whose interpretation should prevail when the constitution uses abstract, value-laden terms and the relevant actors disagree on the meaning of those terms. In that context, we have three main options: one can give primacy to the views of judges, legislators or framers. My argument so far focused on the contrast between the adjudicative and the political process. This argument compelled me to reject all theories that give primacy to the judiciary in the specification of human rights. However, this consideration alone does not explain why I prefer a broadly Thayerian approach to originalism that gives primacy to the views of the framers. This is the question I am going to address here. I do not aim or pretend to provide a comprehensive critique of originalism; I limit myself to two objections that follow more or less directly from the analysis of the previous chapters.

My first claim is that in the paradigmatic cases of constitutional interpretation (see subsection 4.1.10) originalism is either unhelpful or self-defeating. To understand why this is the case, it is important to see that originalism presupposes an institutional framework that Bruce Ackerman dubbed dualist democracy.[97] This institutional framework is built on a clear distinction between ordinary politics and constitutional politics and gives priority to past supermajorities over later legislative majorities. Dualism does not commit someone to originalism, but originalism presupposes a dualist institutional structure.

To substantiate my claim, let me refer back to the paradigmatic example of constitutional interpretation. Let us suppose that making or amending the constitution requires a two-thirds supermajority. Let us suppose further that our fictitious constitution contains a norm that provides that everyone has the right to human dignity. Let us abbreviate this norm as HD. Now let us suppose that the concept of human dignity has three rival conceptions in the community: dignity as autonomy (HD1), substantive dignity (HD2) and dignity as recognition (HD3). Let us stipulate further that the framers could agree on HD, but they were divided on the more detailed conceptions of the general concept, and neither of these conceptions was supported by a two-thirds majority. Above I argued that this is the typical dilemma judges face in human rights adjudication. In most cases, the semantic conventions – neither the

---

[97] Bruce Ackerman, *We the People: Volume 1 – Foundations* (Belknap Press 1993) 3–33.

semantic conventions of the present nor the semantic conventions of the past – are simply not sufficiently detailed to determine the outcome of a case.

My claim is not simply that the meaning of human rights is sometimes indeterminate, but that under a dualist system, constitutional indeterminacy with regard to the more specific conceptions of human rights is the rule, rather than the exception. In addition, the fact that the framers are unable to elevate one of the rival conceptions to constitutional status is not a pathology, but a virtue of institutional design. If they were able to elevate one of the contested conceptions to the level of constitutional norms, the constitution could no longer secure the loyalty of those citizens who prefer the rival conceptions.

Facing such cases, an originalist can choose from two options. On the one hand, she can argue that because most framers preferred HD1 to its two rivals, judges should also prefer HD1. But we do not have good reasons to prefer the judgement of past majorities over present majorities. Whatever our reason for a dualist institutional framework, for preferring past *supermajorities* to present majorities, this reason applies only to HD, but, *ex hypothesi*, does not apply to HD1. Preferring HD1 thus undermines dualism, the political theory that originalism is based upon. If, on the other hand, the originalist remains faithful to dualism, she must concede that her preferred approach is unhelpful in the paradigmatic cases of constitutional interpretation, because it does not facilitate the choice between the rival conceptions of abstract constitutional concepts. If the function of an interpretative theory is to help us to choose between the rival conceptions of the abstract constitutional clauses in such cases, originalism has inherent limitations in fulfilling this function.

Now let us tweak the example slightly and suppose that two-thirds of the framers agreed not only on HD but also on one of the conceptions of HD, HD1. Even if that is the case, since the framers had never voted on HD1, it is almost impossible to prove that their agreement went beyond the abstract concept, so the force of the previous argument applies virtually to all cases where linguistic conventions underdetermine the result. But let us concede that we have strong historical evidence that the requisite majority of the framers agreed not only on HD but also on HD1. Let us assume further that the judges prefer HD2, while our present-day legislatures prefer HD3. I would reject the claim that judges should opt for HD1 just because this was the preferred interpretation of the framers. However, since the previous argument does not apply here, I need a separate strategy to reject originalism.

My objection to originalism under this scenario builds on Dworkin's distinction between abstract and concrete intentions.[98] Dworkin is right to claim that the framers might have wanted to impose rather specific obligations on future generations, but it is also possible that they wanted to enact general principles and leave the specification of these principles to them. We cannot choose between these two options on conceptual grounds. I would opt for the second option because of normative considerations.

As I made clear in Chapter 2, I consider LPL the most attractive interpretation of what the principle of Equal Consideration requires. LPL asserts that the authoritative decisions of the state are legitimate if they are publicly justified, or can be considered as good faith attempts to interpret the publicly justified principles of the political community. Of course, we need procedures to define the publicly justified principles of the community, and my theory is compatible with the view that some of these principles are defined by a supermajority. However, the Liberal Principle of Legitimacy does not give us any reason to go beyond what the framers actually enacted, and that is HD. If the constitution was passed a long time ago, under circumstances that are very different from our own ones, the framers' interpretation of abstract constitutional principles is unlikely to track the principles that are justified to *us*. To put it otherwise, my approach to constitutional interpretation belongs to the family of constitutional theories that interpret the constitution as a living document, the meaning of which can develop and deviate from the framers' expectations. However, the idea of a living constitution implies only that we are not bound by the framers' conceptions of the constitution's concept, it does not commit one to the view that one should give priority to the judges' conceptions.

Originalism would be an attractive option in those few cases in which a supermajority of the framers agreed not only on our abstract constitutional concepts, but also on the more specific interpretations of these concepts, if we accepted a legitimizing theory that is very different from LPL. I share the view of Richard Primus, who claims that originalism presupposes a distinctive conception of democracy, which can be called the democratic-enactment theory:

> The command theory maintains that the Constitution has authority because it was democratically enacted by the American people. Therefore, it continues, the Constitution must mean what the people who adopted it understood themselves to be agreeing to. As with any set of rules that rests on consent,

---

[98] Dworkin (n 22) 132–7.

> the content of the consent determines the content of the rules; the parties to the agreement are bound to what they consented to be bound by, neither more nor less. The parties can alter the rules through consensual processes which in the case of the Constitution means through democratically enacted amendments. But until the terms of the agreement are so revised, enforcing the Constitution means enforcing the bargain that was democratically struck in the past. To do anything else would disrespect democracy by denying the people at any point in time the ability to strike democratic bargains that could be reliably enforced in the future.[99]

The very idea that participation in democratic procedures qualifies as consent has been convincingly challenged by many political theorists.[100] However, whatever one thinks about the general issue, if the people who enacted the constitution and the people who live under the constitution form two entirely distinct groups, the consent theory becomes utterly implausible. The only way to save the idea of consent is to admit that the continuing authority of the constitution is based not on the original agreement, but rather on the implied consent of later generations. Regardless of what one believes about the intrinsic merits of this justification, it does not help, but rather undermines originalism, since in that case originalism becomes unnecessary.[101]

---

[99] Richard A Primus, 'When Should Original Meanings Matter?' (2008) 107 *Michigan Law Review* 165, 188.

[100] John A Simmons, *Moral Principles and Political Obligations* (Princeton University Press 1981) chs 3–4.

[101] Primus (n 99) 195–9.

5. A theory of weak judicial review

5.1 RETHINKING THE CONCEPT OF WEAK JUDICIAL REVIEW

5.1.1 A Three-Dimensional Approach

Although I mounted a general attack against strong constitutional review in Chapter 3, I did not reject the idea that judges should have an important role in the specification of rights. Building on the insights of the previous chapter and equipped with the concept of deference, now I am in the position to further refine my institutional analysis. The main purpose of this chapter is to outline a theory of weak constitutional review. As I indicated in the introduction, I will deviate from the established terminological convention of the literature. In distinguishing between strong and weak judicial review, this convention relies on the criterion whether a court has the final say on what the constitutions means.[1] Although this is a crucially important aspect of judicial power, I submit that the strength of a constitutional court is a multidimensional concept and has to be analysed accordingly. I will use the term 'weak judicial review' as a broad umbrella concept and distinguish three subtypes of it: limited, penultimate and deferential review.

'Weakness' itself is not a technical term of art but is borrowed from ordinary language. If judicial review could be weak only in one dimension, the use of the phrase would be without any dangers. However, if judicial review can be weak in more than one dimension, the adjective 'weak' in itself fails to give a precise indication of in what sense a constitutional court is weak. To avoid possible misunderstandings, we need more accurate categories that are also associated with and refer to the dimension in which a particular form of judicial review is weak.[2]

---

[1] Mark Tushnet, 'Alternative Forms of Judicial Review' (2003) 101 *Michigan Law Review* 2781.

[2] Stephen Gardbaum also points out the confusing use of the term 'weak' judicial review in the Canadian context. Stephen Gardbaum, *The New Commonwealth Model of Constitutionalism: Theory and Practice* (Cambridge University

However, I do not suggest that we should drop the idea of weak judicial review altogether. On the contrary, I believe that using it as an umbrella concept has a few advantages. (1) Most importantly, my proposed terminological strategy is based on the hypothesis that the different instances of weak judicial review can be, to some extent, seen as functional equivalents or alternative institutional solutions to reach the same objective: to find a distinctive balance between democracy and the vigorous protection of human rights, a balance that is different from the one struck by the New Constitutionalism. Using weak judicial review as an umbrella concept helps us to identify the common themes and principles behind the different institutional mechanisms. Considering them as instances of the same umbrella concept gives us a vantage point from which we can compare them and identify their respective strengths and weaknesses. (2) Keeping in mind the common objectives also makes the shared historical and sociological features of the countries of weak judicial review more apparent and visible.[3] (3) Finally, I am convinced that separating the different dimensions of strength helps us to understand better the newest forms of constitutional review that extend judicial scrutiny to constitutional amendments.

5.1.2 Limited Judicial Review

The very concept of constitutional judicial review implies that a court scrutinizes whether certain provisions of a law conform to the constitution. Since each constitution is unique, both what is scrutinized and the criteria that are used for the purposes of scrutiny differ from one legal system to another. To put it otherwise, judicial review has a dimension of *scope*. Other things being equal, the wider the scope of judicial review is, the stronger the court is.

At first sight, the scope of scrutinized laws does not raise too many challenging theoretical questions. Since my inquiry focuses on the judicial review of *legislation*, we can set aside the review of administrative acts and delegated legislation. However, even if we concentrate on

---

Press 2013) 114–15. Some constitutional scholars in Finland also started to use the term in a way that departs from the existing convention. See J Lavapuro, T Ojanen and M Scheinin, 'Rights-Based Constitutionalism in Finland and the Development of Pluralist Constitutional Review' (2011) 9 *International Journal of Constitutional Law* 505, 517; Tuomas Ojanen, 'From Constitutional Periphery toward the Center: Transformations of Judicial Review in Finland' (2009) 27 *Nordic Journal of Human Rights* 194, 204.

[3] See subsection 3.5.3 of this book.

legislation, there can be a couple of borderline cases for the definition of constitutional review. For instance, it can happen in a federal state that courts can review state legislation, but cannot review federal legislation. This is the case, for example, in Switzerland. Depending on the definition of constitutional review, one can say that Switzerland does not have constitutional review at all, or that this review is limited.[4]

The criterion of the review seems to give rise to more interesting questions. First of all, the scope of a constitution is a matter of degree. Zachary Elkins, Tom Ginsburg and James Melton, analysing all present-day constitutions, identified 92 major themes that are covered in at least one constitution and, by examining how many topics a certain constitution includes, they came up with a comprehensiveness ranking.[5] According to this ranking, New Zealand has the least (0.21) and Kenya and Zimbabwe have the most comprehensive constitutions (0.81). Even if we focus exclusively on fundamental rights, there are significant differences between various constitutions. The constitution of Brunei recognizes only two rights while that of Ecuador protects 99.[6] By using the dimension of scope, we can intelligibly claim that the constitutional review of country *A* is more comprehensive than that of country *B*; the question is whether we can identify salient cut-off points on this scale that help us to develop a useful and manageable typology.

My contention is that there is at least one cut-off point that no theory of judicial review can ignore. It makes a huge difference whether a court can appeal to a bill of rights when scrutinizing legislation or must rely exclusively on the structural provisions of the constitution. Right-based review gives such immense power to a court, and influences the character of judicial review to such an extent, that we should take into account this fact in our typology. Therefore, I will call constitutional review *limited* when the constitution does not include a bill of rights. For the time being, I will leave open the question whether this is the only instance of limited constitutional review, or are there other principled cut-off points that justify the use of the label in other contexts.

To the best of my knowledge, today Australia is the only mature democracy which does not have a codified bill of rights. Therefore, it is appropriate to say that the constitutional review exercised by the High

---

[4] In Chapter 3, I classified Switzerland as a country without constitutional review.

[5] Comparative Constitutions Project, 'Constitutional Rankings' <http://comparativeconstitutionsproject.org/ccp-rankings> accessed 1 December 2015.

[6] ibid.

Court of Australia is limited, and in one dimension the High Court is significantly weaker than, for instance, its American or German counterparts.

Now that I have introduced the general idea of what I mean by limited review, I can add a couple of remarks that refine my analysis further. First of all, we should treat the presence of a bill of rights only as a heuristic category. According to the ranking of the Comparative Constitutions Project, even the Australian constitution, which does not have a bill of rights, gives protection to 11 rights.[7] The Norwegian constitution, which does have a bill of rights, protected only slightly more rights until recently (14). Since it seems to be largely irrelevant whether rights are collected in a separate chapter or scattered in the constitution, the existence of a bill of rights operates as a proxy. The number of rights represents points along a continuum and saying that a constitution has/does not have a bill of rights is a useful way of simplifying the many alternatives lying along this continuum.

Second, in analysing the scope of judicial review, one cannot rely exclusively on the text of a constitution. Constitutional doctrine can create or recognize a number of questions that are not justiciable. The rules of justiciability can thereby significantly narrow down the scope of judicial review by making some issues immune from scrutiny. For instance, Finnish courts, as a general rule, cannot disapply a legal rule if it was already scrutinized by the Constitutional Law Committee of the Parliament and the Committee did not find a manifest conflict between the scrutinized law and the constitution.[8] Since this practice excludes a broad category of cases from judicial scrutiny, judicial review in Finland should also be considered limited, although the limits are not defined in advance in the constitution, but change dynamically.

Third, my previous comments focused on the instances of judicial review where the scope of review is significantly narrower than that of the paradigmatic or standard case. However, the scope of review can deviate from the standard case in the other direction as well. That happens if a court is authorized to review not only ordinary legislation but also constitutional amendments. In such cases, not only the subject matter of scrutiny but also the criterion of scrutiny can change. If the constitution includes an eternity clause, the criterion of scrutiny might be limited to a specific provision of the constitution. However, when courts

---

[7] ibid.

[8] Lavapuro, Ojanen and Scheinin (n 2) 518.

rely on the basic structure of the constitution, the criterion of review changes from the specific provisions of the document to its fundamental principles.

5.1.3 Penultimate Constitutional Review

Scope is not the only factor that determines the strength of judicial review. The strength of review crucially depends on what courts are authorized to do if they reach the conclusion that a legal provision violates the constitution. I will call this second dimension of the analysis the dimension of *finality*. According to the conventional terminology of comparative constitutional scholarship, today the concept of weak judicial review is closely associated with Canada, the United Kingdom and New Zealand. What makes these instances of judicial review weak is that in specifying the content of the constitution, the final say belongs not to the courts, but the legislative body.

My contention here is that although finality is a crucially important factor when we assess the strength of constitutional review, it is not the only one. This is why I suggest that we should use a multidimensional approach and understand weak judicial review as an umbrella concept. However, this terminological move requires us to find a label that is specifically related to the dimension of finality and can account for the distinctive features of the form of judicial review associated with Canada, the United Kingdom and New Zealand. For that purpose, I will borrow Michael Perry's label and call this type of judicial review penultimate.[9]

As Mark Tushnet has claimed, one can argue that judicial review was originally born in its weak version.[10] Departmentalism was arguably the dominant constitutional theory in most of the nineteenth century in the United States.[11] Joel Colón-Ríos lent further support to Tushnet's claim by providing Latin American examples.[12] But weak judicial review also existed in Central and Eastern Europe.[13] Tushnet's point is that due to the rise of the New Constitutionalism, weak judicial review had to be reinvented at the end of the twentieth century. Although Canada

---

[9] Michael J Perry, 'Protecting Human Rights in a Democracy: What Role for the Courts' (2003) 38 *Wake Forest Law Review* 635, 670.

[10] Tushnet, 'Alternative Forms of Judicial Review' (n 1) 2782–6.

[11] See also subsection 1.1.2 of this book.

[12] Joel I Colón-Ríos, 'A New Typology of Judicial Review of Legislation' (2014) 3 *Global Constitutionalism* 143, 145–8.

[13] This was the case in Poland between 1989 and 1997 and in Romania between 1991 and 2003.

re-established weak judicial review in 1960, the real career of the term began only after New Zealand and the United Kingdom joined Canada and penultimate judicial review has become a general model for mature democracies rather than an idiosyncratic Canadian solution.

Although the dimension of finality gives rise to a real dichotomy, it does not mean that all forms of penultimate review are of the same strength. Of the three countries that are best known for their penultimate review, Canada has an entrenched constitution, while the other two countries do not; instead they adopted a parliamentary bill of rights. In addition, Canadian courts can strike down unconstitutional statutes, but the legislature, using section 33 of the Canadian constitution, can, with some exceptions, override such judicial decisions. Although UK courts have a strong power to interpret all laws in accordance with Convention rights so far as possible, they can make only a declaration of incompatibility, but such a declaration does not affect the validity of an Act of Parliament. Finally, the courts of New Zealand cannot even make a formal declaration of incompatibility if they conclude that an Act violates the New Zealand Bill of Rights Act 1990 (hereinafter ZBORA).

Joel Colón-Ríos argues that constitutional scholarship should go beyond the distinction between weak and strong constitutional courts because there are two or possibly three types of review that go beyond the powers of standard constitutional courts.[14] Legislatures sometimes use constitutional amendments to override judicial decisions that are unfavourable to them. This makes it natural to analyse basic-structure review in the dimension of finality and say that it is stronger than standard constitutional review since legislatures cannot override the court's decision even by constitutional amendment. However, constitutional amendments are not necessarily aimed at overriding unfavourable judicial decisions and in such cases it is difficult to conceptualize them as the continuation of an existing constitutional debate between courts and legislatures. I would argue, therefore, that instead of putting basic-structure review alongside the types of strong and weak judicial review, a distinction that is related to the dimension of finality, analytically it is more precise to keep the dimensions of scope and finality separate. In my view, the basic-structure review of constitutional amendments is a scope-related concept, even if in some cases the purpose of an amendment is to override a judicial decision. Colón-Ríos's analysis itself assumes a two-dimensional analysis where he points out that two constitutional courts with the power of basic-structure review (with the

[14] Colón-Ríos (n 12).

same scope of review, we could add) can differ in the dimension of finality. In the terminology of my analysis, India, Belize and Pakistan combine final rights-based constitutional review with final basic-structure review.[15] By contrast, Colombia, Bolivia and Ecuador combine final rights-based constitutional review with penultimate basic-structure review.

5.1.4 Deferential Judicial Review

I believe that many of my readers would accept that both the existence of a codified bill of rights and judicial supremacy are essential features of the New Constitutionalism. For them, my suggestion that we should take into consideration both the dimension of scope and finality when we build a typology of judicial review will not sound particularly problematic. On the other hand, considering robustness as a defining element of strong judicial review and taking into consideration the *intensity* of review in the very definition of weak judicial review seems to be much more controversial. However, since the intensity of scrutiny is a distinct and crucially important dimension for evaluating the strength of judicial review, we should ignore it in our typology only if the methodological obstacles for taking it into consideration are insurmountable.

There are two main reasons against incorporating the intensity of scrutiny into our typology. The first one says that as the intensity of review is a matter of degree, it is unsuitable for being used for the purposes of a typology, since a typology has to create distinct categories. However, the fact of the matter is that we regularly use heuristic devices that simplify reality and create distinct and manageable categories where in reality there are infinite alternatives lying along a continuum. As I argued above, for instance, the scope of judicial review is also a matter of degree. Just like in the case of scope, the question is how we can create distinct categories along the continuum that represents the different levels of scrutiny. I suggest that the received distinction between *correctness* review and *reasonableness* review is a useful way of simplifying reality and refer to the two ends of the spectrum.[16] Using correctness review,

---

[15] Isaam Bin Haris, 'Judicial Review of Constitutional Amendments: Pakistan's Uneasy Subscription to the Basic Structure Doctrine' (24 September 2015) <http://ukconstitutionallaw.org/2015/09/24/isaam-bin-haris-judicial-review-of-constitutional-amendments-pakistans-uneasy-subscription-to-the-basic-structure-doctrine/> accessed 1 December 2015.

[16] Many people use a similar distinction between proportionality and reasonableness review. I was convinced by Aileen Kavanagh, proportionality inquiry

judges ask whether the legislature made the correct decision on the issue of constitutionality; while using reasonableness review, they ask whether the legislature's decision is within the range of reasonable alternatives.

There is, however, a much more formidable objection to building robustness into the very concept of strong judicial review. This objection says that we should not confuse the legal regulation of constitutional review with the actual practice of it; we should not confuse doctrinal analysis with sociological inquiry. If a court has the right to decide on the constitutionality of a piece of legislation and this decision cannot be overridden by the legislature, judicial review is strong, even if the court does not strike down legislation very often.

It is beyond doubt that different courts exercise their powers differently, and some of them are less effective than others.[17] However, there is something fundamentally unsatisfactory in equating ineffectiveness with judicial self-restraint or deference. Neither the Constitutional Court of Belarus nor the Supreme Court of Finland exercises its review robustly. For the external, 'behavioural' approach the two cases might seem indistinguishable. I would suggest, however, that there is a fundamental *normative* difference between the two cases, and this normative dimension is worthy of more sustained analysis. To characterize the Supreme Court of Finland simply as an ineffective institution would amount to missing the normative dimension of its operation and judge the court against a standard that it was not meant to achieve. Moreover, if it is the normative dimension that is in the focus of our analysis, we are not guilty of confusing descriptive and normative questions.

The difficulty with my suggestion is that, in practice, it is very hard to distinguish between deferential and simply ineffective courts. The main reason for this is that the normative foundations of judicial self-restraint are rarely articulated clearly. They are usually based on judicial conventions that defy easy formulation. But even poorly articulated conventions

---

should be understood as a general method of human rights adjudication rather than a single test. Aileen Kavanagh, *Constitutional Review under the UK Human Rights Act* (Cambridge University Press 2009) 237. In addition, it is also useful to distinguish correctness review from merit review. As I understand the difference, both reviews ask whether the legislature made the correct decision, but correctness review is limited only to the constitutionality of a decision, while merit review does not have such a limitation.

[17] Alec Stone Sweet, 'Constitutional Courts' in Michel Rosenfeld and András Sajó (eds), *The Oxford Handbook of Comparative Constitutional Law* (Oxford University Press 2012) 825–8.

are normative in nature; they create obligations and give rise to expectations and should not be confused with the purely sociological or empirical dimension of judicial behaviour. Fortunately, the normative foundations of deference are sometimes better articulated. They are defined and elaborated upon by judicial doctrine, or, exceptionally, are elevated to constitutional status.

Since the line between ineffective and deferential review is porous, and the distinction between robust and deferential review is a matter of degree, undoubtedly there are many borderline cases. But even if there are real difficulties in drawing the boundaries, it does mean that there are no more or less clear cases. I will argue that the Nordic countries provide us with the paradigmatic examples of deferential review. Three considerations lend support to my position. First, according to all democracy rankings, the Nordic countries are consistently considered the best-governed states.[18] Therefore, we have some reasons to assume that their political institutions are generally in 'good shape' and, therefore, the lack of robust judicial intervention is a sign of self-restraint rather than ineffectiveness. Second, judicial restraint in the Nordic countries has a consistent tradition and a relatively well-articulated theory.[19] Finally, the requirement of judicial self-restraint has received doctrinal elaboration in Norway, Denmark and Sweden; it was incorporated into the constitution in Sweden, and is still part of the Finnish constitution. When prescribed by the constitution, it becomes especially clear that deference is not an

---

[18] See section 3.5.3 of this book.

[19] David Arter, *Democracy in Scandinavia: Consensual, Majoritarian or Mixed?* (Manchester University Press 2006); Andreas Follesdal and Marlene Wind, 'Introduction – Nordic Reluctance towards Judicial Review Under Siege' (2009) 27 *Nordic Journal of Human Rights* 131; Veli-Pekka Hautamäki, 'The Question of Constitutional Court: On Its Relevance in the Nordic Context' in Jaakko Husa, Kimmo Nuotio and Heikki Pihlajamäki (eds), *Nordic Law: Between Tradition and Dynamism* (Intersentia 2007); Jaakko Husa, *Nordic Reflections on Constitutional Law: A Comparative Nordic Perspective* (P Lang 2002); Uffe Jakobsen, 'The Conception of "Nordic Democracy" and European Judicial Integration' (2009) 27 *Nordic Journal of Human Rights* 221; Jussi Kurunmäki and Johan Strang, *Rhetorics of Nordic Democracy* (Finnish Literature Society 2010); Mats Lundström, 'Value Relativism, Procedural Democracy and Opinion Representation: Reflections on Three Conceptual Underpinnings of Swedish Anti-Constitutionalism' (2009) 27 *Nordic Journal of Human Rights* 242; Sten Schaumburg-Müller, 'Parliamentary Precedence in Denmark: A Jurisprudential Assessment' (2009) 27 *Nordic Journal of Human Rights* 170; Marlene Wind, 'When Parliament Comes First: The Danish Concept of Democracy Meets the European Union' (2009) 27 *Nordic Journal of Human Rights* 272.

external, sociological aspect of adjudication that should be separated from legal-doctrinal analysis, but is part of the legal framework within which courts have to operate. In addition, from that point on deference ceases to be the synonym of judicial self-restraint, since it is not self-imposed.

This focus on the Nordic countries invites a very brief summary of the development of constitutional review in those states. The power of judicial review is not granted explicitly by the constitution in Norway and Denmark but has been developed by the courts. In Norway, judicial review was exercised by the courts and was already recognized by legal doctrine in the nineteenth century, and the Supreme Court reinforced and articulated this power in several decisions in the twentieth century.[20] In Denmark, constitutional review was first vindicated by the Supreme Court in the first decades of the twentieth century.[21] Similarly to Norway and Denmark, the practice of judicial review was developed first by the courts in Sweden, but in 1979 the constitution gave official recognition to this practice.[22] Finland has followed a different trajectory, since the judicial review of legislation was prohibited up until the constitutional reform of 1999.[23]

The practice of the Nordic countries has two pivotal features that derive from the same underlying principles. First, according to mainstream constitutional theory, the primary responsibility for the protection of human rights lies with the legislature. This idea was reflected very clearly in the Danish and Swedish parliamentary debates that revolved around the incorporation of the ECHR into domestic law, and the very same idea animates the Finnish constitution, too.[24] At an institutional

---

[20] Inger-Johanne Sand, 'Judicial Review in Norway under Recent Conditions of European Law and International Human Rights Law: A Comment' (2009) 27 *Nordic Journal of Human Rights* 160, 160–62.

[21] JE Rytter and M Wind, 'In Need of Juristocracy? The Silence of Denmark in the Development of European Legal Norms' (2011) 9 *International Journal of Constitutional Law* 470, 475.

[22] Joakim Nergelius, 'Judicial Review in Swedish Law: A Critical Analysis' (2009) 27 *Nordic Journal of Human Rights* 142, 145.

[23] The history of judicial review is discussed in Jaakko Husa, *The Constitution of Finland: A Contextual Analysis* (Hart Publishing 2011); Lavapuro, Ojanen and Scheinin (n 2); Juha Lavapuro, 'Constitutional Review in Finland' in Kimmo Nuotio, Sakari Melander Sakari and Merita Huomo-Kettunen (eds), *Introduction to Finnish Law and Legal Culture* (Faculty of Law, University of Helsinki 2012); Ojanen (n 2).

[24] Iain Cameron, 'Protection of Constitutional Rights in Sweden' [1997] *Public Law* 488, 492.

level, Finland implements this idea most consistently, since the new constitution makes it abundantly clear that the primary organ of human rights protection is the Constitutional Law Committee of the Finnish Parliament.[25] Judicial review has an important, but supplementary function in the Finnish legal system. To put it otherwise, Finland combines preventive legislative preview with *a posteriori* judicial review.

Another pivotal feature of the practice of Nordic constitutional review, judicial restraint, is even more important for our purposes. Although the line between robust and deferential judicial review is difficult to draw, judicial review in the Nordic countries is clearly closer to the deferential end of the scale. This is less true of Iceland and Norway, but Denmark, Sweden and Finland should be considered as the paradigmatic cases for deferential review. In Denmark, the Supreme Court first set aside a piece of legislation for being unconstitutional in 1999.[26] It is important to emphasize that judges do not only happen to be deferential, but deference is a constitutional requirement articulated in judicial doctrine. The Danish example illustrates nicely that it would be misleading to speak here about a gap between constitutional form and empirical reality. The power of judicial review was established by the same judicial decisions that articulated the need for judicial deference. That is, the power of judicial review and its limitations have the same legal standing. It is also instructive to notice the similarity of terminology in the three countries. In a 1921 decision, the Danish Supreme Court stated that 'the claim of the individual could not be affirmed with the *certainty* which is required for the courts to set aside an act of Parliament as unconstitutional'.[27] The same idea popped up in Swedish court decisions.[28] The 1979 constitutional amendment (Chapter 11, Article 14), relying on these decisions, established the requirement of manifest error.[29] Although Sweden modified the relevant provision of the constitution in 2011, in the meantime it

---

[25] Lavapuro, Ojanen and Scheinin (n 2) 517–18.

[26] Wind (n 19) 278; Rytter and Wind (n 21) 475.

[27] Rytter and Wind (n 21) 475.

[28] Nergelius (n 22) 145.

[29] 'If a court or other public body finds that a provision conflicts with a rule of fundamental law or other superior statute, or finds that a procedure laid down in law has been disregarded in any important respect when the provision was made, the provision shall not be applied. If the provision has been approved by the Riksdag or by the Government, however, it shall be waived only if the error is manifest.'

was transplanted to Article 106 of the Finnish constitution.[30] The requirement of manifest conflict between the challenged law and the constitution makes Finland the paradigmatic case of deferential judicial review today.

To sum up the argument so far, I have claimed that judicial review can be weak or strong in three different dimensions: scope, finality and intensity. The US Supreme Court or the German Constitutional Court, two paradigmatic institutions of the New Constitutionalism, are strong in all the three dimensions. The Australian High Court, the British Supreme Court or the Supreme Court of Sweden are all weak in comparison to the paradigmatic case, but they are weak in different dimensions. The Australian High Court's decision is final, and its review is robust, however, the scope of its scrutiny is limited. The scope of the UK Supreme Court's review is broad, and the applied test is robust, but the decisions of the court can be overridden. Finally, the scope of the Swedish Supreme Court's review is broad, its decisions are final, but the level of scrutiny is deferential. Since these three courts are weak in different dimensions, it is impossible to rank them along a continuum and make an overall judgement about their strength or weakness.

5.2 WEAK JUDICIAL REVIEW AND INTER-INSTITUTIONAL INTERACTION

5.2.1 The Interaction between the Judiciary and the Legislature

The foregoing analysis has suggested that judicial review can be weak in three different dimensions and identified the defining features of the three forms of weak judicial review. The purpose of this section is to find the form of judicial review that fits best with the justificatory principles spelled out in the previous chapters. However, this task is not simple. The primary difficulty we face is that the constitutive rules of the three types of weak judicial review do not determine fully how these institutions should work. This applies particularly to penultimate judicial review. As Mark Tushnet has pointed out, this form of judicial review can easily

---

[30] 'If in a matter being tried by a court, the application of an Act of Parliament would be in manifest conflict with the Constitution, the court of law shall give primacy to the provision in the Constitution.'

collapse into de facto strong constitutional review or de facto parliamentary supremacy.[31] Therefore, to find the most optimal judicial contribution to the collaborative form of human rights protection, I cannot simply choose one of the three types of weak judicial review, but have to develop a more fine-grained analysis. For that purpose, I will focus on the interaction between legislators and judges that the different forms of weak judicial review can give rise to. Judicial dialogue has been an important organizing metaphor in the literature about penultimate constitutional review for a long time.[32] Some commentators even used the concept of dialogue to capture the distinctive feature of this model.[33] Although I draw extensively on this literature, I prefer to use the more neutral term 'inter-institutional interaction' here. The difference is not only semantic. Since the terminology I chose here is broader than the concept of dialogue, that makes it easier for me to extend the analysis to and compare the different forms of weak judicial review. My contention is that the three forms of judicial review can give rise to at least four different models of inter-institutional interaction. This implies that there is not a one-to-one correspondence between the types of weak judicial review and the models of interaction. I also submit that, from the perspective of the justificatory principles I developed in the previous chapters, the crucial dividing line is not between the three forms of weak judicial review, but rather between the different models of interaction.

A final preliminary note on methodology: since I try to find the institutional framework that fits best with the theory of legitimacy I endorsed, the ambitions of my enterprise are normative. Although the models I will use for the purposes of the analysis draw on and are inspired by actual legal systems, my primary aim is to explore the internal logic of these models as models and not to assess to what extent existing legal systems correspond to them.

---

[31] Mark Tushnet, 'New Forms of Judicial Review and the Persistence of Rights – and Democracy-Based Worries' (2003) 38 *Wake Forest Law Review* 813, 824–37; Mark Tushnet, 'Weak-Form Judicial Review: Its Implications for Legislatures' (2004) 2 *New Zealand Journal of Public and International Law* 7, 17–23.

[32] The most influential paper on the idea of dialogue has been Peter W Hogg and Allison A Bushell, 'The Charter Dialogue between Courts and Legislatures (Or Perhaps the Charter of Rights Isn't Such a Bad Thing after All)' (1997) 35 *Osgoode Hall Law Journal* 75.

[33] See eg Alison L Young, *Parliamentary Sovereignty and the Human Rights Act* (Hart Publishing 2009) ch 5.

In every constitutional system, there is some kind of interaction between courts and legislatures. However, in different systems of judicial review judges have a different role in this process. Although this is a crude simplification, I will call the inter-institutional interaction in the system of strong constitutional review *monological*, due to the fact that constitutional courts have the dominant position in the determination of the meaning of human rights.

I will argue that weak judicial review can induce four different models of interaction, and all of them deviate from the monological model of strong constitutional review. I will call them (A) the model of parallel monologues; (B) the model of defiant legislature; (C) the model of shared responsibility; and (D) the emergency brake model, respectively.

Of the three forms of weak judicial review, the limited version raises the less theoretical issues for my analysis, since it gives rise to one particular model of interaction (Model A). By contrast, both penultimate and deferential review are compatible with more than one model of interaction. As has been already pointed out, the penultimate form of judicial review is especially prone to instability in that respect. It can easily collapse into de facto parliamentary supremacy if the legislature systematically ignores the court's opinion on human rights issues. By contrast, if the legislature always follows the court's interpretation, the model will be in practice indistinguishable from strong judicial review. My argument draws on Mark Tushnet's insight but aims to develop it further by reformulating its main point in the context of institutional interaction. I will argue that the penultimate review is compatible with three different models of dialogue and, depending on which one becomes the dominant one, judicial review will exhibit very different characteristics. In his recent monograph about the Commonwealth model, Stephen Gardbaum says:

> [I] shall be developing a sort of ideal type, a general normative account of how a well-functioning version of the new model operates to ensure that its distinctness is maintained and its objectives and benefits realized. This, I believe, is currently the most pressing and least developed theoretical issue surrounding the new model.[34]

My analysis aims to contribute to this enterprise. In the meantime, however, it also extends the scope of inquiry to the other forms of weak constitutional review.

---

[34] Gardbaum (n 2) 77.

5.2.2 Model A: Parallel Monologues

Limited constitutional review does not change the monological nature of the institutional interaction that characterizes strong judicial review. Rather, by limiting the scope of constitutional review, it divides the leading role between different institutions. If the country does not have a bill of rights, the legislature will have the leading role in rights-related issues and courts will have priority on structural questions.

5.2.3 Model B: The Defiant Legislature

The proponents of this model, similarly to the advocates of strong constitutional review, believe that the authority to determine the content of controversial human rights should be vested in courts. The special expertise and/or the independence of judges make courts the best institutions to define what human rights *really* require, that is courts are the authentic interpreters of human rights. The above assumption is widely shared in both the system of penultimate review and the system of deferential review, and I will analyse the two types in turn.

I deliberately used the term 'authentic' instead of 'authoritative' in the previous paragraph. Let me explain what I mean by this and why this distinction matters. If an institution (let us say, a court) has the right to hand down the authoritative interpretation of a text, that means that once that court interprets the text, the court's interpretation is elevated to official status and becomes binding on everyone. If I am subject to the authority of the court, I have a legal obligation to follow the authoritative interpretation. However, this does not imply that I have an epistemic reason to believe in the correctness of the decision. By contrast, by authentic interpretation I mean that I also have epistemic reasons to believe that the court's interpretation is the correct one. This does not mean that judges are infallible and each decision of the court is correct; it is sufficient for me to believe that the court is more likely to make correct decisions than other interpreters of the text.

It is also worth paying attention to the temporal dimension of the two claims. If an interpretation is authoritative, my legal obligation to abide by this interpretation cannot predate the decision itself. Since I do not have epistemic reasons to believe that the authoritative interpretation is superior to mine, I do not have to feel ashamed if I previously held an interpretation that is inconsistent with that of the court. By contrast, if the interpretation of the court is considered the authentic one, it implies that my own interpretation that is inconsistent with the court's one has been

mistaken all along. I should have acted as the authentic interpretation requires already before that interpretation was handed down by the court.

To put the same idea slightly differently, philosophers often distinguish between 'being an authority' and 'being in authority'.[35] Someone can be in authority without being an authority and can be an authority without being in authority. Having the right to determine the authoritative meaning of a text means that someone is in authority: her decisions are binding on others. However, if the same person is also an authority that carries the meaning that her interpretation is not only binding but also likely to be the correct one.

After this brief detour, let us turn back to the legal framework of the penultimate review. In all jurisdictions of the penultimate review, judges can determine what they believe to be the authentic content of a human rights provision and whether a particular piece of legislation is consistent with that human rights provision, regardless of whether they can make a formal declaration of incompatibility or strike down the unconstitutional law. For the sake of simplicity, I will clarify what I mean by the model of defiant legislature by referring to the British context, but the logic of my analysis can be hopefully extended to all jurisdictions of the penultimate review. The British HRA authorizes judges to issue a declaration of incompatibility when the incompatibility with a Convention right cannot be removed by interpretation (section 4). The legal consequences of such a declaration are well understood and not disputed. What is disputed is how such a declaration should be conceptualized and how it fits with the broader matrix of our constitutional ideas.

I will take it for granted that the legislature has a moral obligation to respect human rights. If the authentic meaning of human rights norms is determined by judges, as our model suggests, it also seems to follow that the legislature is under a moral obligation to respect the authentic interpretation of human rights. This also implies that legislators are supposed to act upon a judicial declaration of incompatibility and correct the unconstitutional law.

So what happens if the legislature does not act upon a declaration of incompatibility issued by the court? According to Model B, the legislature's response should not be understood as an alternative attempt at defining or interpreting the right in question, but as a legally tolerated violation of the right in question. To formulate it even more dramatically, the conflict is not conceptualized as a disagreement between

---

[35] Gerald F Gaus, *Political Concepts and Political Theories* (Westview Press 2000) 237–46.

epistemic equals, but as a conflict between the will of the parliament and the reason of judges. The underlying idea is also reflected in the vocabulary the proponents of the model use: by equating the judicial interpretations of human rights with human rights themselves, not acting upon a declaration of incompatibility, the legislature's act is, by definition, a rights-violation.

Although I think that this approach characterizes the position of many public lawyers in the UK, the fundamental point is articulated with exceptional clarity in Jeffrey Jowell's and Tom Hickman's works. Indeed, the very term of the defiant legislature has been inspired by Jowell.[36] It is worth citing a paragraph from both of them in full:

> The courts are empowered under the Act to pronounce whether the standards of the new constitutional order have been honoured. Parliament may then decide to ignore such pronouncements. In so doing, however, Parliament does not purport itself to overrule the view of the courts that Convention rights have been infringed. Parliament simply retains the raw power (call it sovereign power if you like) to act, or continue to act, in breach of the Convention, even in opposition to the sole authoritative interpretation of the scope of a Convention right, that of a declaration issued by a court. Such a power permits Parliament to defy the expectations of the new order, but not to define them (for that task rests squarely with the judiciary).[37]

> But ultimately it falls to the courts to uphold the requirements of principle even where these conflict with a present expediency. For this reason, the constitutional system quite properly allows Parliament to have the last word. This is not so that Parliament can redefine the scope of fundamental principles, but to allow Parliament to depart from them. Under the Human Rights Act, Parliament retains the raw power to overrule judicial decisions. Rights-defying legislation also cannot be struck-down. This enables expediency to trump rights, but the politicians must face up to the injustice and must bear the political cost.[38]

---

[36] Parliament's continued power to defy the courts' declarations on Convention rights does not impinge upon the courts' power to define the scope of those rights. Jeffrey Jowell, 'Judicial Deference: Servility, Civility or Institutional Capacity?' [2003] *Public Law* 592, 597.

[37] Jeffrey Jowell, 'Judicial Deference and Human Rights: A Question of Competence' in Paul Craig and Richard Rawlings (eds), *Law and Administration in Europe: Essays in Honour of Carol Harlow* (Oxford University Press 2003) 70.

[38] Tom Hickman, *Public Law after the Human Rights Act* (Hart Publishing 2010) 2.

I have already alluded to Mark Tushnet's prediction, according to which penultimate judicial review can easily collapse into the strong form of constitutional review if legislators systematically defer to the court's interpretation. One could argue that this is not the case, if the legislature regularly defies the court. Although my analysis draws on Tushnet's insights, it does not focus on the behavioural aspect of inter-institutional interactions. Therefore, the critical factor for me is not whether legislators often deviate from the interpretation of judges, but whether these deviations are understood as legitimate disagreements about rights or clear rights violations.

The model of the defiant legislature also has a Nordic version. This interpretation suggests that violations of the constitution have a dimension of gravity and the manifest conflict requirement that is included in the Finnish constitution and was part of the Swedish constitution until 2011 should be understood against this backdrop. If that is the case, manifest conflict can be contrasted with less severe rights violations: Juha Lavapuro contrasts manifest with *ordinary* conflict[39] while Tuomas Ojanen contrasts manifest conflict with *mere* conflict.[40] The Finnish legislature, unlike the British one, cannot get away with the manifest violation of the constitution, but, according to this interpretation, the manifest conflict requirement authorizes them to defy human rights, provided that the breach of the right does not go beyond a certain limit and remains small scale. So even if the legislature is under a moral obligation to respect constitutional rights, this moral obligation is only partially transformed into a legal one.

5.2.4 Model C: Shared Responsibility

The third model is predicated on the assumption that human rights usually have more than one reasonable interpretation and that neither of the two institutions can lay claim to considering its own attempt *the* authentic interpretation. Courts and legislatures are epistemic equals. This model does not assume that the judicial interpretation of a constitutional right is the authentic one; the legislature's position on a human rights issue is considered as a good-faith attempt to define the content and scope of the right and if this interpretation differs from that of the courts, it does not have to carry the symbolic stigma of rights-violation. By not acting upon a declaration of incompatibility, the legislature does

---

[39] Lavapuro (n 23) 136.
[40] Ojanen (n 2) 205.

not *automatically* violate its moral obligation, since this course of action is not only legally, but also morally tolerated.

This idea gets symbolic expression in section 36(2) of the Victorian Charter of Human Rights and Responsibilities Act 2006 that empowers the Supreme Court of the Australian state to issue a declaration of *inconsistent interpretation* rather than a declaration of incompatibility. This terminology confirms that the two branches of the government have equal status in epistemic terms.

The flip side of this equality is that, since the court's determination of a human right is not (and is not considered) final, judges do not have any reason to be deferential to the legislature. Judicial scrutiny should be robust exactly *because* the legislature has the final say when the two institutions disagree.

Since the model of shared responsibility requires judges to develop a robust interpretation of the constitution, it is clearly incompatible with the deferential Nordic model. However, according to many commentators, this is the most attractive normative model of how penultimate review should operate. The most detailed exposition of this idea can be found in Stephen Gardbaum's book on penultimate review. Looking for the optimal operation of the model, he argues that courts should 'provide an independent judgment that seeks to present the best legal view on the merits'.[41] The central insight is summarized most eloquently perhaps by Danny Nicol:

> So we have two institutions, each with interpretative legitimacy: how should they deploy their interpretative powers? In the view of the present author, each should do so robustly. The courts should uncompromisingly tell their truth on human rights. To spell it out, there should be an exact coincidence between what judges say and what they think.[42]

5.2.5 Model D: The Emergency Brake

The proponents of the next model also use reasonable pluralism as their starting point. The idea of reasonable pluralism entails the distinction between our first-person singular and our first-person plural interpretations of justice and rights. Using this insight, it is instructive to distinguish three types of interpretations of a human right: (1) the interpretation that we think to be the best one (our first-person singular

---

[41] Gardbaum (n 2) 85.

[42] Danny Nicol, 'Law and Politics after the Human Rights Act' [2006] *Public Law* 722, 744.

interpretation); (2) rival first-person singular interpretations that we disagree with, but still consider to be within the range of good-faith and plausible interpretations; (3) interpretations that are seriously flawed and cannot be considered as good-faith attempts to interpret a constitutional right. While Model C requires judges to develop their own first-person singular interpretation of a given right (1), Model D suggests that the primary function of judges is not to develop what they believe to be the best interpretation of a given right, but to police the boundaries of reasonableness, that is the boundaries between (2) and (3). This is just restating that correctness and reasonableness review can lead to different outcomes.

One could argue that this model is in principle compatible with the penultimate form of judicial review. This idea is nicely summarized by a comment made by Francesca Klug. (Although I do not claim that the emergency brake model is the best representation of her overall position.)

> Many of us who were involved in the campaign for a bill of rights in the early 1990s, including myself, held the view that the interpretation of broad values inherent in all bills of rights – such as the right to life or the legitimate limits of free speech – often involves philosophical or quasi-political judgments that are better determined by elected representatives, with the courts acting as a check on the executive, rather than as a primary decision-taker or law-maker.[43]

Although Model D is theoretically compatible with penultimate judicial review, if we focus on the UK, it is very far from how judicial review actually operates, how it is legally required to work[44] or how it should operate according to most commentators. This model fits more naturally with the tradition of Nordic legal systems.[45] According to one interpretation of the manifest conflict requirement, that I have alluded to above, the said requirement is related to the *gravity* of rights violation. I believe that the manifest conflict rule becomes more attractive, if we interpret it

---

[43] Francesca Klug, 'A Bill of Rights: Do We Need One or Do We Already Have One?' [2007] *Public Law* 619, 710.

[44] *Smith and Grady v United Kingdom* (1999) 29 EHRR 493 [138]; *R (Daly) v Secretary of State for the Home Department* [2001] 2 AC 532, [25]–[28] (Lord Steyn).

[45] Contemplating the transplantability of the penultimate model, Gardbaum comments: 'I could even more easily conceive the model operating in one or more Nordic countries, with their histories of ultra-minimalist judicial review.' Gardbaum (n 2) 12. If we assume that judicial attitudes do not easily change, Nordic judges would be not more, but less suitable to operate penultimate review according to what Gardbaum considers the internal logic of the model.

as a perspectival concept. According to this view, the relevant provision does not require judges to tolerate a small scale violation of the constitution if they are convinced that a violation had happened. Rather, the function of this requirement is to handle our reasonable disagreements about rights. A judge should not disapply a piece of legislation if it is not compatible with her first-person singular interpretation of a right, but she is allowed to do that if the law in question transgresses the limits of reasonable interpretations.[46]

Analysing Swedish judicial review, Joakim Nergelius quotes the comments of a Swedish judge, Bertil Bengtsson, on the requirement of manifest conflict. Justice Bengtsson said that 'respect for the requirement may force him to uphold laws which he himself finds unconstitutional, as long as his learned colleagues have a different opinion'.[47] For Nergelius, this quote illustrates the weakness of the manifest conflict doctrine, since it shows that different judges have different views on what manifest conflict means. I have no reason to deny that the requirement of manifest conflict itself can be contested.[48] However, the example seems to illustrate not a disagreement about what manifest conflict means, that is not where the boundary between (2) and (3) lies. Rather, the comment simply restates that (1) and (2) are different. Reading the comment this way, it confirms rather than refutes the proposition that the manifest conflict requirement is workable. Justice Bengtsson was clearly able to distinguish between his first-person singular interpretation and other plausible interpretations.

5.3 ASSESSING THE FOUR MODELS

5.3.1 A Threshold Criterion

The four models of inter-institutional interactions can be used for both descriptive and normative purposes. Analysing the patterns of

---

[46] Kaarlo Tuori makes a similar distinction between the epistemological and the quantitative readings of the manifest conflict requirement. Kaarlo Tuori, 'Landesbericht Finland' in Armin von Bogdandy, Christopher Grabenwarter and Peter M Huber (eds), *Handbuch Ius Publicum Europaeum. Volume VI–VII. Verfassungsgerichtsbarkeit im europäischen Rechtsraum* (CF Müller forthcoming).

[47] Nergelius (n 22) 147.

[48] However, this is hardly a decisive argument against the manifest conflict requirement. Reasonable people also disagree, for instance, on which state interest is compelling, which limitation of a right is proportionate or which punishment is unusual.

inter-institutional interactions in a particular jurisdiction, one might ask which model gives the most accurate description of the existing practice? For instance, if the legislature never stands up for its own specification of human rights in the system of penultimate review, the model of defiant legislature clearly gives a more accurate description of the practice than the model of shared responsibility. However, this exercise has certain limits. Let us imagine that the legislature stands up regularly for its own interpretation. In that case, the criterion of fit will not decide which is the better interpretation of the practice. The same fact will be understood by some as a rights violation, and by others as a rights disagreement. In that case, the two models tell us more about how commentators interpret the practice than about the practice itself.

As my enterprise is primarily normative, I will set aside the descriptive accurateness of the four models and focus on their normative appeal instead. So in light of the justificatory principles and institutional considerations I have developed so far, which of the four models is the most attractive? Or if these considerations do not single out one model, which models are within the range of adequate options?

As the first step of this comparison, I lay down a threshold criterion for the four models based on my institutional analysis. This criterion itself has two prongs. (1) We have no reason to suppose that there is a close fit between the fundamentalness of a right and the existence of political malfunctions (the Correspondence Thesis). Although some people believe that the malfunctions of the political process are systemic, the systemic failure theory, if true, would undermine the desirability of representative democracy in general. In addition, the fact that there are democracies without strong constitutional review that function as well as the best performing political systems with constitutional review shows either that the systemic failure theory is incorrect or that a constitutional court is unlikely to be the cure for the malfunctions of the political system. So we should assume that even if political malfunctions exist, they do not corrupt the whole political process. Following the blind spot theory, we can expect that the legislature's specification of a human right will be on many occasions reasonable even if it deviates from the judicial specification of the same right. (2) When the legislature's decision-making process is not distorted by political malfunctions, procedural and epistemic arguments clearly tip the scale in favour of the legislative process. Therefore, it is reasonable to accept the following maxim: when the legislature's reasonable specification of a human right conflicts with the court's reasonable specification, we should give priority to the former.

The threshold criterion defined above eliminates the model of defiant legislature from the contest. The model of defiant legislature requires that

in case of disagreement we should always treat the court's interpretation as the authentic one. However, this institutional arrangement can be justified only if someone rejects one of the components of the threshold criterion. Giving priority always to the court's specification can be justified only if we hold either that the legislature's interpretation of a human right is always unreasonable if it differs from that of judges, or that the reasonable view of judges should prevail over the view of legislatures, even if the latter's view is also reasonable.

The three other models all meet the threshold requirement since none of them give priority to the reasonable view of judges over the reasonable view of legislatures. The foregoing analysis has an important implication for my argument. From the perspective of my general institutional analysis, the most important dividing line lies not between the different forms of weak judicial review, but rather between the different models of institutional interactions. Although I find the penultimate review more attractive than the limited one in general, it does not follow that all incarnations of the former are superior to those of the latter. So the choice between the three forms of judicial review depends to a great extent on which model of inter-institutional interaction the different forms of weak judicial review will give rise to.

5.3.2 A Tentative Case for the Emergency Brake Model

What about the remaining three models? Among the three alternatives, the model of parallel monologues seems to be the less attractive from my perspective. Since I admitted that the political process is prone to malfunctions, it is not unreasonable to give courts an important role in the specification of human rights, if this can be done without privileging their views. Since both the model of shared responsibility and the emergency brake model have the promise to deliver a more optimal balance, we should give priority to the model of parallel monologues only if it is likely that the other two models are inherently unstable and collapse either into de facto or *de jure* strong constitutional review.[49] The examples of New Zealand and the two Australian states suggest that it is far from certain that penultimate review will collapse into de facto strong judicial review.[50] Similarly, in the Nordic countries the courts did not ignore the manifest conflict requirement and did not become activists.

---

[49] If they collapse into de facto parliamentary supremacy, they will be neither better nor worse than the model of parallel monologues, at least as far as human rights are concerned.

[50] Gardbaum (n 2) chs 6 and 8.

This shows that neither the model of shared responsibility nor the emergency brake model is inherently prone to collapsing into a stronger form of judicial review. This, of course, does not mean that that cannot happen with the individual instantiations of the model due to contingent historical factors. However, we do not have reason to prefer Model A *as a model* to its two rivals.

The really challenging task for my inquiry is to decide which one of the remaining two models (Model C and Model D) fits better with my position. Although both have pros and cons, I believe that the emergency brake model has a slight advantage in light of my institutional analysis. To explain my position, let me first say something about what makes the model of shared responsibility attractive to its advocates. Contemplating the internal criteria a well-functioning penultimate review should meet, Stephen Gardbaum concludes:

> At the same time, however, their informing and alerting function – which, under the model, exists alongside their adjudicatory one – requires that the courts provide an independent judgment that seeks to present the best legal view on the merits. That is, they should take into account but not be foreclosed by, or formally deferential to, the views of the political branches expressed at the previous stage. Judicial rights review should be respectful but unapologetic. Not only is it unconstrained by full practical responsibility for the final decision and its consequences that can lead to under-enforcement of rights within judicial supremacy, but cultivating the 'passive virtues' would be structurally misplaced and counterproductive in a system of penultimate judicial review.[51]

If judicial decisions are not final, it is certainly reasonable to think that courts contribute most effectively to the collaborative enterprise of human rights protection, if they spell out their position as fully as possible. The reason I reject the position quoted above is rooted in my understanding of the nature of constitutional reasoning. As the chapter on constitutional interpretation explains, I believe that human rights provisions seriously underdetermine the outcome of almost all complex human rights issues. It is impossible to decide those cases without adding additional moral, empirical and legal premises to the argument. In order to make an overall assessment of a complex human rights issue and reach a conclusion, judges also have to add a whole range of moral and empirical premises to their argument.

So what Gardbaum calls the best *legal view of the merit* either remains a strictly legal, and therefore utterly partial and incomplete, assessment

---

[51] ibid 85.

of the issue at hand, or resolves the issue, but in that case it is not strictly legal anymore. I agree with Gardbaum that technical legal expertise should be channelled into rights-related decision-making. However, if judges spell out what they think to be the best solution of a complex human rights issue, they also have to fill in the gaps left open by legal arguments.

The very reason why we are looking for alternatives to strong constitutional review is that human rights adjudication requires us to spell out abstract, value-laden norms and judges do not have special expertise on the moral questions that have to be answered in that process. Although the model of shared responsibility does not make the judges' moral views final, it still gives these views privileged position.[52] Inviting judges to spell out their views on the *moral* issues that are involved in the case means that these moral views will become salient in the debate. Although politicians are authorized to deviate from the judicial interpretation under the penultimate form of judicial review, judicial interpretation will probably have a 'chilling effect' on the legislature to stand up for its own interpretation. Since judges are (and considered by others as) legal experts, and legal and moral arguments are inextricably intertwined, it is difficult to challenge their position even if the disagreement concerns a moral premise of the argument. Second, challenging a judicial decision can have a political price that politicians are unwilling to pay even if they believe that their interpretation of a human right is the correct one.

This soft form of elevating the moral views of judges into a privileged position sits uneasily with the idea of equal participation and diversity. As far as moral questions are concerned, judges should have an equal status with the other members of the political community. In addition, pitching the moral views of judges against those of the legislators, it is highly unlikely that judges could bring new *moral* perspectives to the debate. What is more likely is that they will amplify one of those moral perspectives that are already well represented in the debate.

Let me summarize my argument against the model of shared responsibility. Since the political process is prone to malfunctions, there are good reasons to involve judges in this process. However, I also assumed that these malfunctions are sporadic rather than systematic. The model of shared responsibility does not link the role of judicial intervention to these malfunctions, since, in this case, it would be focused and selective.

---

[52] Although Tom Hickman rejects Model C for very different reasons, I agree with his claim that this model makes judges similar to a privileged political pressure group. Hickman (n 38) 97.

Rather, the idea is that judicial intervention has an epistemic function. By spelling out their own views about the content of human rights provisions, courts allegedly enhance the overall epistemic performance of the system. I concede that courts do contribute to the overall epistemic performance of the system to the extent that we channel in their technical legal expertise. However, since complex human rights issues can be very rarely solved without adding moral and empirical premises to legal rules, inviting the courts to spell out their own specification of a human right always implies that the judges' moral views will have a salient place and special status in the process of rights-specification. Both the principle of equal participation and the idea of public reason require that controversial moral questions be determined by the legislature rather than the courts. Even if the judges' moral views are not final, giving them salient and special status compromises both equality and the public reason argument.

While the model of shared responsibility is predicated on the assumption that courts should generally contribute to the specification of human rights because their contribution enhances the overall epistemic performance of the system, the emergency brake model is driven by motivational rather than epistemic considerations, and considers the courts' contribution sporadic rather than regular. This role is more suitable for courts in light of my institutional analysis than the role assigned to courts by the model of shared responsibility, since the upshot of that analysis was that the strongest argument for judicial review is motivational rather than epistemic. Apart from their technical legal expertise, it is not clear why courts would enhance the overall epistemic performance of the decision-making process. What makes their involvement useful is not their special epistemic contribution, but rather, their independence of the political process. However, as I assumed that the blind spot theory is correct, judicial intervention in the specification of human rights must be selective and sporadic rather than systematic.

5.4 THE PROSPECTS FOR WEAK JUDICIAL REVIEW

5.4.1 Weak Judicial Review and the Strasbourg Court

The aim of my concluding section is not to make general predictions of whether weak judicial review is viable in the long run. Rather, I would like to point out one specific issue that raises serious doubts about the prospects for this institutional arrangement. My thesis is that there is a fundamental tension between the robust interpretation of the ECHR by the Strasbourg court and both the model of shared responsibility and the

emergency brake model. Later I have to qualify this claim somewhat, but first let me flesh out the nature of the fundamental tension. I will turn first to the model of shared responsibility.

Section 2 of the HRA prescribes that courts must 'take into account' the jurisprudence of the Strasbourg court. Although the language of the HRA does not make the case law of the ECtHR binding, according to the higher courts of the UK, section 2 creates a strong presumption in favour of following Strasbourg case law.[53] The idea of a strong presumption confirms that the jurisprudence of the Strasbourg court is not absolutely binding. Although the question of what can rebut the presumption is important to understand fully the nuances of British human rights adjudication, it does not have to detain us here.[54] According to the *Ullah* decision that is still the leading authority on section 2, 'the duty of national courts is to keep pace with the Strasbourg jurisprudence as it evolves over time, no more, but certainly no less'.[55]

Since the inception of the HRA, there has been an intense debate about the status of Convention rights.[56] According to one interpretation, the HRA has incorporated Convention rights into domestic law. Although the list and textual formulation of the rights that are protected by the HRA happen to be (almost) coextensive with those of the ECHR, the HRA has created domestic constitutional rights. According to the other position, the purpose of the HRA was to provide domestic remedies for the violation of international human rights norms. As an implication, the rights that are enforced by domestic courts are still international human rights.

For the second approach, the 'no less' and the 'no more' prongs of the *Ullah* principle are symmetrical and justified by the very same considerations. If the rights enshrined in the HRA are international human rights, it is natural to conclude that the final arbiter of these international rights must be an international court, that is, the ECtHR. The United Kingdom

---

[53] *R (Ullah) v Special Adjudicator* [2004] UKHL 26; [2004] 2 AC 323 [20] (Lord Bingham).

[54] See eg *R v Horncastle* [2009] UKSC 14; [2010] 2 AC 373 [11] (Lord Phillips); *Manchester City Council v Pinnock* [2010] UKSC 45; [2011] 2 AC 104 [48] (Lord Neuberger). For a detailed analysis of these reasons, see Kavanagh (n 16) 150–52.

[55] *R (Ullah) v Special Adjudicator* [2004] UKHL 26; [2004] 2 AC 323 [20] (Lord Bingham).

[56] Hickman (n 38) 25; Roger Masterman, 'Aspiration or Foundation? The Status of the Strasbourg Jurisprudence and the "Convention Rights" in Domestic Law' in Helen Fenwick, Gavin Phillipson and Roger Masterman (eds), *Judicial Reasoning under the UK Human Rights Act* (Cambridge University Press 2011).

can certainly give more protection to human rights than the ECtHR by legislation. Courts, developing the common law, are also free to be more generous than the Strasbourg court. However, since Convention rights are international human rights, they must have the same meaning and content for all the signatory states. The important point is that according to this view, the requirement of uniformity is not practical, but conceptual: it follows from the nature of Convention rights as international human rights.

Those who interpret Convention rights as domestic constitutional rights can also account for both the 'no less' and 'no more' prongs of the *Ullah* principle, but their arguments are somewhat different and not necessarily symmetrical. For them, the core argument for giving 'no less' protection than the ECtHR is practical rather than conceptual. If a UK court gave a Convention right interpretation *A*, while the clear and consistent jurisprudence of the Strasbourg court was based on interpretation *B*, and *B* was more favourable to the right in question than *A*, UK citizens would be required to travel to Strasbourg to get the more generous protection. On top of that, if the ECtHR found against the United Kingdom, which is almost certain in that situation, this would adversely affect the country's international reputation. To put it bluntly, giving less protection to Convention rights than the Strasbourg court would defeat the principal rationale behind the HRA, 'bringing rights home'.

If the human rights that are enshrined in the HRA are considered domestic constitutional rights, it is not immediately clear why British courts should not leap ahead of the ECtHR and grant more generous interpretation to those rights while interpreting the HRA. Neither of the two considerations mentioned above is relevant under this scenario: British citizens would not have to travel to Strasbourg, and the United Kingdom's international standing would also remain unaffected. The reason for not leaping ahead of Strasbourg jurisprudence, therefore, must be more subtle. It is not a coincidence that the debates about section 2 gravitate around the 'no more' prong of the *Ullah* principle. One could argue that by not giving more generous protection to Convention rights, courts leave as much discretion to the political process as possible. However, this is not the justification that is usually offered for the 'no more' prong of the principle.

The central point seems to be that not leaping ahead of the jurisprudence of the Strasbourg court is required by judicial comity between the ECtHR and domestic courts.[57] To put it otherwise, this practice would

[57] Kavanagh (n 16) 163.

undermine the effectiveness of the Convention as an international instrument. But how exactly would this practice undermine the effectiveness of the Convention as an international instrument? What is the exact nature of judicial comity that advises judges not to leap forward? The unstated assumption of the argument, I believe, is that a more generous interpretation of a right is still, by definition, a *different* interpretation. If different interpretations were considered normal when they are more generous than that of the Strasbourg court, why should we also not consider them appropriate when they give less protection to Convention rights?

I believe that my distinction between authentic and authoritative interpretations can account for this aspect of the practice. Let me offer a litmus test that helps us to clarify the status people tend to assign to Strasbourg case law. One of the principal incentives to incorporate the ECHR into domestic law has been to protect the international reputation of the country in question and avoid the embarrassment that an unfavourable decision of the ECtHR implies. Should a government be embarrassed because of an unfavourable judicial decision if previously the law was not entirely clear on the issue?

The point I wish to make is that if the court's interpretation is considered authoritative without being also considered authentic, such an embarrassment is not the proper reaction. I am not saying that a government should not be embarrassed if a law it has enacted manifestly violates Convention rights. However, if the law in question is based on a reasonable interpretation of human rights, the government (or a domestic court) has a prospective obligation to comply with the decision of the Strasbourg court but does not have to believe that its interpretation of Convention rights has been mistaken all along. Embarrassment in the case of an unfavourable decision is the proper attitude only if the court's decision is considered not only final for practical purposes but also believed to be the correct one.

The fact that many countries make significant efforts to avoid unfavourable decisions by the Strasbourg court and predict the outcome of future decisions indicates that they think that such decisions are embarrassing and affect the international reputation of the country negatively, even if there was no settled law on the issue previously. If my analysis is correct, that shows the Strasbourg court's interpretation of Convention rights is generally considered not only authoritative but also authentic. Giving a different interpretation to the Convention than the Strasbourg court, whether it is more or less generous than the Strasbourg court's interpretation, is at odds with the status of the ECtHR as the authentic interpreter of the Convention.

Having examined the status of Strasbourg case law in the United Kingdom, we are now in a better position to understand why the model of shared responsibility fits uneasily with the robust interpretation of the ECHR. According to the model of shared responsibility, both courts and legislatures are presumed to give serious thought to the interpretation of human rights. When they come up with their own interpretations, they might disagree on how the right in question should be interpreted. If the court makes a declaration of incompatibility, this sends a serious signal to legislators. In some cases, the latter will change their minds and follow the court's interpretation. However, they can also insist that their interpretation is the correct one, even if in some cases they have to pay the political price for this disagreement.

One could argue that the drafters of the HRA had two primary objectives. On one hand, the rationale for creating the HRA was to 'bring rights home', or to use the more precise language of the preamble, 'to give further effect to rights and freedoms guaranteed under the European Convention on Human Rights'. On the other hand, the legislature wanted to find an institutional mechanism that is different from strong constitutional review and preserves the supremacy of the Parliament.

I do not claim that there is a logical inconsistency between those two aims. The model of defiant legislature pays lip service to the principle of parliamentary supremacy and formally preserves that principle. The UK Parliament, unlike, for instance, its German counterpart, can get away with a course of action that, according to the courts, violates a constitutional right. However, if someone believes that the penultimate form of judicial review not only allows but also requires the model of shared responsibility, the conclusion seems to be inevitable: the HRA has a built-in structural flaw, since its two aims can be hardly realized simultaneously. Under the supervision of the Strasbourg court, the model of shared responsibility is not a feasible option.

Let us imagine that the UK Parliament and the UK Supreme Court disagree on the interpretation of a certain Convention right and let us grant that the latter follows the jurisprudence of the ECtHR as the *Ullah* principle requires.

Whether the Parliament treats the courts' interpretation as the authentic or only the authoritative one does not matter in that context. If the former is the case, the Parliament has epistemic reasons to believe that the courts' interpretation is the correct one. The very concept of authentic interpretation is antithetical to the idea of reasonable interpretative disagreement. If the courts' interpretation is the correct one, the Parliament's own interpretation must be necessarily incorrect. But even if the MPs of the UK Parliament were convinced that the courts' interpretation

is incorrect, if they are to comply with the Convention, in their legislative capacity, they are required to follow the authoritative interpretation. Their belief that the courts made a mistake can inform only their political actions, but not their law-making activity.

To summarize, the dilemma is that the model of shared responsibility *permits* the legislative body to develop its own interpretation of Convention rights. By contrast, the logic of the European system of human rights protection *requires* the legislative body to follow the Strasbourg court's interpretation. (I will set aside here the exceptional circumstances that justify the deviation from Strasbourg case law.) If a human rights provision has two reasonable interpretations, *A* and *B*, the model of shared responsibility permits the legislative body to choose either *A* or *B*. However, if the Strasbourg court sides with interpretation *A*, *B* is no longer a legitimate interpretation of the Convention. Acting on *B* is at best a legally tolerated violation of a Convention right. According to the model of shared responsibility, preserving parliamentary supremacy not only in form, but also in spirit, requires that the law should treat the legislative and the judicial branches as epistemic equals. By contrast, 'bringing rights home' requires strict compliance with Strasbourg case law.

The dilemma raised by the foregoing analysis is well illustrated by the infamous *Hirst* case and its aftermath. As is well known, the case revolved around prisoners' voting rights. The UK government asserted that a blanket ban on prisoners' right to vote is compatible with the Convention, but the Strasbourg court disagreed.[58] I tend to think that the right to vote is the single most important symbolic expression of one's standing in the political community and its restriction is justified only if the nature of the crime is related to elections. However, similarly to the dissenting judges of the ECtHR, I believe that the UK government's position was within the range of reasonable alternatives.

However, whatever one thought about the reasonableness of the UK government's position before the *Hirst* decision, if we accept that the Strasbourg court determines the authoritative meaning of the Convention, since the decision was delivered, the UK government's position, as a legal position, is untenable. The UK government's reluctance to comply with the decision of the Strasbourg court is considered by all commentators as a rights-violation as opposed to an alternative reasonable interpretation of the Convention.

---

[58] *Hirst v United Kingdom (No. 2)* (2006) 42 EHRR 41.

As far as the emergency brake model is concerned, the explanation seems to be even more straightforward. Analysing the intensity of judicial scrutiny, I have distinguished two ideal-types, correctness review and reasonableness review. The very essence of the emergency brake model is that judges apply the deferential reasonableness test. By contrast, most of the time the Strasbourg court applies the more robust correctness review. If the standards of scrutiny that two courts apply are different, we can safely assume that the two courts will reach different conclusions in a subset of the cases. A legal provision that does not meet the correctness standard can still meet the reasonableness standard. If domestic courts apply a more deferential review than the Strasbourg court, they are unable to filter out some of the rights violations. So my general conclusion is that logic of both models is in fundamental tension with that of the European system of human rights protection. However, it is necessary to qualify somewhat this general claim.

5.4.2 Qualifying the General Claim

First, we should keep in mind that in certain areas the Strasbourg court gives a wide margin of appreciation to the signatory states. The foregoing analysis does not apply to these cases. Within the margin of appreciation, individual states can develop their own interpretation of a given right or pursue their own policies.

Second, in the analysis above I have conflated constitutional review in general with the domestic protection of Convention rights. As the HRA does not provide a list of protected rights that is independent of the ECHR, the supervision of the Strasbourg court is particularly strong in the UK. However, the lack of a bill of rights that is textually independent of the ECHR is a contingent feature of the British legal system. Penultimate review would be perfectly possible in a legal system where constitutional rights are not coextensive with Convention rights.

As far as deferential review is concerned, each Nordic country has a codified constitution with a bill of rights. These constitutions do not only have independent textual identity but also protect a fairly extensive list of rights that are not enshrined in the ECHR. The supervision of the Strasbourg court, of course, does not extend to those rights that are not protected by the ECHR; in those areas the emergency brake model can operate perfectly well.

However, having a separate constitution with a list of rights that does not directly replicate the Convention does not mean that constitutional review will be immune from the supervision of the ECtHR. To the extent that a constitution regulates the same rights as the ECHR, it is natural to

expect that national courts will take Strasbourg case law into account even if the textual formulations of the two human rights instruments are different. The Strasbourg-compliant interpretation of national constitutions has become the norm in Europe, even in those countries where the constitution does not instruct judges to follow the jurisprudence of the ECtHR.[59] As we have seen, British courts should give 'no less' protection to human rights than the Strasbourg court, and this view is shared even by those people who are of the opinion that the HRA created domestic constitutional rights. The same considerations that justify the 'no less' requirement in the United Kingdom are at play in all cases where the subject matter of a national constitution overlaps with that of the ECHR. The upshot of the argument is that even if human rights are defined in a national constitution, the supervision of the Strasbourg court undermines the viability of the emergency brake model in all those cases where the constitution overlaps with the ECHR.

This scenario is well illustrated by a high profile Swedish case.[60] In 2003, a Swedish minister, Åke Green, gave a sermon entitled 'Homosexuality Congenital or the Powers of Evil Meddling with People'. Swedish law criminalized incitement against homosexuals as a group, and the court was of the view that Åke Green's sermon amounted to incitement. The legal issue was whether the relevant provision of the Criminal Code is compatible with freedom of expression and freedom of religion, protected by both the Swedish constitution and the ECHR. The Supreme Court of Sweden was of the opinion that there was no manifest conflict between the Criminal Code and the constitution. However, the court acquitted Åke Green because the judges anticipated that a contrary decision would be considered by the Strasbourg court as a violation of the ECHR.[61]

---

[59] For an overview of the topic, see Catherine Van de Heyning, 'Constitutional Courts as Guardians of Fundamental Rights: The Constitutionalisation of the Convention through Domestic Constitutional Adjudication' in Patricia Popelier, Armen Mazmanyan and Wouter Vandenbruwaene (eds), *The Role of Constitutional Courts in Multilevel Governance* (Intersentia 2013).

[60] NJA 2005 p. 805.

[61] Although 2:19 of the Instrument of Government (IG), the most important constitutional document in Sweden, gives the ECHR a quasi-constitutional status, there can be substantive conflicts between the requirements of the ECHR and those of the IG. See Iain Cameron and Thomas Bull, 'Sweden' in Joseph Fleuren and Janneke H Gerards (eds), *Implementation of the European Convention on Human Rights and of the Judgments of the ECtHR in National Case Law: A Comparative Analysis* (Intersentia 2014) 279.

Hate speech provides us with an excellent illustration of the dilemma we face here. The position of the Strasbourg court is clearly a reasonable position, a position that happens to be the position I agree with. However, I admit that there are serious considerations in favour of criminalizing hate speech, and therefore would be very reluctant to say that the relevant provision of the Swedish Criminal Code is in manifest conflict with freedom of speech. Where the Strasbourg court takes sides in a debate that is subject to reasonable disagreement, it will elevate one of the positions to authoritative status. If Swedish courts wanted to avoid a collision with the Strasbourg court, they had to follow Strasbourg case law even if giving less protection to a constitutional right did not violate the manifest conflict requirement of the domestic constitution.

I would like to address one final question here. How can a country avoid a conflict with the ECtHR if courts can disapply an act only if it is in manifest conflict with the constitution?

Part of the answer is that the Nordic countries operate a fairly efficient pre-enactment review that is able to filter out most human rights violations.[62] The legislative process is well structured and is of high quality in all Nordic countries, and this fact certainly goes a long way in explaining their excellent human rights record. In addition, as I have already alluded to, Sweden and Finland each have a specialized body, the Law Council and the Constitutional Law Committee, respectively, that has a central role in constitutional review. We have many reasons to praise the process of pre-enactment review in Sweden and Finland. However, the point I wish to make here is slightly different.

Where the Strasbourg court applies a correctness standard, there is no room for reasonable disagreement. If courts do not filter out all inconsistencies with Strasbourg case law, it means that other institutions will have greater responsibility. In the model of shared responsibility, the UK Parliament has relatively greater freedom to develop its own interpretation of a human right in course of the legislative process. The Parliament can always rely on courts to catch the inconsistencies with Strasbourg case law, and if a higher court issues a declaration of incompatibility, the Parliament can decide how to react to that declaration. By contrast, in the case of the emergency brake model, the legislature is less free to develop its own interpretation of human rights, since it is primarily the legislature's job and responsibility to make sure

---

[62] See, for instance, Thomas Bull and Iain Cameron, 'Legislative Review for Human Rights Compatibility: A View from Sweden' in Murray Hunt, Hayley Jane Hooper and Paul Yowell (eds), *Parliaments and Human Rights: Redressing the Democratic Deficit* (Hart Publishing 2015).

that all laws comply with the jurisprudence of the ECtHR. I do not want to exaggerate these differences, since, at the end of the day, both the UK Parliament and its Swedish and Finnish counterparts are required to comply with the interpretation of the Strasbourg court. However, perhaps it has some significance that the two models use slightly different approaches to reach the same objective.

I suggest that this difference is also reflected in the character of pre-enactment review.[63] As Stephen Gardbaum argues, pre-enactment *political* review is a defining feature of what he calls the New Commonwealth model.[64] The Joint Committee on Human Rights (hereinafter JCHR) in the UK that has a pivotal role in pre-enactment review is a political body not only in its composition, but also in the sense that its main job is to articulate the Parliament's own interpretation of human rights. Although the JCHR does not always live up to this model and its reasoning, to use Tom Hickman's distinction, is often predictive rather than normative,[65] this fact does not change the fundamentally political nature of the institution. By contrast, the Law Council that is at the centre of the Swedish review process is clearly a *legal* body, consisting of active and retired Supreme Court judges.

The Constitutional Law Committee of Finland seems to contradict rather than confirm my hypothesis, since that institution, just like the JCHR, is a political body as far as its composition is concerned. However, upon closer inspection it becomes clear that the Constitutional Law Committee operates in many respects like a constitutional court. It relies extensively on the expertise of constitutional lawyers; it makes official reports, and perhaps most importantly, its reports are considered binding on the Finnish Parliament. Many commentators feel it important to emphasize that the dominant style of argumentation is legal rather than political.[66] The Committee takes case law, including the jurisprudence of the Strasbourg court into consideration. Although it does not have a strict system of precedent, the Committee also regularly refers to its own

---

[63] Murray Hunt, Hayley Jane Hooper and Paul Yowell, *Parliaments and Human Rights: Redressing the Democratic Deficit* (Hart Publishing 2015).

[64] Gardbaum (n 2) 14.

[65] Hickman (n 38) 39.

[66] Länsineva Pekka, 'The Constitutional Committee of Parliament: The Finnish Model of Norm Control' in Maija Sakslin (ed), *The Finnish Constitution in Transition* (Hermes-Myynti Oy; Finnish Society of Constitutional Law 1991) 71; Lavapuro, Ojanen and Scheinin (n 2) 510; Tuori (n 46).

reports. Therefore, it is not very far-fetched to claim that Finland has a de facto constitutional court.[67]

So the conclusion I wish to secure here is that because of the robust review of courts, pre-enactment review may remain to some extent political in the system of penultimate review. By contrast, if courts are deferential, pre-enactment review must be closer to the legal end of the spectrum since otherwise there is a good chance that inconsistencies with the Strasbourg case law go unnoticed. However, it is important to emphasize that these requirements follow not from the internal logic of the two models, but rather the European context in which they operate.

---

[67] Hautamäki (n 19) 159.

6. Conclusion

6.1 THE DOMAIN OF SCEPTICISM: THREE APPROACHES

In this book I have articulated a sceptical position concerning the justifiability of the New Constitutionalism. Although being sceptical of constitutional review is certainly a minority position in the contemporary constitutional discourse, I am hardly alone with these views. Therefore, it might be helpful to summarize briefly how my position can be located within the camp of constitutional sceptics. The easiest way to do this is to differentiate my line of argument from three other versions of the sceptical position.

First, my position is the furthest from the output-based criticism of constitutional review. Most constitutional scholars have considered opinion on abortion, assisted suicide, hate speech, affirmative action and a whole range of similar problems. We strongly believe that our position is the correct one on those issues. When facing an institutional choice, it is reasonable to prefer the institution that is more likely to reach the conclusions that we consider right, just or correct. Following this logic, one can sign up for the sceptical position because one thinks that constitutional courts are less likely to reach the conclusions that are morally correct than legislatures. This argumentative strategy was articulated most clearly by Wojciech Sadurski, although I am not claiming that this is the most accurate characterization of his overall position on the issue.[1] However, this option is incompatible with the position I defend in this book. The cornerstone of my argument is that on most complex moral issues one can very rarely claim that one's position is conclusively justified. If there are many reasonable, but inconclusively justified views on a moral issue, it would be unfair to give privileged status to one's own view. Therefore, if we take the implications of reasonable pluralism seriously, we cannot appeal to such output-based considerations.

[1] Wojciech Sadurski, 'Judicial Review and the Protection of Constitutional Rights' (2002) 22 *Oxford Journal of Legal Studies* 275.

People who belong to the second camp reject the aforementioned output-based critic. They say that under the circumstances of reasonable pluralism we need a fair procedure to identify the principles of justice that we, as a community, endorse. Although these theorists often mobilize other, outcome-related arguments to support their position on institutional design, their moral lodestar is procedural fairness. Jeremy Waldron and Richard Bellamy are the best-known proponents of this approach. My position differs from theirs in two important respects. First, I agree with the New Constitutionalists that we should impose substantive limits on the legitimate use of legislative power. Even if public justifiability is an abstract and contested concept, and we need further institutional mechanisms to spell out the meaning of publicly justified principles, it is still a substantive limit on the legitimate use of legislative power. Second, I also agree with the proponents of the New Constitutionalism that the malfunctions of the political system can be so severe that at some point the insulation argument can outweigh PEP. Equal participation is an important and independent consideration in the equation, but it has no privileged place in my argument.

Finally, there are some theorists, who, like the proponents of the second group, reject output-based criticism of constitutional review. However, like the advocates of the first group, their position is based primarily on outcome-related reasons and not procedural fairness. The criticism (even if not rejection) of constitutional review put forward by Neil Komesar, Adrian Vermeule and other 'institutionalists' consciously detaches institutional considerations from more fundamental political principles and focuses exclusively on the former. By contrast, my theory does not try to detach the problems of institutional design from the analysis of political principles, but rather tries to create a link between the two fields. I submitted that the choice between different theories of political legitimacy has far-reaching implications for institutional analysis. If PEP were the most attractive legitimizing political principle, outcome-related institutional considerations would play only a marginal role in the debate about judicial review. But those considerations will become clearly relevant and of paramount importance for the proponents of outcome-related theories, like RF and LPL. Although institutional considerations are relevant for both theories of legitimacy, they do not necessarily make the same institutional considerations salient. Although cognitive diversity is a pertinent factor for many rights foundationalist theories, they hardly give it a central place in their analysis. By contrast, LPL makes diversity one of the most salient institutional considerations and the lack of diversity has a pivotal role in my case against strong constitutional review.

6.2 THE NEW CONSTITUTIONALISM: THREE PILLARS OF THE DOMINANCE

After having located my position in the sceptical camp, let me sketch the outline of that position by summarizing the main findings of the book. The question of the legitimacy of judicial review, often called the counter-majoritarian difficulty, generated such a voluminous literature that it is often considered to be the main puzzle for, or as others put it, the obsession of scholars of constitutional law. The sheer volume of the literature gives us a reason to be humble and refrain from sweeping conclusions: it suggests that it is unlikely for anyone to come up with knock-down arguments. However, I believe that even if we give the most charitable interpretation to the case for strong constitutional review, and balance the arguments cautiously, we can confidently put forward a couple of concluding theses that are critical of the New Constitutionalism.

My first concluding remark is a negative one. My contention is that the balance of arguments does not justify the almost orthodox intellectual position of the New Constitutionalism within the broader intellectual elite and its overwhelming dominance among constitutional lawyers. Within the legal academia, the New Constitutionalism has both a naive and a sophisticated version. I will set aside the naive version that is based on the declaratory theory of constitutional interpretation and a simplistic distinction between law and politics. But what is the explanation for the dominance of the New Constitutionalism among legal academics who do not subscribe to the simplistic ideas that underpin the naive version? Having examined the case for strong constitutional review in detail, I suggest that the orthodoxy of the New Constitutionalism rests on three intellectual pillars: the Cancellation Thesis (subsection 3.2.2), the Enlightenment View of Reason (subsection 3.4.1) and the Correspondence Thesis (subsection 3.6.2).

First, the adherents of the New Constitutionalism claim that we should replace the simplistic conception of majoritarian democracy that equates democracy with majority rule with a more nuanced conception that is called constitutional democracy. The sophisticated conception of constitutional democracy, so the argument runs, preserves everything that is worth preserving from the majoritarian conception, but since it is more sophisticated, it will also correct the flaws of its rival. By endorsing the constitutional conception of democracy, and conferring the role of moral arbitrator on constitutional courts, we do not have to sacrifice anything of moral value. What we give up is not a cause for moral regret, therefore, we do not need to engage in a moral balancing exercise.

Second, according to the Enlightenment View of Reason, the specification of human rights has, in principle, a right solution that is not only true, but also justifiable to each of us, since the rules of good moral reasoning are the same for everyone. If that is the case, highly educated judges, who are insulated from the pressures of the political process and whose reason-giving practice is very similar to academics, are in a much better position to find the truth than biased politicians.

Finally, the New Constitutionalism also assumes that there is an intimate link between fundamental rights and political malfunctions and the scope of constitutional review is coextensive with the scope of those malfunctions that courts are especially well situated to correct.

Let me make more precise what I mean by saying that the three theses above are the pillars of the dominance of the New Constitutionalism. Chapter 3 of the book gave a survey of the most relevant institutional arguments for and against constitutional review and explained how I see the equation that we have to solve when we make the overall decision about institutional design. I am not claiming that any of the three theses above is logically necessary in order to defend the case for strong constitutional review. Rather, my point is that their endorsement or rejection radically changes the nature of the equation. The Cancellation Thesis removes procedural fairness as an independent criterion from the balance of arguments. The Enlightenment View of Reason does not negate, but significantly decreases the relevance of diversity. Finally, the Correspondence Thesis ensures that the insulation argument justifies what it claims to justify, that is, it accounts for strong judicial review without undermining the other institutional features of the New Constitutionalism.

The flip side of the foregoing analysis is that removing the above three tenets from the intellectual edifice of the New Constitutionalism makes strong constitutional review significantly less attractive. Once one gives up the Cancellation Thesis, one has to admit that procedural fairness is an independent criterion of institutional design that has to be balanced against outcome-related considerations. The outcome of this balancing exercise is far from self-evident. More importantly, without offering some intersubjectively acceptable, or at least intelligible criteria for this balancing exercise, the proponents of the New Constitutionalism cannot demonstrate or claim confidently that the balance they strike is more rational or desirable than the one struck by their opponents.

If we remove the Enlightenment View of Reason from the edifice, the case for diversity becomes almost irresistible. (I argued that cognitive diversity is a crucial epistemic asset even if we subscribe to the Enlightenment View of Reason.) If human rights provisions have many

reasonable but inconclusively justified interpretations, and a judge's interpretation is only one of the possible specifications of a human right that citizens, legislators and other judges can reasonably reject, giving this judge's view a privileged position seems unwarranted. Under the circumstances of reasonable pluralism the institution that specifies the meaning of human rights must somehow reflect the diversity of reasonable interpretations within the political community.

Finally, giving up the Correspondence Thesis, we are necessarily led to the conclusion that the legitimacy of judicial review, as we know the institution today, is problematic. If the argument for strong constitutional review is overinclusive, the justificatory principles will fit better with a form of juristocracy than with the institutional set-up that characterizes our contemporary constitutional democracies. If the argument is underinclusive, the New Constitutionalism cannot account for at least some aspects of the practice of constitutional review.

I have no intention to summarize my detailed arguments against the three theses here. It suffices to say these theses do not seem to be robust enough to justify the constitutional orthodoxy. Although the Enlightenment Theory of Reason raises complex meta-ethical questions and therefore cannot be dismissed easily, it is worth noting that even most proponents of the New Constitutionalism pay lip service to the idea of reasonable pluralism. As far as the Cancellation Thesis is concerned, I submitted that even Dworkin's theory of constitutional democracy, which is arguably the most sophisticated exposition of the idea, explicitly admits that participation is one of the criteria of membership in a political community. Even if a democratic theory can explain why the exclusion of citizens from a cluster of fundamentally important political decisions is justifiable all things considered, it is hard to imagine how it could explain that this arrangement is prima facie unproblematic. Finally, I find the attractiveness of the Correspondence Thesis even more mysterious. I fail to see any plausible argument that explains the conceptual link between the constitutional status of a right and the existence of political malfunctions that courts are so well suited to correct.

6.3 THE CASE AGAINST STRONG CONSTITUTIONAL REVIEW: THREE THESES

Without the three theses above, it is difficult to demonstrate that the New Constitutionalism is clearly superior to its rival(s). However, even if removing them from the equation will change the balance of arguments radically, one can reasonably believe that, in the final analysis, the

advantages of judicial review still seem to outweigh the disadvantages. Since I did not manage to offer a knock-down refutation of the insulation argument, it is still possible to claim that this argument overrides all countervailing reasons. To claim simply that one sees the balance of arguments differently, leads us to an impasse where people with different intuitions will strike a different balance. My book provided three considerations to go beyond this stalemate.

First, I argued that because the Correspondence Thesis cannot be substantiated, we have a cluster of cases where the appeal to the insulation argument is unconvincing. Even if we concede that the majority is prone to violate the interests of the minority, it is simply implausible to claim that every single right raises the issue of majoritarian bias. Where there are no well-identifiable political malfunctions that judges are well suited to correct, the solution of the equation is clear. If there is nothing that can counterbalance the procedural and epistemic reasons that support the legislature, we should vest the authority of specifying fundamental rights in that body.

Second, I argued that the weight of the insulation argument is not constant, but depends on the political context. Since the weight of the insulation argument is not constant, the balance of arguments can also change from one political system to another. In well-ordered democracies, which give roughly the same level of protection to human rights without strong constitutional review as do other well-ordered democracies that are endowed with a constitutional court, the speculative and marginal improvement in human rights protection does not justify the direct, imminent and systematic exclusion of the citizenry from some of the most important political decisions of the community.

The above two considerations do not give a wholesale refutation of the insulation argument, but rather circumvent its scope. My first point suggests that under some conditions the balancing exercise is not necessary. Where there are no political malfunctions, the insulation argument does not come into play. My second point clarified the conditions under which the insulation argument is outweighed by countervailing considerations. In practice, the first point imposes a subject matter and the second imposes a territorial or geographical limitation on the insulation argument.

My third argument operates differently. Having identified the relevant considerations in the institutional equation, I claimed that we should confer the authority to specify fundamental rights on an institution that combines the relevant virtues optimally. The core chapter of my book suggests that diversity should play an absolutely vital role in the institutional equation. The gist of my third point is that, even assuming that the insulation from the political process is a pivotal consideration,

courts are so far from the ideal of a diverse and representative institution that it is almost certain that it is possible to design institutions that strike a more ideal balance between the requirements of diversity and political independence than courts.

My book is a plea for both institutional conservativism, and institutional experimentalism. On the one hand, the second point of the foregoing analysis implies that we should regret if the distinctive constitutional traditions of mature, first wave democracies will be lost. I am not against significant reforms or giving human rights a more prominent place in those legal systems. However, moulding them into the uniform template that the New Constitutionalism offers is something that we should regret. The general intellectual dominance of the New Constitutionalism and the institutional pressure that is put on those political systems by the European institutional framework of human rights poses a major challenge to these constitutional traditions. Although both the United Kingdom and the Nordic countries, primarily Sweden and Finland, have been experimenting with ingenious institutional solutions that strike a very delicate balance between democratic decision-making and the effective protection of human rights, I am sceptical about the viability of these experiments. Chapter 5 gave an overview of the types of dialogue that the institutions of weak judicial review can give rise to. I have argued that neither the model of shared responsibility nor the model of emergency brake can work effectively under the current European framework of human rights protection outside the sphere of discretion that the ECtHR gives to the states by the margin of appreciation doctrine.

On the other hand, my book is also a plea for institutional innovation and radicalism. Even if we concede that in the specification of human rights we should always give priority to the insulation argument over the argument for equal participation, I find it hard to believe that our best answer to the twin challenges of political malfunctions and cognitive diversity is a constitutional court.

Bibliography

Ackerman B, 'Beyond Carolene Products' (1984) 98 *Harvard Law Review* 713

Ackerman B, *We the People: Volume 1 – Foundations* (Belknap Press 1993)

Ackerman B, 'The Rise of World Constitutionalism' (1997) 83 *Virginia Law Review* 771

Allan TRS, 'Parliamentary Sovereignty: Lord Denning's Dexterous Revolution' (1983) 3 *Oxford Journal of Legal Studies* 22

Allan TRS, *Constitutional Justice* (Oxford University Press 2003)

Allan TRS, 'Human Rights and Judicial Review: A Critique of "Due Deference"' (2006) 65 *Cambridge Law Journal* 671

Allan TRS, 'Deference, Defiance, and Doctrine: Defining the Limits of Judicial Review' (2010) 60 *The University of Toronto Law Journal* 41

Aristotle, *The Politics of Aristotle* (Jowett B tr, Clarendon Press, 1885)

Arter D, *Democracy in Scandinavia: Consensual, Majoritarian or Mixed?* (Manchester University Press 2006)

Baer S, 'Equality: The Jurisprudence of the German Constitutional Court' (1999) 5 *Columbia Journal of European Law* 249

Banaji MR and Greenwald AG, *Blindspot: Hidden Biases of Good People* (Delacorte Press 2013)

Barber SA and Fleming JE, *Constitutional Interpretation: The Basic Questions* (Oxford University Press 2007)

'Behind France's Islamic Veil', *BBC News Channel* (8 April 2010) <http://news.bbc.co.uk/1/hi/world/europe/8607802.stm> accessed 1 December 2015

Bellamy R, *Political Constitutionalism: A Republican Defence of the Constitutionality of Democracy* (Cambridge University Press 2007)

Biskupic J, 'Ginsburg: Court Needs Another Woman' *USA Today* (5 October 2009)

Boix C, Miller M and Rosato S, 'A Complete Data Set of Political Regimes, 1800–2007' (2013) 46 *Comparative Political Studies* 1523

Bork RH, *The Tempting of America: The Political Seduction of the Law* (Sinclair-Stevenson 1990)

Borowski M, 'The Beginnings of Germany's Federal Constitutional Court' (2003) 16 *Ratio Juris* 155

Bowles S and Gintis H, 'Social Preferences, Homo Economicus, and Zoon Politikon' in Robert E Goodin and Charles Tilly (eds), *The Oxford Handbook of Contextual Political Analysis* (Oxford University Press 2008)

Brady ADP, *Proportionality and Deference under the UK Human Rights Act: An Institutionally Sensitive Approach* (Cambridge University Press 2012)

Brewer-Carías AR, *Judicial Review in Comparative Law* (Cambridge University Press 1989)

Brewer-Carías AR, *Constitutional Protection of Human Rights in Latin America* (Cambridge University Press 2009)

Brown MB, 'Survey Article: Citizen Panels and the Concept of Representation' (2006) 14 *Journal of Political Philosophy* 203

Bull T and Cameron I, 'Legislative Review for Human Rights Compatibility: A View from Sweden' in Murray Hunt, Hayley Jane Hooper and Paul Yowell (eds), *Parliaments and Human Rights: Redressing the Democratic Deficit* (Hart Publishing 2015)

Cahill-O'Callaghan RJ, 'The Influence of Personal Values on Legal Judgments' (2013) 40 *Journal of Law and Society* 596

Cameron I, 'Protection of Constitutional Rights in Sweden' [1997] *Public Law* 488

Cameron I and Bull T, 'Sweden' in Joseph Fleuren and Janneke H Gerards (eds), *Implementation of the European Convention on Human Rights and of the Judgments of the ECtHR in National Case Law: A Comparative Analysis* (Intersentia 2014)

Cappelletti M, *The Judicial Process in Comparative Perspective* (Clarendon Press 1989)

Cheibub JA, Gandhi J and Vreeland JR, 'Democracy and Dictatorship Revisited' (2009) 143 *Public Choice* 67

Choudhry S and Hume N, 'Federalism, Devolution and Secession: From Classical to Post-Conflict Federalism' in Tom Ginsburg and Rosalind Dixon (eds), *Comparative Constitutional Law* (Edward Elgar Publishing 2011)

Clark WR, Golder MR and Golder SN, *Principles of Comparative Politics* (2nd edition, CQ Press 2012)

Clayton R, 'Judicial Deference and "Democratic Dialogue": The Legitimacy of Judicial Intervention under the Human Rights Act 1998' [2004] *Public Law* 33

Coan AB, 'Irrelevance of Writtenness in Constitutional Interpretation' (2009) 158 *University of Pennsylvania Law Review* 1025

Coan AB, 'Judicial Capacity and the Substance of Constitutional Law' (2012) 122 *Yale Law Journal* 422

Colón-Ríos J, 'A New Typology of Judicial Review of Legislation' (2014) 3 *Global Constitutionalism* 143

Comparative Constitutions Project, 'Constitutional Rankings' <http://comparativeconstitutionsproject.org/ccp-rankings> accessed 1 December 2015

Congleton RD, *Perfecting Parliament: Constitutional Reform, Liberalism, and the Rise of Western Democracy* (Cambridge University Press 2010)

Craig PP, 'Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework' (1997) *Public Law* 467

Dahl RA, 'Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker' (1957) 6 *Journal of Public Law* 279

Dahl RA, *Democracy and Its Critics* (Yale University Press 1991)

Dahl RA, 'Procedural Democracy' in Gerald F Gaus and Chandran Kukathas (eds), *Handbook of Political Theory* (Sage 2004)

Diamond LJ, 'Thinking about Hybrid Regimes' (2002) 13 *Journal of Democracy* 21

Dicey AV, *Introduction to the Study of the Law of the Constitution* (Liberty Classics 1982)

Draper H, *Karl Marx's Theory of Revolution, Volume I: The State and Bureaucracy*, vol 2 (Monthly Review Press 1977)

Dworkin R, *Taking Rights Seriously* (Duckworth 1977)

Dworkin R, 'The Forum of Principle' (1981) 56 *New York University Law Review* 469

Dworkin R, *A Matter of Principle* (Harvard University Press 1985)

Dworkin R, *Law's Empire* (Fontana Press 1986)

Dworkin R, 'Equality, Democracy, and Constitution: We the People in Court' (1990) 28 *Alberta Law Review* 324

Dworkin R, *Freedom's Law: The Moral Reading of the American Constitution* (Oxford University Press 1996)

Dworkin R, 'The Partnership Conception of Democracy' (1998) 86 *California Law Review* 453

Dworkin R, *Sovereign Virtue* (Harvard University Press 2000)

Easterbrook FH, 'Presidential Review' (1989) 40 *Case Western Reserve Law Review* 905

Eberle EJ, 'Human Dignity, Privacy, and Personality in German and American Constitutional Law' (1997) 1997 *Utah Law Review* 963

Eberle EJ, *Dignity and Liberty: Constitutional Visions in Germany and the United States* (Praeger 2002)

Edwards RA, 'Judicial Deference under the Human Rights Act' (2002) 65 *The Modern Law Review* 859

Elster J, 'Forces and Mechanisms in the Constitution-Making Process' (1995) 45 *Duke Law Journal* 364

Elster J, *Securities against Misrule: Juries, Assemblies, Elections* (Cambridge University Press 2013)
Ely JH, *Democracy and Distrust: A Theory of Judicial Review* (Harvard University Press 1980)
Epstein L and Knight J, *The Choices Justices Make* (CQ Press 1998)
Epstein L, Segal JA and Spaeth HJ, *The Supreme Court Compendium: Data, Decisions & Developments* (5th edition, Sage – CQ Press 2012)
Estlund DM, *Democratic Authority: A Philosophical Framework* (Princeton University Press 2009)
Follesdal A and Wind M, 'Introduction – Nordic Reluctance towards Judicial Review under Siege' (2009) 27 *Nordic Journal of Human Rights* 131
Freedom House, 'Freedom in the World 2015' (2015) <https://freedomhouse.org/report/freedom-world/freedom-world-2015> accessed 1 December 2015
Fuller LL, *The Morality of Law* (Revised edition, Yale University Press 1977)
Gardbaum S, 'The New Commonwealth Model of Constitutionalism' (2001) 49 *American Journal of Comparative Law* 707
Gardbaum S, 'Limiting Constitutional Rights' (2007) 54 *UCLA Law Review* 789
Gardbaum S, *The New Commonwealth Model of Constitutionalism: Theory and Practice* (Cambridge University Press 2013)
Gaus GF, *Justificatory Liberalism: An Essay on Epistemology and Political Theory* (Oxford University Press 1996)
Gaus GF, *Political Concepts and Political Theories* (Westview Press 2000)
Gaus GF, *Contemporary Theories of Liberalism: Public Reason as a Post-Enlightenment Project* (Sage 2003)
Gaus GF, *On Philosophy, Politics, and Economics* (Thomson Wadsworth 2008)
Ginsburg T, *Judicial Review in New Democracies: Constitutional Courts in Asian Cases* (Cambridge University Press 2003)
Ginsburg T and Versteeg M, 'Why Do Countries Adopt Constitutional Review?' (2014) 30 *Journal of Law, Economics, and Organization* 587
'Ginsburg Wants Court to Add Second Woman' *The Columbus Dispatch* (11 April 2009)
Go J, 'A Globalizing Constitutionalism? Views from the Postcolony, 1945–2000' (2003) 18 *International Sociology* 71
Goldsworthy J, 'Conclusions' in Jeffrey Goldsworthy (ed), *Interpreting Constitutions: A Comparative Study* (Oxford University Press 2006)
Goldsworthy J, *Parliamentary Sovereignty: Contemporary Debates* (Cambridge University Press 2010)

Green L, 'Law, Legitimacy, and Consent' (1989) 62 *Southern California Law Review* 795

Grimm D, 'Types of Constitutions' in Michel Rosenfeld and András Sajó (eds), *The Oxford Handbook of Comparative Constitutional Law* (Oxford University Press 2012)

Gyorfi T, *Az Alkotmánybíráskodás Politikai Karaktere: Értekezés a Magyar Alkotmánybíróság Első Tíz Évéről* (Indok 2001)

Gyorfi T, 'From Equal Treatment to the Prohibition of Arbitrariness: An Analysis of the General Right to Equality' (2012) 6 *Vienna Journal on International Constitutional Law* 65

Gyorfi T, 'The Supreme Court (House of Lords) of the United Kingdom' in András Jakab, Arthur Dyevre and Giulio Itzcovich (eds), *Comparative Constitutional Reasoning* (Cambridge University Press forthcoming)

Habermas J, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (Polity Press 1997)

Haidt J, *The Righteous Mind: Why Good People Are Divided by Politics and Religion* (Allen Lane 2012)

Hamilton A, Jay J and Madison J, *The Federalist Papers* (Oxford University Press 2014)

Hanretty C, 'The Decisions and Ideal Points of British Law Lords' (2013) 43 *British Journal of Political Science* 703

Haris IB, 'Judicial Review of Constitutional Amendments: Pakistan's Uneasy Subscription to the Basic Structure Doctrine' (24 September 2015) <http://ukconstitutionallaw.org/2015/09/24/isaam-bin-haris-judicial-review-of-constitutional-amendments-pakistans-uneasy-subscription-to-the-basic-structure-doctrine/> accessed 1 December 2015

Hautamäki V-P, 'The Question of Constitutional Court: On Its Relevance in the Nordic Context' in Jaakko Husa, Kimmo Nuotio and Heikki Pihlajamäki (eds), *Nordic Law: Between Tradition and Dynamism* (Intersentia; METRO 2007)

Hickman T, *Public Law after the Human Rights Act* (Hart Publishing 2010)

Hirschl R, 'Constitutional Courts vs. Religious Fundamentalism: Three Middle Eastern Tales' (2004) 82 *Texas Law Review* 1819

Hirschl R, 'The Political Origins of the New Constitutionalism' (2004) 11 *Indiana Journal of Global Legal Studies* 71

Hirschl R, *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism* (Harvard University Press 2004)

Hobbes T and Minogue KR, *Leviathan* (JM Dent 1987)

Hogg PW and Bushell AA, 'The Charter Dialogue between Courts and Legislatures (Or Perhaps the Charter of Rights Isn't Such a Bad Thing after All)' (1997) 35 *Osgoode Hall Law Journal* 75

Hönnige C, 'The Electoral Connection: How the Pivotal Judge Affects Oppositional Success at European Constitutional Courts' (2009) 32 *West European Politics* 963

Hunt M, 'Sovereignty's Blight: Why Contemporary Public Law Needs the Concept of "Due Deference"' in Nicholas Bamforth and Peter Leyland (eds), *Public Law in a Multi-Layered Constitution* (Hart Publishing 2003)

Hunt M, Hooper HJ and Yowell P, *Parliaments and Human Rights: Redressing the Democratic Deficit* (Hart Publishing 2015)

Hunter R, McGlynn C and Rackley E (eds), *Feminist Judgments: From Theory to Practice* (Hart Publishing 2010)

Huntington SP, 'Democracy's Third Wave' (1991) 2 *Journal of Democracy* 12

Huntington SP, *The Third Wave: Democratization in the Late Twentieth Century* (University of Oklahoma Press 1991)

Husa J, *Nordic Reflections on Constitutional Law: A Comparative Nordic Perspective* (P Lang 2002)

Husa J, *The Constitution of Finland: A Contextual Analysis* (Hart Publishing 2011)

Jakab A, Dyevre A and Itzcovich G (eds), *Comparative Constitutional Reasoning* (Cambridge University Press forthcoming)

Jakobsen U, 'The Conception of "Nordic Democracy" and European Judicial Integration' (2009) 27 *Nordic Journal of Human Rights* 221

Jennings WI, *The Law and the Constitution* (5th edition, University of London Press 1960)

Jowell J, 'Judicial Deference and Human Rights: A Question of Competence' in Paul Craig and Richard Rawlings (eds), *Law and Administration in Europe: Essays in Honour of Carol Harlow* (Oxford University Press 2003)

Jowell J, 'Judicial Deference: Servility, Civility or Institutional Capacity?' (2003) *Public Law* 592

Kavanagh A, 'The Elusive Divide between Interpretation and Legislation under the Human Rights Act 1998' (2004) 24 *Oxford Journal of Legal Studies* 259

Kavanagh A, *Constitutional Review under the UK Human Rights Act* (Cambridge University Press 2009)

Kavanagh A, 'Defending Deference in Public Law and Constitutional Theory' (2010) 126 *Law Quarterly Review* 222

Kelsen H, *Vom Wesen Und Wert Der Demokratie* (Mohr 1929)

King JA, 'Institutional Approaches to Judicial Restraint' (2008) 28 *Oxford Journal of Legal Studies* 409

Klein C and Sajó A, 'Constitution-Making: Process and Substance' in Michel Rosenfeld and András Sajó (eds), *The Oxford Handbook of Comparative Constitutional Law* (Oxford University Press 2012)

Klug F, 'A Bill of Rights: Do We Need One or Do We Already Have One?' (2007) *Public Law* 619

Klug HJ, *The Constitution of South Africa: A Contextual Analysis* (Hart Publishing 2010)

Komesar NK, 'A Job for the Judges: The Judiciary and the Constitution in a Massive and Complex Society' (1987) 86 *Michigan Law Review* 657

Komesar NK, *Imperfect Alternatives: Choosing Institutions in Law, Economics and Public Policy* (University of Chicago Press 1997)

Komesar NK, 'The Logic of the Law and the Essence of Economics: Reflections on Forty Years in the Wilderness' (2013) 2013 *Wisconsin Law Review* 265

Kommers DP, *Constitutional Jurisprudence of the Federal Republic of Germany* (Duke University Press 1990)

Koncewicz TT, 'Polish Constitutional Drama: Of Courts, Democracy, Constitutional Shenanigans and Constitutional Self-Defense' (2015) <http://www.iconnectblog.com/2015/12/polish-constitutional-drama-of-courts-democracy-constitutional-shenanigans-and-constitutional-self-defense/> accessed 6 December 2015

Kovács Á, 'Fényevők? A Hazai Alkotmányelmélet Esete a Politikai Konstitucionalizmussal' (2015) 19 *Fundamentum* 2–3

Kurunmäki J and Strang J, *Rhetorics of Nordic Democracy* (Finnish Literature Society 2010)

Landemore H, *Democratic Reason: Politics, Collective Intelligence, and the Rule of the Many* (Princeton University Press 2013)

Landfried C, 'The Judicialization of Politics in Germany' (1994) 15 *International Political Science Review* 113

Lavapuro J, 'Constitutional Review in Finland' in Kimmo Nuotio, Sakari Sakari Melander and Merita Huomo-Kettunen (eds), *Introduction to Finnish Law and Legal Culture* (Faculty of Law, University of Helsinki 2012)

Lavapuro J, Ojanen T and Scheinin M, 'Rights-Based Constitutionalism in Finland and the Development of Pluralist Constitutional Review' (2011) 9 *International Journal of Constitutional Law* 505

Law DS and Versteeg M, 'The Evolution and Ideology of Global Constitutionalism' (2011) 99 *California Law Review* 1163

Law DS and Versteeg M, 'Sham Constitutions' (2013) 101 *California Law Review* 863

Lerner H, *Making Constitutions in Deeply Divided Societies* (Cambridge University Press 2011)

Lijphart A, *Patterns of Democracy: Government Forms and Performance in Thirty-Six Countries* (2nd Revised edition, Yale University Press 2012)

Loughlin M, 'Constituent Power Subverted: From English Constitutional Argument to British Constitutional Practice' in Martin Loughlin and Neil Walker (eds), *The Paradox of Constitutionalism: Constituent Power and Constitutional Form* (Oxford University Press 2007)

Lundström M, 'Value Relativism, Procedural Democracy and Opinion Representation: Reflections on Three Conceptual Underpinnings of Swedish Anti-Constitutionalism' (2009) 27 *Nordic Journal of Human Rights* 242

Malleson K, 'Rethinking the Merit Principle in Judicial Selection' (2006) 33 *Journal of Law and Society* 126

Malleson K, 'Appointments to the House of Lords: Who Goes Upstairs' in Louis Blom-Cooper, Brice Dickson and Gavin Drewry (eds), *The Judicial House of Lords: 1876–2009* (Oxford University Press 2009)

Manin B, *The Principles of Representative Government* (Cambridge University Press 1997)

Martin AD and Quinn KM, 'Dynamic Ideal Point Estimation via Markov Chain Monte Carlo for the U.S. Supreme Court, 1953–1999' (2002) 10 *Political Analysis* 134

Masterman R, 'Aspiration or Foundation? The Status of the Strasbourg Jurisprudence and the "Convention Rights" in Domestic Law' in Helen Fenwick, Gavin Phillipson and Roger Masterman (eds), *Judicial Reasoning under the UK Human Rights Act* (Cambridge University Press 2011)

Mazmanyan A, 'Majoritarian Countermajoritarian Courts: Introduction' in Patricia Popelier, Armen Mazmanyan and Werner Vandenbruwaene (eds), *The Role of Constitutional Courts in Multilevel Governance* (Intersentia 2013)

McCrudden C, 'Human Dignity and Judicial Interpretation of Human Rights' (2008) 19 *European Journal of International Law* 655

Mercier H and Sperber D, 'Why Do Humans Reason? Arguments for an Argumentative Theory' (2011) 34 *Behavioral and Brain Sciences* 57

Mill JS, *On Liberty. With an Introduction by WL Courtney* (The Walter Scott Publishing Co., Ltd 1901)

Möller K, *The Global Model of Constitutional Rights* (Oxford University Press 2012)

Möllers C, 'We Are (Afraid of) the People: Constituent Power in German Constitutionalism' in Martin Loughlin and Neil Walker (eds), *The*

Paradox of Constitutionalism: Constituent Power and Constitutional Form (Oxford University Press 2007)

Moore MS, 'Law as a Functional Kind' in Robert P George (ed), *Natural Law Theory: Contemporary Essays* (Oxford University Press 1992)

Moran L,'Britain's Highest Female Judge Blasts Secretive Men-Only Garrick Club for "Holding Women Back"'*Daily Mail* (15 October 2011)

Navot S, *Constitution of Israel: A Contextual Analysis* (Hart Publishing 2014)

Navot S, 'The Israeli Supreme Court' in András Jakab, Arthur Dyevre and Giulio Itzcovich (eds), *Comparative Constitutional Reasoning* (Cambridge University Press forthcoming)

Nergelius J, 'Judicial Review in Swedish Law: A Critical Analysis' (2009) 27 *Nordic Journal of Human Rights* 142

Nicol D, 'Law and Politics after the Human Rights Act' (2006) *Public Law* 722

Ojanen T, 'From Constitutional Periphery toward the Center: Transformations of Judicial Review in Finland' (2009) 27 *Nordic Journal of Human Rights* 194

Page SE, *The Difference: How the Power of Diversity Creates Better Groups, Firms, Schools, and Societies* (Princeton University Press 2008)

Paterson A, *Final Judgment: The Last Law Lords and the Supreme Court* (Hart Publishing 2013)

Paulsen MS, 'The Most Dangerous Branch: Executive Power to Say What the Law Is' (1994) 83 *Georgetown Law Journal* 217

Paulsen MS, 'The Irrepressible Myth of Marbury' (2003) 101 *Michigan Law Review* 2706

Pekka L, 'The Constitutional Committee of Parliament: The Finnish Model of Norm Control' in Maija Sakslin (ed), *The Finnish Constitution in Transition* (Hermes-Myynti Oy; Finnish Society of Constitutional Law 1991)

Perry MJ, 'Protecting Human Rights in a Democracy: What Role for the Courts' (2003) 38 *Wake Forest Law Review* 635

Perry SR, 'Second-Order Reasons, Uncertainty and Legal Theory' (1989) 62 *Southern California Law Review* 913

Pitkin HF, *The Concept of Representation* (University of California Press 1967)

Plato, *The Republic* (Infomotions, Inc. 2001)

Polity IV, 'Polity IV Project: Political Regime Characteristics and Transitions, 1800–2013' (2014) <http://www.systemicpeace.org/polity/polity4.htm> accessed 1 December 2015

Poole T, 'Dogmatic Liberalism: T.R.S. Allan and the Common Law Constitution' (2002) 65 *Modern Law Review* 463
Posner RA, *How Judges Think* (Reprint edition, Harvard University Press 2010)
Prempeh HK, 'Africa's "Constitutionalism Revival": False Start or New Dawn?' (2007) 5 *International Journal of Constitutional Law* 469
Primus RA, 'When Should Original Meanings Matter?' (2008) 107 *Michigan Law Review* 165
Rackley E, *Women, Judging and the Judiciary: From Difference to Diversity* (Routledge 2013)
Radbruch G, 'Statutory Lawlessness and Supra-Statutory Law (1946)' (2006) 26 *Oxford Journal of Legal Studies* 1
Rao N, 'Three Concepts of Dignity in Constitutional Law' (2011) 86 *Notre Dame Law Review* 183
Rawls J, *A Theory of Justice* (Oxford University Press 1973)
Rawls J, *Political Liberalism* (Columbia University Press 1993)
Raz J, *The Authority of Law: Essays on Law and Morality* (Clarendon 1983)
Raz J, *The Morality of Freedom* (Clarendon Press 1988)
Raz J, *Practical Reason and Norms* (Princeton University Press 1990)
Reid Lord, 'The Judge as Law Maker' (1972) 12 *Journal of the Society of Public Teachers of Law* 22
Robertson D, *Judicial Discretion in the House of Lords* (Clarendon Press 1998)
Robertson D, *The Judge as Political Theorist: Contemporary Constitutional Review* (Princeton University Press 2010)
Rytter JE and Wind M, 'In Need of Juristocracy? The Silence of Denmark in the Development of European Legal Norms' (2011) 9 *International Journal of Constitutional Law* 470
Sadurski W, 'Judicial Review and the Protection of Constitutional Rights' (2002) 22 *Oxford Journal of Legal Studies* 275
Sadurski W, *Rights before Courts: A Study of Constitutional Courts in Postcommunist States of Central and Eastern Europe* (Springer 2007)
Sadurski W, 'Rights and Moral Reasoning: An Unstated Assumption – A Comment on Jeremy Waldron's "Judges as Moral Reasoners"' (2009) 7 *International Journal of Constitutional Law* 25
Sand I-J, 'Judicial Review in Norway under Recent Conditions of European Law and International Human Rights Law: A Comment' (2009) 27 *Nordic Journal of Human Rights* 160
Scalia A, 'Originalism: The Lesser Evil' (1988) 57 *University of Cincinnati Law Review* 849
Schaumburg-Müller S, 'Parliamentary Precedence in Denmark: A Jurisprudential Assessment' (2009) 27 *Nordic Journal of Human Rights* 170

Scheppele KL, 'Aspirational and Aversive Constitutionalism: The Case for Studying Cross-Constitutional Influence through Negative Models' (2003) 1 *International Journal of Constitutional Law* 296

Schmitt C, *The Crisis of Parliamentary Democracy* (MIT Press 1985)

Schmitt C, *Constitutional Theory* (Duke University Press 2008)

Segal JA, Epstein L, Cameron CM and Spaeth HJ, 'Ideological Values and the Votes of U.S. Supreme Court Justices Revisited' (1995) 57 *The Journal of Politics* 812

Segal JA and Spaeth HJ, *The Supreme Court and the Attitudinal Model Revisited* (Cambridge University Press 2002)

Sieder R, Schjolden L and Angell A, *The Judicialization of Politics in Latin America* (Palgrave Macmillan 2011)

Simmons JA, *Moral Principles and Political Obligations* (Princeton University Press 1981)

Skach C, *Borrowing Constitutional Designs: Constitutional Law in Weimar Germany and the French Fifth Republic* (Princeton University Press 2009)

Slaughter A-M, 'A Global Community of Courts' (2003) 44 *Harvard International Law Journal* 191

Sólyom L, 'Az Alkotmánybíróság önértelmezése' (1996) *Jogtudományi Közlöny,* 6

Sólyom L, 'The Role of Constitutional Courts in the Transition to Democracy with Special Reference to Hungary' (2003) 18 *International Sociology* 133

Sólyom L and Brunner G, *Constitutional Judiciary in a New Democracy: The Hungarian Constitutional Court* (The University of Michigan Press 2000)

Spaeth HJ, Epstein L, Martin AD, Segal JA, Ruger TJ and Benesh SC, 'Supreme Court Database, Version 2015 Release 01' (2015) <http://Supremecourtdatabase.org> accessed 1 December 2015

Steyn, Lord, 'Deference: A Tangled Story' (2005) *Public Law* 346

Stone Sweet A, *Governing with Judges: Constitutional Politics in Europe* (Oxford University Press 2000)

Stone Sweet A, 'Why Europe Rejected American Judicial Review: And Why It May Not Matter' (2003) 101 *Michigan Law Review* 2744

Stone Sweet A, 'Constitutional Courts' in Michel Rosenfeld and András Sajó (eds), *The Oxford Handbook of Comparative Constitutional Law* (Oxford University Press 2012)

Strauss DA, 'Common Law Constitutional Interpretation' (1996) 63 *University of Chicago Law Review* 877

Sunstein CR, 'Naked Preferences and the Constitution' (1984) 84 *Columbia Law Review* 1689

Sunstein CR, 'Foreword: Leaving Things Undecided' (1996) 110 *Harvard Law Review* 4

Sunstein CR, 'Burkean Minimalism' (2006) 105 *Michigan Law Review* 353

Sunstein CR and Vermeule A, 'Interpretation and Institutions' (2003) 101 *Michigan Law Review* 885

Surowiecki J, *The Wisdom of Crowds: Why the Many Are Smarter Than the Few* (Abacus 2005)

Thayer JB, 'The Origin and Scope of the American Doctrine of Constitutional Law' (1893) 7 *Harvard Law Review* 129

The Economist Intelligence Unit, 'Democracy Index 2014, Democracy and Its Discontents' (2015) <http://www.eiu.com> accessed 1 December 2015

Tierney S, *Constitutional Referendums: The Theory and Practice of Republican Deliberation* (Reprint edition, Oxford University Press 2014)

Tomkins A, *Our Republican Constitution* (Hart Publishing 2005)

Tribe LH, 'The Puzzling Persistence of Process-Based Constitutional Theories' (1979) 89 *Yale Law Journal* 1063

Triepel H, Kelsen H, Layer M and von Hippel E, 'Wesen Und Entwicklung Der Staatsgerichtsbarkeit. Uberprüfung von Verwaltungsakten Durch Die Ordentlichen Gerichte. Verhandlungen Der Tagung Der Deutschen Staatsrechtslehrer Zu Wien Am 23. Und 24. April 1928: Mit Einem Auszug Aus Der Aussprache' (de Gruyter 1929)

Tuori K, 'Landesbericht Finland' in Armin von Bogdandy, Christopher Grabenwarter and Peter M Huber (eds), *Handbuch Ius Publicum Europaeum. Volume VI–VII. Verfassungsgerichtsbarkeit im europäischen Rechtsraum* (CF Müller forthcoming)

Tushnet M, 'Policy Distortion and Democratic Debilitation: Comparative Illumination of the Countermajoritarian Difficulty' (1995) 94 *Michigan Law Review* 246

Tushnet M, 'Alternative Forms of Judicial Review' (2003) 101 *Michigan Law Review* 2781

Tushnet M, 'New Forms of Judicial Review and the Persistence of Rights – and Democracy-Based Worries' (2003) 38 *Wake Forest Law Review* 813

Tushnet M, 'Weak-Form Judicial Review: Its Implications for Legislatures' (2004) 2 *New Zealand Journal of Public and International Law* 7

Urbinati N, *Democracy Disfigured: Opinion, Truth, and the People* (Harvard University Press 2014)

Van de Heyning C, 'Constitutional Courts as Guardians of Fundamental Rights: The Constitutionalisation of the Convention through Domestic Constitutional Adjudication' in Patricia Popelier, Armen Mazmanyan

and Wouter Vandenbruwaene (eds), *The Role of Constitutional Courts in Multilevel Governance* (Intersentia 2013)

Vermeule A, *Judging under Uncertainty: An Institutional Theory of Legal Interpretation* (Harvard University Press 2006)

Vermeule A, *Law and the Limits of Reason* (Oxford University Press 2009)

Vermeule A, 'Collective Wisdom and Institutional Design' in Hélène Landemore and Jon Elster (eds), *Collective Wisdom: Principles and Mechanisms* (Cambridge University Press 2012)

Wade HWR, 'Sovereignty: Revolution or Evolution?' (1996) 112 *Law Quarterly Review* 568

Waldron J, *Law and Disagreement* (Clarendon Press 1999)

Waldron J, 'The Core of the Case against Judicial Review' (2006) 115 *Yale Law Journal* 1346

Waldron J, 'Judges as Moral Reasoners' (2009) 7 *International Journal of Constitutional Law* 2

Way L and Levitsky S, 'The Rise of Competitive Authoritarianism' (2002) 13 J*ournal of Democracy* 51

West JM and Yoon D-K, 'The Constitutional Court of the Republic of Korea: Transforming the Jurisprudence of the Vortex?' (1992) 40 *The American Journal of Comparative Law* 73

Whittington KE, 'The New Originalism' (2004) 2 *Georgetown Journal of Law & Public Policy* 599

Wicks E, *The Evolution of a Constitution: Eight Key Moments in British Constitutional History* (Hart 2006)

Wilson BM, 'Changing Dynamics: The Political Impact of Costa Rica's Constitutional Court' in Rachel Sieder, Line Schjolden and Alan Angell (eds), *The Judicialization of Politics in Latin America* (Palgrave Macmillan 2011)

Wind M, 'When Parliament Comes First: The Danish Concept of Democracy Meets the European Union' (2009) 27 *Nordic Journal of Human Rights* 272

Wislon J, *Sleepovers* (Doubleday 2001)

Wollheim R, 'A Paradox in the Theory of Democracy' in Peter Laslett and WG Runciman (eds), *Philosophy, Politics and Society (2nd series): A Collection* (Reprint edition, Basil Blackwell 1979)

Woolf, Lord, 'Droit Public: English Style' (1995) *Public Law* 57

World Justice Project, 'Rule of Law Index 2015' (2015) http://worldjusticeproject.org/rule-of-law-index> accessed 1 December 2015

Young AL, 'In Defence of Due Deference' (2009) 72 *The Modern Law Review* 554

Young AL, *Parliamentary Sovereignty and the Human Rights Act* (Hart Publishing 2009)
Young AL, 'Deference, Dialogue and the Search for Legitimacy' (2010) 30 *Oxford Journal of Legal Studies* 815

Index