

Constitutional Rights and Constitutional Design

Moral and Empirical Reasoning
in Judicial Review

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Comparative Analysis of Institutional Capacities

This chapter analyses courts and legislatures with regard to their reasoning processes, structures for deliberation and decision-making, and institutional capacities. These are vast topics, and any comprehensive examination of them would be beyond the scope of the book. I will focus on salient differences that are important from the point of view of constitutional design, particularly with respect to the decision of whether—and if so, in what form—to adopt a system of rights-based judicial review of legislation. The chapter will consider the law-making capacity of legislatures and courts, and basic differences in their purpose and institutional structure (sections I and II); the legislature’s capacity for empirical reasoning, in light of chapter four’s discussion of judicial capacity (section III); a comparative analysis of capacity for moral reasoning (section IV); the majoritarian character of the legislature (section V) and the capacity of courts and legislatures to protect minorities (section VI); and an historical perspective on issues concerning minorities (section VII).

I. The Basic Structure of Judicial Reasoning

The lack of judicial capacity for finding general empirical facts about society, which was surveyed in chapter four, is not, properly considered, a defect of courts. It is what we should expect of institutions set up primarily to resolve disputes according to law laid down by another institution, in response to claims initiated by litigants and their lawyers. Although legal scholars tend to focus on interpretation and other aspects of adjudication with law-forming effects—including judicial review of legislation—the purpose for which adjudicative systems and institutions is set up is not to make law. Judicial decisions may contribute to determining and settling the content of the law, and this may be anticipated and accepted in a given legal system. Nonetheless, such consequences are incidental to the main activity of hearing cases and rendering judgment according to law.

Consider, first, the position of the traditional common law trial court. The world of the trial is in important ways an artificial world, which makes it unsuited

for finding general empirical facts about society and making difficult choices about social policy. This is an important claim, and it is different from making a claim about the individual, personal qualities of judges; and so I will analyse the structure of a trial in some detail. Although major constitutional questions in common law systems are finally decided by supreme courts rather than trial courts, they begin in trial courts and in many cases a substantial part of the evidence is generated there. Moreover, as observed in chapter one, the American model of constitutional rights adjudication presumes the competence of trial judges to decide whether legislation complies with constitutional rights.

The pre-trial and trial process is mainly controlled by the parties (whether plaintiff, prosecutor, or defendant), who set the court's agenda by the decisions they make in filing criminal charges, initiating civil complaints, asserting defences, and making pre-trial motions. Even with regard to the question of which law to apply to the case, the judge may not have a free hand. A legal norm that fits the facts may be left unmentioned by a party or intentionally set aside for strategic reasons—or because of an attorney's negligence. Depending on the rules of pleading, this could place that law beyond the judge's remit, or this could be treated by the judge as sufficient reason not to consider applying it. With regard to ascertaining the relevant law, the judge may or may not have the responsibility or resources to go beyond the legal research presented by the parties. In the UK, there is a general expectation that a judge will not perform legal research beyond what is submitted by the parties. When judges do this in exceptional cases they are expected, before relying on legal authority not previously submitted by the parties, to raise the issue and invite their comment. In the US any expectations in this regard are relaxed; judges are relatively more likely to research legal issues beyond party submissions, but often do not do so.

The parties are chiefly responsible for gathering and submitting evidence, a process governed by many technical rules and routines. Parties have this responsibility in constitutional as well as ordinary cases, despite the tendency observed in chapter four of some judges to conduct their own research into legislative facts. Documents and physical evidence are subject to stringent standards for authentication. Oral testimony is regulated by a system of exclusionary rules. In criminal cases the accused is not required to testify, and evidentiary privileges allow spouses and certain others not to testify. Many sources that would be valuable to ordinary historical investigation of an incident are not considered in the context of a trial. Some of the traditional rules regarding exclusion of hearsay, similar act evidence, and character evidence have been relaxed in England, but most are still rigorously observed in the US and other common law jurisdictions. These rules are part of an intricate system governing the submission of evidence as well as direct and cross examination, touching not only on matters of content but also on the amount of time allotted to the parties. Decisions regarding the admission of evidence depend on the judge's assessment of relevance and appropriate use of limited time. To further efficiency, parties may be permitted to stipulate certain facts.

Certain procedures allow facts to be deemed to be true for the purposes of a case, and this can be so even when the actual truth is not known or is known to be the opposite.¹

When the evidentiary record has been compiled, the judge assesses it against the particular legal concepts made relevant by the parties' claims ('contract', 'foreseeable risk', 'intent to defraud', etc), in light of the appropriate standard of proof and the law's allocation of the burden of proof. The two most common standards, 'preponderance of the evidence' (or 'balance of probabilities') in civil cases and 'beyond reasonable doubt' in criminal cases, are chosen for the particular purposes of trials and would be unsuited for much of the work of investigators such as historians—or for legislators. The judge's ultimate decision on the legal claim—and the entire trial process—is not only filtered through a legally prescribed standard of proof but also framed by the bivalent nature of Western legal proceedings.² A criminal trial ends in conviction or acquittal of the accused. A civil trial ends in a decision as to whether a legal claim or set of claims—usually a question of liability of one party to another—is established. Bivalence affects judicial review proceedings as well, since they must generally conclude in a judgment that a statute is either constitutional or not constitutional. This point will be taken up in chapter seven in a discussion of whether the remedies available to constitutional courts are appropriate.

The fact-finding process of the trial is not simply a search for historical truth. The path to judgment is bounded on every side by procedural and evidentiary rules. A trial is a technical routine centred on giving an answer to a binary legal question, and it is subject to the shifting strategies of parties who manoeuvre for advantage as the process unfolds. I am not arguing that historical truth does not matter or is not important. A system of adjudication is established to test the accuracy of legal claims, including their factual basis. This aim, however, exists in tension with other goals such as efficient use of limited judicial resources, finality, and procedural fairness.³ Thus, for example, evidence discovered after a final judgment usually cannot be used to challenge it. There are exceptions to this, but without a general rule of finality cases could be perpetually re-litigated. Some rules promote accuracy by causing the court to focus on what is of greater relevance and to exclude that which could cause prejudice, particularly to lay jurors. Other rules and privileges against testifying, however, promote policy goals distinct from truth-finding in an individual case. A rule excluding evidence obtained through

¹ For example, the US federal rules of civil procedure allow parties to make a 'request for admission' in the form of statement regarding factual and legal issues in a case; the opposing party's failure to make a timely denial results in such statements being deemed true, unless the judge permits the admission to be withdrawn or amended. US Federal Rule of Evidence 36.

² See T Endicott, *Vagueness in Law* (Oxford, Oxford University Press, 2001) XX.

³ For an argument that certain rules excluding relevant evidence promote fairness to the parties see HL Ho, *A Philosophy of Evidence Law: Justice in the Search for Truth* (Oxford, Oxford University Press, 2008) Ch 2.

illegal searches, for example, may be designed to deter police misconduct and promote the integrity of the judicial process, at the known and accepted expense of eliminating information that would enhance the accuracy of judgment in an individual case. An historian would never accept a verdict in a criminal trial as necessarily establishing the guilt or innocence of the accused. The verdict could have turned not only on mistake, bribery, or intimidation, but also on contingent factors that legitimately affect the outcome, such as exclusion of relevant but invalidly obtained evidence or the unavailability of a key witness.

Thus far I have focused primarily on the role of the judge in the traditional common law trial. Appellate courts are accorded greater authority in matters of legal interpretation, but their jurisdiction is often limited to determining whether trial courts made errors substantial enough to warrant reversal. They usually focus on questions of law, reviewing the fact-finding of trial courts under deferential standards and without receiving new evidence on adjudicative facts. This is in part because the capacity of appellate court to determine adjudicative facts is inferior to trial courts, which have the ability to observe and engage with witnesses. With regard to legislative facts, appellate courts increasingly consider new evidence not considered at trial, as described in chapter four. Whether trial or appellate courts have better capacities for finding legislative facts is debatable, but I will argue below that both are inferior to legislatures.

Much of what I have said about the adversarial nature and artificiality of common law trials is characteristic of civil law trial processes as well,⁴ though judges there have more power to ensure pertinent legal issues are raised and evidence obtained; they are more involved in questioning witnesses,⁵ and there are fewer constraints on the admissibility of evidence.⁶ The more focused point of comparison, however, is to the Kelsenian constitutional court, which, as discussed in chapter one, generally has a monopoly on questions of constitutional law in civil law systems and is institutionally structured to be different from ordinary legal courts. It exists outside that system rather than at the top of its hierarchy. The Kelsenian court is not set up primarily to settle disputes between parties, but to resolve controversies over constitutional provisions and their application and interpretation. Thus, it is intentionally set up to play a political role and, for Kelsen, to be a 'negative legislator'. This results in some significant differences regarding institutional capacities and structure between Kelsenian constitutional courts and courts in common law systems, which will be touched on here below and discussed further in chapter seven.

⁴ See JH Merryman and R Pérez-Perdomo, *The Civil Law Tradition: An Introduction to the Legal Systems of Europe and Latin America* (Stanford, Stanford University Press, 2007) 82, 112.

⁵ Civil procedure reforms in the US and the UK have given trial judges certain powers to manage the pre-trial and trial process that are somewhat like those of civil law judges. See J Resnik, 'Managerial Judges' (1982) 96 *Harvard Law Review* 374; Lord Woolf, 'Access to Justice: Final Report to the Lord Chancellor on the Civil Justice System in England and Wales' (London, HMSO, 1996) Chs 1–8.

⁶ See M Damaška, 'Evidentiary Barriers to Conviction and Two Models of Criminal Procedure: A Comparative Study' (1972) 121 *University of Pennsylvania Law Review* 506.

One might question whether supreme courts in common law systems have evolved in the direction of Kelsenian constitutional courts. The US Supreme Court now focuses on settling major questions of law—including questions of statutory interpretation but with an emphasis on constitutional law—and the number of cases it decides has been shrinking steadily. In the early 1980s the Court decided over 150 cases per year, and since 2000 it has been around half that number; in 2014, 71 cases were heard.⁷ While there seems to be less emphasis now on resolving individual disputes, the fact that the Court's jurisdiction derives from actual cases and its position on top of the federal court system still frames its institutional capacities in important ways. The Court, like the Canadian and Irish supreme courts, still has the basic structure of a common law appellate court, whose function is to hear appeals from cases in lower courts, mainly on questions of law.

Over and beyond the differences between civil and common law systems, both adhere, generally, to the underlying principle that a judge acts in a public capacity. He renders judgment based only on the legally admissible evidence, not on the basis of his private knowledge. That evidence forms a complete, written record, which can be reviewed on appeal and is subject to public scrutiny. The concept of public or official capacity was established well before Aquinas, who described the judge's role as *persona publica*,⁸ and illustrated the principle with his argument that even in a trial of a capital offence, a judge should render a verdict only on the basis of legally admitted evidence, even if he is certain of the innocence of the accused from his private knowledge.⁹ The principle that Aquinas defended, and that Roman lawyers had earlier developed, is now generally accepted in Western legal systems, though modulated by rules regarding recusal in cases where a judge cannot sufficiently insulate his public role from what he knows or suspects in his private capacity. That principle—in short, that a judge acts in a public capacity and renders judgment only on the basis of legally admitted evidence—gives structure to the forms and procedures of our legal systems and lies at the centre of our conception of a fair trial. That principle, moreover, entails that judicial reasoning is (to a very large extent) autonomous; it is purposefully insulated from—and impervious to—many truths that guide the reasoning of historians, moral philosophers, or legislators.¹⁰

When the context is shifted to judicial review of legislation, the cases discussed in chapters two and four demonstrate that the judge's public persona cannot be maintained with respect to finding legislative facts. All that a judge knows

⁷ See 'Statistics' at ScotusBlog, available at www.scotusblog.com/statistics/.

⁸ See *Summa Theologiae* II-II q. 40 a. 1 ad 1; q. 98 a. 4c.

⁹ See J Finnis, *Aquinas: Moral, Political, and Legal Theory* (Oxford, Oxford University Press, 1998) 250. In such a case the judge should strive to obtain admissible, exculpatory evidence: *ibid.*, n 158. Aquinas's position is in contrast to that of Lucas de Penna, who argued in the fourteenth century that a judge had but one conscience; he could not convict on the basis of conscience alone, but nor could he convict if he knew that the accused was innocent. See W Ullmann, *The Medieval Idea of Law As Represented by Lucas De Penna* (London, Routledge, 2010) 127–29.

¹⁰ See J Finnis, 'Natural Law and Legal Reasoning' (1990) 38 *Cleveland State Law Review* 1.

(or thinks he knows), whether from Brandeis briefs, independent research conducted during a case, or from past reading, is relevant to empirical questions in a balancing test (as one court put it, ‘the *actual* connection between the objective and what the law *will in fact* achieve’ (emphasis added)).¹¹ There is no requirement for a complete and comprehensive record of legislative facts. That would be as difficult to compile as it would be for a judge to separate on-the-record legislative facts from his general knowledge of the world (recall Justice Blackmun’s account of his two weeks in the Mayo Clinic archives, research that was ‘personally and very privately performed’).¹²

The general limitations on judicial reasoning identified in this section are not a defect. Western artists have, for good reason, chosen to represent Justice with a blindfold. Lord Bingham has well described this commonplace but important ideal of adjudication:

All legal arbiters are bound to apply the law as they understand it to the facts of individual cases as they find them. They must do so without fear or favour, affection, or ill-will, that is, without partiality or prejudice. Justice is portrayed as blind not because she ignores the facts and circumstance of individual cases but because she shuts her eyes to all considerations extraneous to the particular case.¹³

The concept of law implicit in this ideal is a pre-existing, objective standard, rather than one devised in response to the specific circumstances of the case. Finnis has described the idea of judicial power as a way of relating the present case to a past decision:

The judicial responsibility is to adjudicate between parties who are in dispute about their legal rights and obligations by applying—to facts agreed between them or found by the court after trial—the law that defined those rights and obligations at that time past when the matter of their dispute (the cause in action) arose. The court’s judgment identifies and applies the legal commitments the community should be judged to *have made* to each of the parties now before the court, *by the time* they came into conflict with each other about the content or applicability of those commitments: past. The legislature’s responsibility is to make new or amended public commitments about private rights (and public powers) for the future.¹⁴

In contrast to the artificial world of the trial, legislators must deal with the ‘real world’ or, in other words, everything that is the case. In their efforts to acquire factual knowledge, legislators are like historians or scientists in that they usually have no need to exclude evidence or to filter information through legal standards of proof. Legislators are responsible to make decisions based on current knowledge of the world, and to change laws that do not fit well with existing (and anticipated) states of affairs. To the extent that judges act as lawmakers, their field of vision

¹¹ *RJR-MacDonald, Inc v Canada* [1994] 1 SCR 311 [133].

¹² See ch 4, section II.

¹³ *Locabail v Bayfield Properties* [2000] QB 451 [2].

¹⁴ J Finnis, ‘Judicial Power: Past, Present and Future’, Lecture at Gray’s Inn Hall, 20 October 2015, Oxford Legal Studies Research Paper No 2/2016 <<http://dx.doi.org/10.2139/ssrn.2710880>>.

and practical orientation resembles that of legislators in some ways, as evidenced by the practice of finding legislative facts considered in chapter four. The scope of their responsibility, however, is usually much narrower than a legislature's, and their ability to respond to changing conditions in society is far more limited. Such considerations led Hart to characterise the law-making power of courts as interstitial:

It is important to note that the powers I ascribe to judges to regulate cases left partly unregulated by the law are different from those of the legislature: not only are the judge's powers subject to many constraints *narrowing his choice* from which a legislature might be quite free, but since the judge's powers are exercised only to dispose of particular instant cases he cannot use these to institute large-scale reforms or new codes. So his powers are *interstitial* as well as subject to many substantive constraints.¹⁵

In constitutional rights cases, the features of judging and judicial power identified by Bingham, Finnis, and Hart are inverted. The circumstances of the individual case are not exactly 'extraneous' to decisions about constitutional rights, but are far less important than the question of whether to strike down or uphold a statute, and the general consequences of that for society. That view of the consequences is forward-looking, an effort to make a better future, not an effort to align the present to a past decision. And there is nothing narrow and incremental about the methods of constitutional rights adjudication analysed in chapter two, and their consequences for the shape and content of the law.

II. The Basic Structure of Legislative Reasoning

The legislature, in contrast to the role of courts in ordinary cases, looks forward, anticipating future dangers and opportunities and prospectively considering whether changes in the law are needed for society to avoid harms and realise goods through co-ordinating in particular ways.¹⁶ The possible courses of action available to a legislature are many and open-ended. Some accounts of the legislature, such as Dworkin's discussed in chapter three, depict it as responding to inputs (say, the preferences of constituents) or choosing among the salient options that have been presented to it. The first and distinctive work of the legislature, however, is to *determine what are* the salient options by means of open-ended investigation and inquiry, and creatively forming and deliberating on proposals. Whereas courts respond to claims initiated by others, the legislature acts on its own initiative. The legislature has the capacity to make new law on any subject and to amend or repeal any existing law, while the law-making capacity of courts extends at most to the particular legal issues raised by parties.

¹⁵ *The Concept of Law*, 2nd edn, (Oxford, Oxford University Press, 1994) 'Postscript', 273.

¹⁶ See R Ekins, *The Nature of Legislative Intent* (Oxford, Oxford University Press, 2012) 118–27.

We can define a legislature as a body that has standing authority to create law in canonical linguistic form—that is to say, statutory law—and the power to amend and change existing law.¹⁷ In this book I use *legislature* to refer to the group of officials responsible for formulating, proposing, and enacting legislation, at whatever place they occupy in the political structure. This usage is broader than referring to a specific body such as the UK House of Commons or US House of Representatives. I assume, for the sake of simplicity, a unitary legislature, setting aside particular differences arising from bicameralism and federalism. In this unitary model¹⁸ the legislature consists not only in elected representatives (and their draftsmen, researchers, and other agents), but also officials who are members of the executive (either by belonging to a separate branch or by having an ‘executive’ or ministerial role while also serving in the legislature). In the UK and other parliamentary systems, the Prime Minister and cabinet ministers often have the main responsibility for drafting, proposing, and overseeing the passage of legislation. The US President can, like some other separately elected heads of the executive branch, initiate legislation and shape its content, through the power to veto laws and other means. Moreover, the officials of regulatory agencies participate in law-making; in addition to implementing legislative decisions through detailed rule-making, they may influence the content of primary legislation or serve as a repository of information for legislators. My focus in this chapter, however, is on primary rather than delegated legislation.

I assume that the members of the legislature are elected representatives, as is largely true in Western legal systems—though not for administrative lawmakers and certain bodies such as the UK House of Lords. The democratic character of the legislature, however, is not central to my comparative analysis of institutional capacities. There is a tendency in the literature on judicial review and separation of powers to characterise the legislature as an institution whose chief, or only, virtue is its ability to ascertain and act on the will of the people. Dworkin and other theorists rely on the majoritarian character of the legislature to disparage its ability to act as a forum of principle (see chapter three, section II). Jeremy Waldron has turned this argument around, offering a powerful defence of legislatures and critique of judicial review as a violation of democracy and the fundamental right of people to participate in law-making.¹⁹ His defence of the legislature and its deliberative powers focuses primarily on its democratic or majoritarian character.

¹⁷ *ibid.*

¹⁸ The sense of ‘unitary’ above is different from the sense in which Waldron criticises unitary models of the legislature in *Law and Disagreement* (Oxford, Oxford University Press, 1999) at 42–45. Waldron argues that the legislature should not be conceived as having intentions like an individual person: *ibid.* For an opposing view see Ekins, *Legislative Intent*, above n 16, Ch 3. This is an important question for understanding the nature of legislative action, but it can be set to one side for purposes of my argument.

¹⁹ Waldron, *Law and Disagreement*, above n 18, Ch 11.

My critique of judicial review is not, like Waldron's, based on the claim that it is undemocratic, and relies only incidentally on the representative nature of legislatures. In section V below, I push back against depictions of the legislature as being in its essence a *majoritarian* institution. While certain aspects of the discussion below connect legislative capacities to democratic representation, many of the capacities I describe would hold true for an aristocratic or non-elected legislature. There are several important deliberative structures and institutional features of the modern legislature that do not depend on being democratic. These include the following capacities: (i) to acquire and evaluate factual information about society as a whole and about technological and scientific matters relevant to legislation; (ii) to take a general and prospective view of society and relate a variety of problems and opportunities to the inter-connected areas of law that affect them; (iii) to bring together a variety of perspectives from individuals with expertise and abilities in different areas; (iv) to deliberate freely about the common good and the actions and standards of conduct needed to achieve it; (v) to alter more than one legal norm at a time; and, perhaps most importantly, (vi) to amend or repeal existing legal rules, freely and openly through regular procedures, in response to changing societal conditions and goals. My account of comparative institutional capacities emphasises these capacities of a legislature.

III. Capacity for Empirical Reasoning

This section focuses on the legislature's capacity for empirical reasoning, which can be compared to the judicial capacity for this that was analysed in chapter four. Today's legislature needs a wide range of information to identify areas where the law needs to be changed, to form intelligent proposals for legislation and evaluate them, and to anticipate the effects of proposed legislation. Its first source of information is its members' own stock of experience, knowledge, and memory. A legislature typically has hundreds of members with experience in various professions and types of government service, and they have a variety of educational backgrounds and personal knowledge of the regions they represent. This diversity of background and expertise provides the legislature with collective knowledge not possessed by a collegial court, much less a lone judge. Although justices of constitutional and supreme courts are highly educated, they are almost all trained as lawyers and are typically drawn from a small set of elite schools and institutions.

My argument proceeds on the intuitive claim that deliberation about questions of political morality is capable of reaching more sound decisions when it includes voices of people with different kinds of knowledge and expertise, and less capable when important areas of social or economic life are excluded from its view

or not understood.²⁰ This is similar to Aristotle's notion of the 'wisdom of the multitude':

For each individual among the many has a share of excellence and practical wisdom, and when they meet together, just as they become in a manner one man, who has many feet, and hands, and senses, so too with regard to their character and thought. Hence the many are better judges than a single man of music and poetry; for some understand one part, and some another, and among them they understand the whole.²¹

Applying Aristotle's ideal to the legislature, Waldron argues that its diversity of experience provides 'a basis for reciprocal questioning and criticism and enabling a view to emerge which is better than any of the inputs and much more than a mere aggregation or function of those inputs'.²² The legislature's deliberations are enhanced by having members with first-hand knowledge of law, medicine, science, and business. Legislative reasoning would be diminished if legislators were all lawyers, all doctors, all scientists, or all business managers.

In addition to their background knowledge, legislators acquire policy expertise in particular areas, often serving on committees that build the knowledge base of the legislature in particular areas. Adrian Vermeule has noted that in the US Congress, 'The seniority norm and the proliferation of subcommittees imply that a member of the modern House of Representatives spends many years becoming deeply expert in a narrow slice of public policy'.²³ In legislatures with a different structure and committee system, a similar result will often be achieved through other paths. It would be impossible for every member to master the details on the various Bills proposed in a legislative session, but Aristotle's ideal of group wisdom—that 'some understand one part, and some another, and among them they understand the whole'—is something a legislature can reasonably strive to attain. When representatives defer to those with greater expertise in a given area, the average competence of the legislature increases.²⁴

Diversity of education and professional expertise is generally found in democratic legislatures, but mainly because of their size rather than their democratic character. Electoral systems are usually designed to provide for representation by regions or for proportional representation of political parties. They do not aim intentionally to produce diversity of professional or educational background. But in a large body some degree of diversity is a likely side effect.²⁵ Although the UK

²⁰ For an argument on how diversity improves political decision-making see T Gyofi, *Against the New Constitutionalism* (Cheltenham, Edward Elgar, 2016) 108–20.

²¹ Aristotle, *Politics*, S Everson (ed) (Cambridge, Cambridge University Press, 1996), Book III: 1281a43–b9. For discussion see Waldron, *Law and Disagreement*, above n 18, 82, 85 136–37; J Waldron, *The Dignity of Legislation* (Cambridge, Cambridge University Press, 1999), Ch 5.

²² *Dignity of Legislation* 106.

²³ A Vermeule, *Law and the Limits of Reason* (Cambridge, Mass, Harvard University Press, 2008) 85 (citing K Krehbiel, *Information and Legislative Organization* (Ann Arbor, Michigan University Press, 1991)).

²⁴ See Gyofi, *Against the New Constitutionalism*, above n 20, 107.

²⁵ Lawyers are often over-represented in democratic legislatures, at least in terms of percentage of population. From 1960 to 2004, 45% of US representatives (House and Senate) were lawyers; 13.6%

House of Lords is a non-elected and now mostly appointed institution, it is more diverse with regard to professional background and life experience than the House of Commons.

Elections and representation also matter in another way for empirical reasoning. As Vermeule observes, ‘legislators are connected to constituents and thus have better information about the factual components and causal consequences’ of decisions than judges; the demands of re-election ‘force legislators to leave the halls of government, to travel the land, and to meet constituents, including, now and again, ordinary people. Judges need never leave the cloister, or at least the bubble of professional prestige that surrounds them.’²⁶ The greater information of legislatures comes at a cost: ‘the need to secure re-election can cause distortion of legislators’ true views.’²⁷ The absence of such demands on judges can make them more impartial, but this also has a cost: ‘a relative dearth of facts and tacit knowledge.’²⁸

Vermeule argues that the trade-off between information and bias ultimately favours the legislature, because biases among legislators are at the individual level where they tend to cancel out in a large, politically diverse group.²⁹ Judges, Vermeule says, have correlated biases arising from their common background and educational training.³⁰ On at least some collegial appellate courts, however, biases of judges could also cancel out due to their having different political opinions and to previous participation in political parties. In my view, constituent representation and the electoral process contribute to the legislature’s capacity for empirical reasoning, but that contribution is relatively less important than in Vermeule’s account. Of at least equal importance are the ways citizens present views and facts to legislators that are not necessarily tied to re-election or representation: through writing letters, working in pressure groups, and expressing views in formal and informal media (such as blogs and social media). Engaging with citizen activity of this kind could give the non-elected, non-representative House of Lords access to factual aspects of a decision that in many contexts would approximate that of the Commons. It is true, however, that elected MPs have more incentive to pay attention to this source of information.

In addition to the sources of information above, legislators rely on knowledge supplied by researchers and experts of various kinds. This will be more important

had a background in business; 2.2% had worked in health care, half of those as physicians; this was a decline from Congress’s first century, when about 5% of representatives were physicians. In 2004 there were eight physicians in Congress. C Kraus and T Suarez, ‘Is There a Doctor in the House? ... Or the Senate?’ (2004) 292 *Journal of the American Medical Association* 2125. From 1960 to 2004, representation by occupation, in declining order, was as follows: attorney, business, public service, education (all levels), military, media/entertainment, agriculture, banking and insurance, other/miscellaneous, health care (nonphysician), physician, law enforcement, minister/clergy: *ibid*, 2126.

²⁶ Vermeule, *Law and the Limits of Reason*, above n 23, 86.

²⁷ *ibid*.

²⁸ *ibid*.

²⁹ *ibid* 87.

³⁰ *ibid*.

in many contexts than background knowledge or facts learned from constituents. Lawmakers need specialised information on myriad topics: technology and applied science; rates of poverty and employment and other demographic data; levels of debt, lending practices, and bank reserves; the efficacy and safety of pharmaceuticals and many other concerns of public health; environmental issues, etc. In recent decades there has been an explosion in information and empirical research, and the internet has reduced the transactions costs of acquiring it. Information is often supplied by universities, non-governmental organisations and think-tanks at no cost to the legislature. Legislators are capable of obtaining information, but they also need assistance: to sift mountains of data, to understand statistical methods used in reporting, to discard faulty research, and generally to judge the reliability of information and its sources. Experts disagree. Indeed, disagreement among experts and researchers is pervasive in most areas relevant to law-making and policy-making.

Social science is an important but fragile foundation for law-making. (Here I use 'social science' broadly to indicate economics, sociology, psychology, criminology, and related fields such as medical research.) It can reveal patterns of interaction of people with each other and their environment; it can identify probabilities of certain events; and sometimes it can point toward the discovery of causal relationships. What is the correlation between raising the speed limit by 10 miles per hour and the number of traffic fatalities? Legislatures need information on many questions like this. Proving actual causation with certainty is another matter, however. Traffic fatalities are caused by many inter-related factors, some of which are likely to change over the course of a single decade: size and weight of vehicles; safety features; road conditions and signage; driver habits and training; and propensity to drive while intoxicated or using mobile phones, etc. Speed limits play their part, but the difficulty of isolating and arguing for the likely causes of traffic fatalities—much less *proving* those causes—is indicative of the general challenge facing researchers.

Lasting and certain conclusions lie largely outside the grasp of social science. Alasdair MacIntyre argues that social science cannot provide 'law-like generalizations' because of the systematic unpredictability of human affairs. We cannot anticipate certain events that seem to be pure contingencies (eg Napoleon catching a cold before Waterloo) and their further consequences,³¹ and we cannot predict radical conceptual innovations such as the invention of the wheel or a new mathematical theorem.³² Consider the economist at the beginning of the twentieth century attempting to predict the future economy without knowledge of the silicon semiconductor. Even at its most certain, social science has temporal limitations. A finding made today, even if replicated, may not be relevant or accurate for the human situation decades from now, or even a few years from now.

³¹ A MacIntyre, *After Virtue*, 2nd edn (Duckworth, London, 1985) 100.

³² *ibid* 93.

Reading the original Brandeis brief, which quotes reports of researchers reflecting perceptions of the role of women in society in the early twentieth century,³³ is sufficient to show the fragility of social science. Today's Supreme Court would almost certainly strike down the law upheld in *Muller v Oregon* (1908),³⁴ given its gender-based distinction on permissible work hours.

Social scientists often direct their research toward what they perceive as problems in social life, and what they perceive as problems depends on their moral and political philosophy, even if inchoate or unarticulated or unconsciously held.³⁵ Daniel Patrick Moynihan, who was a Harvard sociologist before becoming a senator (as a Democrat representing New York), observes that the political orientation of the social sciences is evident in the shifting fashions in research topics.³⁶ Trade unions, for example, were heavily researched from 1910 to 1950 but later neglected, Moynihan contends, for political reasons: community organisations funded by government and anti-poverty efforts became more favoured subjects.³⁷ It is not improper for social science—and the researchers themselves—to be motivated or influenced by moral concerns or political considerations. One should, rather, assume that they often are. Neither law-makers engaging with social science nor judges reading Brandeis briefs should, therefore, presume that studies are unaffected by researchers' views on questions of political morality.

In addition to the temporal limitations of social science and possible bias, there is the problem of understanding statistical methods. In chapter four, section V, I considered persistent judicial misunderstandings surrounding 'statistical significance' and related concepts, and the disagreement among statisticians about proper methods for research and reporting data. While judges lack competence for understanding social science, as I have argued, the same will be true for many individual legislators. Some legislators have a background in fields such as medicine or engineering, but even they need help in navigating the statistical minefield.

It is at this crucial juncture of the *interface* between law-makers and researchers that the institutional differences between courts and legislatures are perhaps most pronounced. Courts are largely *passive* recipients of empirical research, which is usually presented by advocates in Brandeis briefs in an adversarial setting designed not for discovering general empirical knowledge about society but for resolving legal disputes between parties and finding the particular facts relevant to that dispute. The exception to this passive reception is when judges conduct their own independent empirical research—a deficient procedure. Legislatures, in contrast, can actively engage with both researchers and intermediaries who help to interpret data and statistical methods. Legislatures can hold hearings, examine experts

³³ See A Baron, 'Protective Labor Legislation and the Cult of Domesticity' (1981) 2 *Journal of Family Issues* 25.

³⁴ *Muller v Oregon* 208 US 412 (1908).

³⁵ See J Haidt, *The Righteous Mind: Why Good People are Divided by Politics and Religion* (London, Allen Lane, 2012).

³⁶ DP Moynihan, 'Social Science and the Courts' (1979) 54 *Public Interest* 12, 20.

³⁷ *ibid.*

and other witnesses, and commission various sorts of research, investigations and inquiries. Some legislatures, such as the US Congress, assign responsibility to study particular areas to committees, which interact with and provide a degree of oversight to a corresponding executive department. In a Westminster-style Parliament such responsibilities are controlled more directly and extensively by Cabinet ministers, though legislative committees may have important responsibilities as well. In both systems legislators acquire and assess empirical research on a daily basis and gain a level of proficiency superior to that of judges, who handle empirical research on a more occasional basis and in a more detached manner.

The US Congress has three in-house research bodies: the Congressional Budget Office, which provides economic analysis; the Government Accountability Office, which was started to review financial accounting but now also conducts general investigations and in-depth evaluations of government programmes; and the Congressional Research Service (CRS), which provides general research and investigatory services.³⁸ Together they have about 4,000 employees.³⁹ The CRS annually responds to about 60,000 specific requests for information from Congress and prepares over 1,000 new full-length reports, on topics ranging from terrorism and national security to water resources.⁴⁰ The staff of 600 at the CRS includes reference librarians, economists, lawyers, and social, natural and physical scientists; and its annual budget is about \$100 million.⁴¹ In the UK and other parliamentary systems, where government ministries, under a Cabinet minister, have the primary responsibility for drafting and proposing legislation, the fact-finding resources for law-making tend to be concentrated in executive bodies rather than in institutions attached to the legislature such as the CRS. Independent statutory bodies also play a role, such as the UK Statistics Authority, which monitors all official statistics in the UK and provides independent assessment of them, and also oversees its executive arm, the Office for National Statistics. In both presidential and parliamentary systems there is considerable overlap of responsibility for law-making between the 'legislative' and 'executive' branches, particularly in areas that concern technological and scientific information. In both systems the legislature often sets general standards and delegates responsibility for detailed rule-making to executive agencies, which develop their own resources for investigation and building a knowledge base. In Germany, for example, the administration is advised by around 300 permanent scientific advisory councils, and there are about 50 scientific institutes under the auspices of executive departments.⁴² The administration receives further advice from para-state institutes such as those in the Max Planck network and the Berlin Science Center.⁴³

³⁸ See I Brudnik, 'The Congressional Research Service and the American Legislative Process' (2008) Congressional Research Service.

³⁹ *ibid.*

⁴⁰ See Annual Report, Fiscal Year 2015, of the US Congressional Research Service.

⁴¹ *ibid.*

⁴² K von Beyme, *The Legislator: German Parliament as a Centre of Political Decision-making* (Aldershot, Ashgate, 1998) 23.

⁴³ *ibid.*

Such institutional structures can, of course, exhibit various forms of incompetence, bias toward the status quo, or corruption. The point of this discussion is not to idealise committees, ministries, or legislative procedure, but to draw a broad sketch of the information-gathering capacities of legislatures, which contrasts with the meagre capacities of courts discussed in chapter four. The key, in keeping with the focus of the book on constitutional design, is *institutional capacity*, not such matters as the specific amount of funding available for research services. Not all legislatures will have—or need—the level of resources of the CRS or other bodies that provide the US Congress with information. But legislatures have the basic capacity to acquire and assess information through the various means discussed above, and to develop those means into structures with appropriate resources. This is a normal outgrowth of their day-to-day activities, and it fits with their future-oriented perspective and their function of having standing authority to change the law on any subject.

It is possible to improve the capacity of courts to investigate legislative facts, and in chapter seven I will consider a proposal for this put forth by Kenneth Davis to add a research service to the US Supreme Court on the model of the CRS. I will argue, however, that such proposals would generally fit better with the Kelsenian model of a constitutional court standing outside the normal system of courts. I will also discuss the German Federal Constitutional Court as an example of a Kelsenian court that has a capacity for active engagement with empirical research, which in certain limited respects resembles the legislative capacities discussed above.

IV. Capacity for Moral Reasoning

In this section I compare the institutional capacities of courts and legislatures to engage in moral reasoning. As this is a vast subject,⁴⁴ my discussion focuses on the arguments usually offered in defence of rights-based judicial review. These arguments rarely stress the personal acumen of judges for ethical theory, or the general quality of the reasoning expressed in judicial opinions on moral issues. This should not be surprising, since the educational background and training of judges typically focuses on technical legal learning and reasoning, with no specific component for moral reasoning. No one thinks that lawyers are inherently moral experts, or that they become such by donning a black robe.

Many arguments amount to variations of Dworkin's distinction between principle and policy and his argument that courts are the forum of principle (and hence the forum of rights: see chapter three, section I). These arguments preserve

⁴⁴ Several topics within that subject are explored in depth in G Webber, P Yowell et al, *Legislated Rights: Securing Human Rights Through Legislation* (Cambridge, Cambridge University Press, forthcoming).

a sphere for democratic decision-making but cast it as deficient for areas that come within constitutional rights. In Dworkin's summing up, judicial review 'insures that the most fundamental issues of political morality will be finally set out and debated as issues of principle and not political power alone.'⁴⁵

Before proceeding, we should recall the scope of constitutional rights jurisdiction discussed in chapter two. It is not confined to a few of the most fundamental issues. Because of the nature of balancing and proportionality tests along with the conception of prima facie rights they assume, that jurisdiction is almost unlimited. In recent decades, cases on constitutional rights in recent decades have addressed, among many other issues: assisted suicide and euthanasia; abortion; adoption by same-sex couples or by single parents; surrogacy; polygamy; prostitution; pornography; possession of guns; religious education and prayer in schools; single-sex schools; the wearing of headscarves and other religious dress in schools and other public settings; public display of religious symbols; regulation of campaign finance and political advertisement; speech that disparages someone on account of race, sex, or sexual orientation; and affirmative action programmes designed to give advantage based on race or other personal characteristics. Formerly constitutional rights cases dealt also with issues such as slavery, racial segregation, eugenics, and the free expression and political rights of Communists and others belonging to parties considered subversive.

The reasons given for considering courts to have greater capacities to decide such issues usually come down to two related points. First, deliberation and decision-making in the legislature is said to be motivated at a basic level by the interests and will of the electorate; further, it is liable to corruption because of the possibility of legislators' personal self-interest, arbitrary partisan interest, or prejudice against minorities. Second, judicial reasoning is claimed to be reason-based, and thus, at a basic level, rational in a way that legislative reasoning is not.⁴⁶ Whereas legislators must concern themselves with political expediency, judges 'can afford to take the long view that moral insight demands.'⁴⁷ A contrast is often drawn between the rancorous debate of legislatures and the calm, serene atmosphere of collegial courts, where judges proceed through arguments in an orderly and measured fashion. Many point to the requirement that judges give reasons to justify decisions as a basis to prefer their moral judgment over legislatures.

The contrast between interest-based legislative reasoning and reason-based judicial reasoning is held to be at its strongest when the interests of minorities are at stake. Dworkin argues:

Legislators who have been elected, and must be reelected, by a political majority are more likely to take that majority's side in any serious argument about the rights of the minority against it; if they oppose the majority's wishes too firmly, it will replace them with those

⁴⁵ R Dworkin, *A Matter of Principle* (Cambridge, Mass, Harvard University Press, 1985) 70.

⁴⁶ For a critique of this view, see R Ekins, 'Legislation as Reasoned Action' in *Legislated Rights*, above n 44.

⁴⁷ M Moore, 'Moral Reality Revisited' (1992) 90 *Michigan Law Review* 2424, 2477.

who do not. For that reason legislators seem less likely to reach sound decisions about minority rights than officials who are less vulnerable in that way.⁴⁸

Hence judicial review is justified as a counter-majoritarian institution, a modern version of the argument of Madison and Tocqueville about the tyranny of the majority. For some critics of legislatures, the scepticism regarding their capacity to reason morally extends beyond the counter-majoritarian situations. Ronald den Otter, for example, writes:

[T]he most honest rationale for the practice of judicial review is rooted in pessimism about the likelihood that ordinary citizens or their elected representatives could decide important cases competently ... In the end judicial supremacy turns out to be the lesser of two evils: it is a safer bet in an imperfect world where the vast majority of citizens are either incapable of making informed, reflective decisions on basic questions of public morality or unwilling to make the effort to do so.⁴⁹

Even a judicial review sceptic such as Robert Nagel writes:

Legislators do not always know or articulate moral objectives before enacting programs and frequently rationalize them to their constituents only afterwards ... They respond to wildly irrational arguments and even to power unadorned by intellectual argumentation ... Compared to the detached, careful evaluation of briefs and evidence in light of an explicit, consistent set of legal values that is the ideal of the judicial process, the legislative process is a nightmare of irrational decision making.⁵⁰

These arguments are exaggerated in two directions. They are unduly critical of the legislature and overly optimistic about the capacity of courts to engage in reasoned deliberation about moral issues. My argument proceeds as follows. In sections IV.A and IV.B, I make some general proposals regarding the proper role of morality in legislative decision-making. My argument is compatible with many different views on moral and political philosophy, as well as differing conclusions about particular issues. I assume that moral truth exists in the sense that right answers are both possible and available regarding the (im)permissibility or otherwise of activities such as those listed above, as well as on the distinct question of whether moral judgment on such issues should be reflected in law.⁵¹ The term, 'question of political morality', which I have used previously, is meant to capture both of these distinct questions. This account of the role of moral reasoning in legislative deliberation is a prelude to analysis of judicial capacity for moral reasoning, which I take up in section IV.C. In section V, I will argue that it is a misconception of legislatures to see their characteristic function or purpose as enacting the will of

⁴⁸ R Dworkin, *Law's Empire* (Cambridge, Mass, Harvard University Press, 1986) 375.

⁴⁹ R Den Otter, *Judicial Review in an Age of Moral Pluralism* (Cambridge, Cambridge University Press, 2012) 19.

⁵⁰ R Nagel, *Constitutional Cultures: The Mentality and Consequences of Judicial Review* (Berkeley, University of California Press, 1989) 119.

⁵¹ I assume moral objectivity without offering a refutation of scepticism, because readers are unlikely to be interested in a comparison of legislative and judicial capacities to engage in moral reasoning unless they think right answers on these questions are available.

the majority or aggregating citizen preferences. In section VI, I will consider the arguments regarding the capacity to protect minority rights, and contend that in certain key historical contexts legislatures have performed better than courts.

A. Utilitarianism

We have seen in chapter three that Dworkin associates legislative reasoning broadly with utilitarianism, and specifically with making a calculation about overall utilitarian preferences. The association has an historical basis, since Bentham and other nineteenth century legal reformers advocated both social reform based on utilitarian principles and legislation as the vehicle for achieving it. That was during the period when statutes were replacing common law on a wide basis.⁵² The attraction to utilitarianism remained strong in the first half of the twentieth century. In 1903 the following claim, from the pages of the *Harvard Law Review*, was fairly unremarkable:

The law is utilitarian. It exists for the realization of the reasonable needs of the community. If the interest of an individual runs counter to the chief object of the law, it must be sacrificed.⁵³

Even in 1951 we find Roscoe Pound saying:

[W]e come to an idea of a maximum satisfaction of human wants or expectations. What we have to do in social control, and so in law, is to reconcile and adjust these desires or wants or expectations, so far as we can, so as to secure as much of the totality of them as we can.⁵⁴

Pound's approach has been eclipsed by the ascendancy of human rights discourse in recent decades. The prevalence of utilitarianism among moral philosophers is now much diminished, in part due to Rawls's argument that it fails to take account of the importance of individuals. While utilitarianism retains a certain allure and a place in popular political discourse, there is no reason to suppose that legislatures are more prone to it than courts. Indeed, as we have seen in chapter two, the conception of prima facie rights assumed in balancing and proportionality tests has a partially utilitarian character. The operation of those tests is consistent with Mills's idea that an individual right is protected only up to the point that 'social expediency' requires it to be overridden (see chapter two, section V).

While I think there is a danger that balancing and proportionality tests could operate in a utilitarian manner, I do not think this is a necessary tendency. We can also conceive of balancing in a non-technical sense, referring to practical deliberation that involves conflicting considerations and reasons of varying strength, and that recognises that there are trade-offs between different values and factors

⁵² See T Campbell, *The Legal Theory of Ethical Positivism* (New York, Routledge, 1996) 4–5.

⁵³ JB Ames, 'Law and Morals' (1908) 22 *Harvard Law Review* 97, 110.

⁵⁴ R Pound, *Justice According to Law* (New Haven, Yale University Press, 1951) 31.

relevant to a decision. In this loose sense many of our everyday decisions, and most legislative decisions, involve ‘balancing.’ In chapter two, section VII I have argued that courts tend to treat balancing tests in this loose, non-technical manner.

B. Value Incommensurability and the Common Good

My argument proceeds by assuming:⁵⁵ (i) that the legislature should seek to protect and promote the common good; and (ii) that the common good consists not in an aggregative notion such as overall utility or maximum preference-satisfaction, but in the realisation of multiple basic human values or goods. More specifically, the common good is a set of conditions that enable each and every member of the community to realise his or her well-being (consisting in multiple goods or values), in community with others, and in particular with regard to those subjects that concern personal interaction and co-operation. Instruments such as the Universal Declaration of Human Rights point to a range of basic human goods (as well as instrumental ones, such as fair procedure), and I have argued elsewhere that the UDHR can and should be considered as a guide to legislative deliberation and action.⁵⁶

The assumptions in the last paragraph about value incommensurability and the legislature’s responsibility to promote human good are embraced by a range of approaches to political morality, including Joseph Raz’s liberal perfectionism;⁵⁷ Martha Nussbaum’s capability-based theory of justice;⁵⁸ and John Finnis’s natural law theory.⁵⁹ Value incommensurability entails a rejection of the approach in classical utilitarianism that reduces all value to utility (the net of pleasure over pain), or, in modern variations, to preference-satisfaction, happiness, or—in Posner’s normative economic analysis—efficiency or wealth. Proponents of these approaches hold that the value that inheres in our choices is commensurable, that is, calculable in terms of one scale tracking a single value. Proponents of value incommensurability recognise that in much of our practical decision-making more than one basic value is at stake.

Value incommensurability thus supports the rejection of utilitarianism as well as its quantitative version of balancing (compare chapter two, section VII on the formulaic accounts of balancing and proportionality tests). Value incommensurability also helps to show the complexity of legislative deliberation and choice.

⁵⁵ For a general defence of incommensurability and application of it to the context of constitutional rights, see F Urbina, *A Critique of Proportionality and Balancing* (Cambridge, Cambridge University Press, 2017) 39–74.

⁵⁶ P Yowell, ‘From Universal Rights to Legislated Rights’ in *Legislated Rights*, above n 44.

⁵⁷ J Raz, *The Morality of Freedom* (Oxford, Oxford University Press, 1988).

⁵⁸ M Nussbaum, *Sex and Social Justice* (Oxford, Oxford University Press, 1999) 41–42; *The Fragility of Goodness: Luck and Ethics in Greek Tragedy and Philosophy* (Cambridge, Cambridge University Press, revised edn 2001). See also T Nagel, ‘The Fragmentation of Value’ in *Mortal Questions* (Cambridge, Cambridge University Press, 1979).

⁵⁹ J Finnis, *Natural Law and Natural Rights*, 2nd edn (Oxford, Oxford University Press, 2011).

Both Raz and Finnis argue that, given the incommensurable values at stake in legislative choice, it is often rationally under-determined.⁶⁰ A legislator, as Finnis states, might have, in some contexts, a ‘luxuriant variety of appropriate but competing choices of “means” to “end”’.⁶¹ The legislator’s responsibility is not to choose the ‘best’ law—which may not exist—but to make a choice within the range of reasonable options. Even with regard to prohibiting acts that violate a basic, universal moral norm, Raz points out that the form and content of legal rules ‘may rightly vary from place to place and time to time’.⁶² As Finnis notes, laws can only rarely be deduced from principle, but many principles require ‘due practical acknowledgement in every legislative act’.⁶³ A legislator must

... hold in mind the good of autonomous and authentic choice, the evil of hypocrisy, bribery, blackmail, and police corruption, the costliness and scarcity of investigative and prosecutorial resources, the clumsiness of the legal process in analysing and resolving human character and relationships, the dignity of helping others to identify and choose consistently for the worthwhile amongst peddlers of decay, the importance of compulsion to education, the elusiveness of consensus in a pluralistic society, the fragility of allegiance in a society seeming to honour none but formal principles ...⁶⁴

If constitutional framers choose to give judges the power of rights-based judicial review, it must be with a realisation of the complexity of legislative choice, and with an expectation that vaguely formulated rights are likely to lead to broad methods of rights adjudication, including balancing and proportionality tests. If they adopt an enforceable bill of rights, then the reasoning of courts in judicial review should be presumed to be rightly open to the same kinds of moral and empirical reasoning as legislatures, and to embrace its full complexity. The question of what level of *deference* courts should show to legislative judgment is distinct, and will be taken up in chapter seven.

C. Comparing Judicial and Legislative Capacity for Moral Reasoning

The focus of this section is on the capacity of an institution to *deliberate* collectively regarding the important moral issues in constitutional rights cases. Innumerable factors are relevant to whether judges and legislators make correct decisions on moral issues, many involving personal, inward qualities that elude examination from the outside. My argument proceeds on the premise that open-ended, frank deliberation about moral issues generally enhances the ability of a group to make correct decisions. One reason is that it encourages positions to be tested, allowing

⁶⁰ See Raz, *Morality of Freedom*, above n 57, 388 (‘Choice between incommensurables is undetermined by reason’); Finnis, *Natural Law and Natural Rights*, above n 59, 93, 100, 111–25.

⁶¹ *ibid* 290.

⁶² Raz, *Morality of Freedom* 340.

⁶³ J Finnis, ‘Human Rights and Their Enforcement’ in *Human Rights and Common Good: Collected Essays, Volume III* (Oxford, Oxford University Press, 2011).

⁶⁴ *ibid*.

flawed arguments and inconsistencies to be exposed. A second reason arises from the complexity of issues in legislation discussed above. The observations in section III about the wisdom of the multitude are relevant here. It is unlikely that any one individual will be able to see all the moral dimensions of an issue, or to anticipate all the ramifications of a decision to adopt a law—or not to adopt it, or to strike it down. Group deliberation helps us to understand more of the consequences and to see the full picture. A full view sees questions of political morality not in isolation but in relation to questions of fact and to questions about how to implement decisions in the language of law and to make them consistent with existing features of the legal landscape.

The deliberation of legislatures is time-limited and oriented toward practical decision-making regarding whether to change the law. It is presumed that not all legislators will agree either with the premises of a proposed law or its content; thus deliberation will be concluded by voting. So far as can be accommodated within time limits, any legislator may argue for or against a proposal or for amendment, aiming to persuade colleagues. Deliberation is valuable not only because of the possibility of persuading someone to adopt a better view in the present time, but also because the record of it can inform future legislators and other participants in and observers of the political process.

In the democratic legislature deliberation is also valuable because it provides for the many views of citizens to be represented. It is conducive to civic harmony and peace for citizens to know that even if their position has lost, it has been presented in the legislature; and that the legislature remains a forum open for proposals to change the law (see chapter six, section I on legal change). This specifically *democratic* value might contribute to the moral correctness of a decision, but it might also stand in its way (see sections V and VI below). It is, at any rate, a value that is mostly distinct from the present discussion on comparative institutional capacities. A non-elected legislature such as the House of Lords has deliberative capacities similar to those of an elected legislature.

It might be thought that judicial deliberations are not burdened by the kind of practical constraints that legislatures face, and are thus freer to focus on the truth of moral questions in a disinterested fashion. This is in fact true only with respect to the specifically democratic constraint regarding the need to seek re-election, which is only one part of a larger question of political pressure. Judges may not need to seek re-election, but they seek external affirmation. The sources of affirmation are wide, and judges will vary in what they seek. Some will care about how decisions are reported in mass media or highbrow publications;⁶⁵ or about the expectations of the politicians who appoint them; or about the approval of legal scholars and criticism in academic journals; or their historical legacy. Perhaps most will care about how fellow members of the elite class of politicians, administrators and educators treat them personally, for judges are social creatures too,

⁶⁵ See C Lim, 'Media Influence on Courts: Evidence from Civil Case Adjudication' (2015) 17 *American Law and Economics Review* 87.

who attend cocktail parties and receive dinner invitations. It would be shallow to say such pressures are generally decisive but naïve to ignore them, especially considering the substantial evidence that judicial outcomes in some cases can be predicted by judges' policy preferences.⁶⁶ Judges no doubt care directly about the truth of their moral decisions and their potential to change and improve society; but even when they think in this mode, they are not relying on the authority of past legal decisions—the authority that ultimately grounds their legitimate power.

The less that judges are constrained by specific legal sources in their decision-making, the more they are exposed to external pressure.⁶⁷ Given the vague and abstract formulations of legal rights, and the tendency of proportionality and balancing tests to focus on overall questions of reasonableness, judges in important constitutional rights cases face public—and indeed political—pressure. This means that the counter-majoritarian question can cut two ways. On the one hand, judges do not have to face the particular kind of pressure of a re-election campaign if they make an unpopular decision regarding, say, a moral issue or a minority interest. On the other hand, when judges make unpopular decisions in the course of applying a vague right or a balancing test, they are more exposed to other kinds of external pressure than they would be if they could attribute their decision squarely to a specific legal text. This is why Justice Black opposed balancing tests, as we saw in chapter two, section III; the interests of minorities can be easily outweighed in a balancing test that pits those interests against the general welfare. Whether or not judges follow the election returns, they anticipate public criticism and often seek to avoid or minimise it.

One instance of this is *Brown v Board of Education* (1954), which, contrary to popular perception, contains very little in the way of overt moral reasoning about the vital issues of racial equality and segregation. Indeed it formally accepts and applies *Plessy v Ferguson* (1896), which established the 'separate but equal' principle. We know from records and correspondence revealed later that some of the justices opposed any segregation on moral grounds and would have liked to overrule *Plessy*.⁶⁸ Anticipating a backlash, however, they sought to make a minimal ruling that could command unanimous assent and reduce public controversy.⁶⁹ The result was the thin decision discussed in chapter three, section III, which held, as a matter of *fact* rather than moral principle, that segregation disadvantaged black children, on the basis of social science findings.

The point is not that such compromise is wrong, but rather that it calls into question the dichotomy that some have proposed between the interest-based deliberation of legislatures and the reason-based deliberation of courts. It may be objected that courts, nonetheless, are structured around a disciplined practice

⁶⁶ J Segal and H Spaeth, *The Supreme Court and the Attitudinal Model Revisited* (Cambridge, Cambridge University Press, 2002).

⁶⁷ See Urbina, *A Critique of Proportionality*, above n 55, 179–80.

⁶⁸ S Ellmann, 'The Rule of Law and the Achievement of Unanimity in *Brown*' (2004) 49 *New York Law School Law Review* 741.

⁶⁹ *ibid.*

lacking in legislatures, namely that of providing a reasoned basis for their conclusions. This depends on a mistake regarding legislative practice. Legislatures do give reasons for proposed bills and are expected to do so. The reasons come in several forms, including white papers produced by government ministries, committee reports, or preambles to legislation. Most importantly, for purposes of comparison, are legislative debates on bills, where proponents of legislation are called on to give reasons for it and expected to answer arguments of the opposition. It could be objected that the reasons for legislation given in debate are not always sincere. It is true that we usually do not know the full backstory of how a bill came to be proposed, what deals and compromises were made on the way to bringing it to the floor for debate, whether the process has been tainted by corruption, and what truly motivates the representative speaking in a debate.

But by the same token, we usually do not know the backstory on how a constitutional decision comes to be made. There is no reason to assume that a judgment in a constitutional case is a complete and sincere disclosure of the reasoning by which the conclusion was reached. As Justice Frankfurter has said:

The compromises that an opinion may embody, the collaborative effort that it may represent, the inarticulate considerations that may have influenced the grounds on which the case went off, the shifts in position that may precede final adjudication—these and like factors cannot, contemporaneously at all events, be brought to the surface.⁷⁰

Most judicial deliberation is confidential, and we have limited access at best to records of discussions between justices, or between justices and their law clerks. Richard Posner has said,

The difficulty outsiders have in understanding judicial behavior is due partly to the fact that judges deliberate in secret, though it would be more accurate to say that the fact that they do not deliberate (by which I mean deliberate *collectively*) very much is the real secret. Judicial deliberation is overrated.

Posner notes, however, that this is a ‘pretty open’ secret, citing the comments of a federal court of appeal judge who initially ‘imagined that conferences [on cases] would be reflective, refining, analytical, dynamic’ but discovered that they ordinarily consist in brief discussions that change few minds.⁷¹ Despite the lack of direct access to deliberations, some political scientists have compiled substantial evidence of strategic decision-making by the US Supreme Court; this includes both: (1) the inward strategy of justices anticipating the positions of other justices, and decisions of the Chief Justice in setting the agenda and assigning opinion writing responsibility; and (2) outward strategy that takes into account the positions of other government actors and public opinion.⁷²

⁷⁰ F Frankfurter, ‘The Administrative Side of Chief Justice Hughes’ (1949) 63 *Harvard Law Review* 1, 1.

⁷¹ P Wald, ‘Some Real-Life Observations about Judging’ (1992) 26 *Indiana Law Review* 173, 177.

⁷² See L Epstein and J Knight, *The Choices Justices Make* (Washington, DC, Congressional Quarterly Press, 1998). See also W Murphy, *Elements of Judicial Strategy* (Chicago, University of Chicago Press, 1964).

Does the reputation of constitutional courts depend in part on the confidentiality of their deliberations? The nature of the question indicates the difficulty of answering it, but also suggests it is worth inquiring into the basis for confidentiality in constitutional rights cases. There are good reasons for confidentiality of judicial deliberations insofar as they relate to the judicial function of resolving disputes between parties. A Kelsenian court judging the constitutionality of laws in the abstract, outside the context of a party dispute, would have less reason to maintain confidentiality. In chapter seven, I will argue that, from the perspective of constitutional design, framers who choose to adopt rights-based judicial review of legislation would have good reason to adopt an institution that is more open and transparent in its deliberation than a common law supreme court.

The legislature is an institution that is structured to be open to every kind of reason in its deliberation and law-making processes, including moral reasoning.⁷³ Courts are not structured to be open in the same way. Here we reach a kind of paradox, for in chapters one, two, and four, I have emphasised the extent to which judicial reasoning in constitutional rights cases relies on both moral and empirical reasoning, and that this is invited by vaguely formulated rights and by balancing and proportionality tests. Nonetheless, the structure of judicial decision-making is not well suited to open deliberation on moral issues. This is especially true in common law courts, where deliberation occurs in the context of resolving a dispute between two parties. This has long been personified by blindfolded Justice, who ignores considerations extraneous to the case and the law governing it (see section II above). It would threaten this ideal of the Rule of Law if judges were to engage openly in wide-ranging moral evaluation of a law in deciding whether to uphold it or strike it down. Though judges no doubt engage in personal, internal deliberation on moral issues, the public justification of decisions is weighted toward precedent and other legal sources of authority.⁷⁴ In *Roe v Wade* (1973),⁷⁵ for example, the question of whether the foetus is a person is treated as an interpretation of the 14th Amendment rather than a subject for moral inquiry, and the holding regarding the permissibility of abortion is reached by a conclusion that it falls within the legal right of privacy and thus admits of only minor limits. Jeremy Waldron has observed that the debate in the UK over the Abortion Act 1967 was far more thorough and robust in its examination of the moral issues than *Roe*.⁷⁶ Waldron argues that such disparity should be expected, because the legislative model of deliberation is designed for the airing of all the main arguments in deciding both individual-level moral questions as well as what should be done in the name of the whole society. A more recent example of this

⁷³ Ekins, *The Nature of Legislative Intent*, above n 16.

⁷⁴ See J Waldron, 'Do Judges Reason Morally?' in G Huscroft (ed.), *Expounding the Constitution: Essays in Constitutional Theory* (Cambridge, Cambridge University Press, 2008).

⁷⁵ *Roe v Wade* 410 US 113 (1973).

⁷⁶ *ibid.*

kind of contrast can be seen in the UK Parliament's debate over whether to permit physician-assisted suicide.⁷⁷ Again, the debate is a substantially more comprehensive examination of the moral issues than, for example, the Canadian Supreme Court's decision in *Carter v Canada*.

In balancing and proportionality cases the discussion of legal authority often takes the form of citing cases to establish what level of general scrutiny to apply, whether to allow for a wide margin of appreciation, or how to weigh an individual or governmental interest of a particular kind. The question of determining where the overall balance lies in a given case is not apt for control by precedent; but it is also not apt for thorough moral reasoning. While judges usually escape the pull toward treating the proportionality test as a utilitarian calculation (see section IV.B), they rarely provide a robust, comprehensive discussion of the values at stake and the moral reasons for favouring the conclusion. It is less problematic, with regard to public perception, for courts to engage in empirical reasoning in balancing cases. But this means that discussion of facts can have the effect of suppressing or concealing moral reasoning. We have seen an example of this in the Supreme Court's decision in *Brown* to rely on sociological data rather than directly engaging the moral issues of segregation. David Faigman has argued with regard to the US Supreme Court:

The Court treats [facts] as rhetorical devices, to be used or withheld as the normative circumstances of the case dictate ... Holdings premised on hollow empirical propositions are nothing more than pronouncements ... The Court should have to state plainly the true reasons for its decisions. Informed constitutional democracy is not possible without this possibility.⁷⁸

Faigman's prescription—to state reasons plainly—faces formidable obstacles discussed above.

In conclusion, legislatures have better capacities than courts for moral and empirical reasoning, for grasping the interplay between moral and factual questions, and for providing a full and transparent justification for decisions on moral issues. In the next two sections, I take up the question of whether the democratic structure of legislatures prevents legislatures from using their capacities in a way that is neutral between majority and minority groups. It should be noted that even if courts were to have advantages over legislatures in this respect, that is just one factor in the overall choice regarding constitutional design, which must be considered against the disadvantages of courts generally in regard to empirical and moral reasoning.

⁷⁷ See HC Debate 11 September 2015, vol 599, cols 655–724.

⁷⁸ D Faigman, *Constitutional Fictions: A Unified Theory of Constitutional Facts* (New York, Oxford University Press, 2008) 180.

V. The Tyranny of the Majority?

Dworkin and many other legal and political theorists—including opponents of judicial review such as Waldron—characterise the legislature as a majoritarian institution whose essential function is to enact into law the views or wishes of the majority in society. A related view, sometimes asserted in tandem with the first, is that the legislature *aggregates* preferences of (a majority of) voters into a collective choice. This section argues that the practice of majority voting in democracies is not designed to empower a group designated as ‘the majority’ or to enact its preferences.

Alexander Hamilton warned that as the result of temporary popular passions inflamed by unscrupulous men, representatives would face pressure from ‘when-ever momentary inclination happens to lay hold of a majority of their constituents, incompatible with the provisions in the existing Constitution’; in this way the ‘major voice of the community’ might depart from constitutional rules and instigate ‘serious oppressions of the minor party in the community’.⁷⁹ James Madison likewise wrote about ‘the superior force of an interested and overbearing majority’⁸⁰ and Tocqueville later decried the ‘tyranny of the majority’, with the legislature as its agent:

The very essence of democratic government consists in the absolute sovereignty of the majority; for there is nothing in democratic states that is capable of resisting it ... The legislature is, of all political institutions, the one which is most easily swayed by the will of the majority. The Americans determined that the members of the legislature should be elected by the people directly, and for a very brief term, in order to subject them, not only to the general convictions, but even to the daily passions, of their constituents.⁸¹

Where Hamilton perceived a transient phenomenon, Madison and de Tocqueville speak more generally of the ‘majority’ as a collective entity that holds sway in a democracy and imposes its will on others. Following what he characterised as a Madisonian tradition, Alexander Bickel coined the term *counter-majoritarian* to describe the power of courts in judicial review (not long after the first usage for the term *majoritarian* given in the *Oxford English Dictionary* in 1957).⁸²

Despite the venerable history of the argument about the tyranny of the majority, the notion of a ‘majority’ as a coherent group that subsists through time and

⁷⁹ *The Federalist* No 78.

⁸⁰ *The Federalist* No 10 (‘Complaints are everywhere heard ... that our governments are too unstable, that the public good is disregarded in the conflicts of rival parties, and that measures are too often decided, not according to the rules of justice and the rights of the minor party, but by the superior force of an interested and overbearing majority’).

⁸¹ *Democracy in America* (1839), Henry Reeve (tr) (Cambridge, Sever and Francis, 1862) vol 1, 324 (ch XV). De Tocqueville also refers to ‘the omnipotence of the majority’, *ibid* 328, 335, and (quoting a letter from Thomas Jefferson to James Madison) the ‘tyranny of the legislature’: *ibid* 345.

⁸² In *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (New Haven, Yale University Press, 1962).

exercises power over legislative outcomes is dubious, and in need of clarification. While it is possible for there to exist in a political society a cohesive, homogenous group whose members act in concert and constitute a numerical majority of the population, the existence of such a group cannot be postulated wherever one finds democratic structures such as majority voting in an elected legislature. The use of majority voting (*majority* here is adjectival) as a method of decision-making must be kept distinct from the question of whether there is a coherent, unified group that constitutes *a* majority (used here as a noun).

GEM Anscombe showed that in a series of votes, each decided by majority vote, a majority of voters can be in the minority on a majority of issues.⁸³ Her demonstration used a table illustrating a ten-member committee voting on eleven successive motions. Michael Dummett constructed a simplified version of Anscombe's table based on a committee with five members (A–E) voting on three successive motions.⁸⁴

Table 1

	A	B	C	D	E	Result
Motion 1	Pro	Con	Con	Pro	Pro	carried
Motion 2	Con	Pro	Con	Pro	Pro	carried
Motion 3	Con	Con	Pro	Pro	Pro	carried

A, B, and C constitute a majority of the committee, but they are outvoted on two of the three motions. Although it cannot be predicted how frequently such a result will occur, nothing seems unusual about the voting patterns depicted in Dummett's and Anscombe's tables.

Thus, adopting a system of majority voting does not ensure that 'the majority' gets its way in a series of successive votes. Moreover, it should not be assumed that in every society there is 'majority' in the relevant sense. De Tocqueville contemplated a particular kind of majority: a numerically superior class of workers with interests and opinions pitted against a much smaller class of educated property holders. John Stuart Mill perceived a similar demographic imbalance, arguing that the 'pure' idea of democracy is 'government of the whole people, by the whole people, equally represented'.⁸⁵ He criticised the democracy practised in his day as 'government of the whole people by a mere majority of the people exclusively

⁸³ GEM Anscombe, 'On Frustration of the Majority by Fulfilment of the Majority's Will' (1976) 36 *Analysis* 161.

⁸⁴ M Dummett, *Voting Procedures* (Oxford, Oxford University Press, 1984) 14; cf R Ekins, *The Nature of Legislative Intent*, above n 16, 86–87.

⁸⁵ JS Mill, *Representative Government* (1861) J Gray (ed) (Oxford, Oxford University Press, 1998) 302 (Ch VII).

represented'.⁸⁶ When each locality has one representative in a national legislature, this exacerbates two dangers to which democracy is prone: 'danger of a low grade of intelligence in the representative body, and in the popular opinion which controls it; and danger of class legislation on the part of the numerical majority, these being all composed of the same class'.⁸⁷ Mill proposed a system of proportional representation to enable the minority of educated, cultivated persons to choose representatives of high intelligence, whose powers of persuasion would help compensate for being outnumbered.⁸⁸

The class-based, numerical majorities that worried Mill and Tocqueville are unlikely to form in today's Western democracies, with their diversified economies and social groups. This is seen in the fact that in countries with proportional representation, one typically finds political fragmentation and a multiplicity of parties;⁸⁹ hence, the need for coalition governments of the kind found in most European states. In non-proportional systems, there are often two dominant parties that alternate in power, as has traditionally been the case in the US and UK. But closer inspection reveals factions within the parties themselves, and disagreement, compromise, and bargaining even among party loyalists. A two-party system creates a façade of party unity, concealing the underlying fractures that are made visible in systems with proportional representation. The balance of power is often held by a large contingent of independent voters that floats between the two parties. As Richard Bellamy notes, 'majorities' are in fact shifting coalitions of minorities.⁹⁰

Let us turn, then, to the claim that legislatures act by aggregating the preferences of individuals into a collective choice. Dworkin describes the democratic process as a 'utilitarian computer' and a 'giant utilitarian calculation', in which there is a close correspondence between voters' inputs of their preferences and legislative outputs.⁹¹ Dworkin argues that such a system is designed in principle to respect equality and promote fair distribution, but the presence of external preferences (of one person for the distribution of goods to another) corrupts the egalitarian nature of preference-satisfaction utilitarianism, thus necessitating judicial review by independent courts to filter out external preferences (see chapter three, section II).

Social choice theorists, however, hold that there is no simple or automatic correlation between voters' preferences and legislative outcomes; their overall

⁸⁶ *ibid.*

⁸⁷ *ibid.*

⁸⁸ *ibid* 307ff (Ch VII).

⁸⁹ D Farrell, *Electoral Systems: A Comparative Introduction* (Palgrave, New York, 2001) 162.

⁹⁰ R Bellamy, *Political Constitutionalism* (Cambridge, Cambridge University Press, 2007) 241 ('[M]ost legislation is not the product of a homogeneous majority imposing its will upon a constituent minority, but of a series of compromises brokered by winning coalitions of different minorities').

⁹¹ 'Someone who reports more preferences to the utilitarian computer does not (except trivially) diminish the impact of other preferences he also reports; he rather increases the role of his preferences overall, compared with the role of other people's preferences, in the giant calculation': Dworkin, *A Matter of Principle* 366.

message, as David Miller puts it, is that ‘in general there is no fair and rational way of amalgamating voters’ preferences to reach a social decision.’⁹² Kenneth Arrow’s impossibility theorem holds that if there are three or more options and two or more voters who rank the options in order of preference, then no voting system can be designed which meets all of certain conditions assumed to be reasonable requirements of a method of fair voting.⁹³

A common phenomenon described by Arrow’s theorem is preference cycling, or the intransitive ordering of preferences: the possibility that when voters face a decision among several options, there may be no option that a majority would choose in preference to all of the others, if each option were paired against the others in a series of binary votes. An option that would be chosen by the majority against all alternatives is known in voting theory as a ‘Condorcet winner’ or, in Dummett’s term, a ‘top’.⁹⁴ In the absence of a top, the majority preference cycles from one option to the next.

Preference cycling can be stopped by decisional rules that differ from traditional majority voting techniques. The Borda count, for example, allows voters to rank options in a list with the first choice receiving the score of n , the second $n-1$, and so forth. Ranking systems, however, usually violate the condition of fair voting that Arrow called ‘independence of irrelevant alternatives’.⁹⁵ Moreover, a Condorcet winner will not always win a Borda count, which seems unfair or at least odd.⁹⁶ Another way to stop preference cycling is through agenda-setting rules and techniques, which empower a subset of the voting group to decide what will be voted upon and when, and which votes will be conclusive for a given option. Agenda setters can produce majority support for a proposal whether or not it would be a Condorcet winner or win a Borda count. Agenda setters commonly determine the success of proposals in legislatures, often through complex rules governing committee hearings, scheduling of floor debates, and votes on bills and amendments.

Preference cycles can also be broken by tactical voting. The attraction of tactical voting is immense; it is ubiquitous in democracies and may be a sufficient explanation of the existence of political parties. Dummett illustrated the appeal of tactical voting with variations on Table 1 above. The following ‘preference satisfaction’ table shows how many of the preferences of A—E were satisfied by the votes in Table 1, allotting +1 when a voter has his wishes satisfied on a vote and -1 when the result is contrary to his wishes.

⁹² D Miller, ‘Deliberative Democracy and Social Choice’ in D Estlund (ed.), *Democracy* (Oxford, Blackwell, 2002) 290 and 293.

⁹³ See KJ Arrow, *Social Choice and Individual Values* (New Haven, Yale University Press, 1970).

⁹⁴ M Dummett, *Voting Procedures* (Oxford, Oxford University Press, 1984) 4, fn 1.

⁹⁵ *ibid* 52–56.

⁹⁶ In other words, the option that a majority of voters would prefer to all other options in a series of binary votes might lose when taking into account the weighting of preferences assigned by the Borda count.

Table 2

	A	B	C	D	E	Total
Mot. 1 (carried)	+1	-1	-1	+1	+1	+1
Mot. 2 (carried)	-1	+1	-1	+1	+1	+1
Mot. 3 (carried)	-1	-1	+1	+1	+1	+1
Total	-1	-1	-1	+3	+3	+3

On the original voting pattern, the committee’s total satisfaction is +3; but A, B, and C each have a satisfaction level of -1. A, B, and C can form a voting bloc, promising that on each motion, each of them will vote in accordance with the wishes of the majority of their party. The ABC party will win all three motions—which will be in their interests overall because each will be more satisfied if all the motions lose—if the committee members vote as follows:

Table 3

	A	B	C	D	E	Result
Motion 1	Con	Con	Con	Pro	Pro	lost
Motion 2	Con	Con	Con	Pro	Pro	lost
Motion 3	Con	Con	Con	Pro	Pro	lost

Now D and E are in the minority on every vote. But note that the ABC party achieved this result only by casting some insincere votes. A voted against motion 1 even though in fact he preferred it, and B and C voted against their preferences on motions 2 and 3 respectively (compare Table 1). This yields the following preference satisfaction table.⁹⁷

Table 4

	A	B	C	D	E	Total
Mot. 1 (lost)	-1	+1	+1	-1	-1	-1
Mot. 2 (lost)	+1	-1	+1	-1	-1	-1
Mot. 3 (lost)	+1	+1	-1	-1	-1	-1
Total	+1	+1	+1	-3	-3	-3

⁹⁷ Tables 3 and 4 are taken from Dummett’s analysis, *ibid* 15–16.

Comparing Table 2 to Table 4 we see that each member of the ABC party has improved his total satisfaction level from -1 to $+1$; but D and E have each gone from $+3$ to -3 . In Table 2 the total preference satisfaction of the committee was $+3$, but after the ABC party was formed the total is -3 .

Dummett argues that the result depicted in Table 4 is endemic: tactical voting always reduces the preference satisfaction of the group as a whole, at least when wins and losses are counted as $+1$ and -1 . It would seem, then, that in order to promote the interests of the whole, individuals should not vote tactically. The sincere, non-strategic voter, however, risks the possibility of consistently being on the losing side. Tactical voting increases his chances of being on the winning side, but at the expense of an overall reduction in preference satisfaction. As Dummett notes, 'Such a satisfaction table should not be taken too seriously; but it provides some intuitive indication of how well the voting procedure has satisfied the wishes of the voters'.⁹⁸

Table 4 does not reflect the possibility that the intensity of the voters' preferences vary across motions 1 to 3. If the five committee members, A to E, were asked not only whether they favour a motion but also how intensely (say, on a scale of 0.1 to 1) then it might be possible to find scenarios in which strategic voting increases the satisfaction level of both individuals and the group as a whole. The pertinent issue, however, is whether the democratic process should be understood as a system for aggregating preferences. If voters are generally willing to trade a loss of satisfaction on many issues that they care about for the sake of a high level of satisfaction on one or a few, then the voting process is not translating their preferences (plural) into outcomes. Contrary to Dworkin's analysis, inputting an additional preference to the utilitarian computer does not necessarily affect output.

Modern election systems contain no *direct* mechanism for inputting such individual preferences, much less for accounting for the intensity of voter preferences across a range of issues. Majority voting is a more complex phenomenon, with less predictable outcomes, than in the theories discussed above.

VI. Capacity to Protect Minorities

The question of the tyranny of the majority is tied to the argument that courts, being unelected, are institutionally better placed to protect the rights of minorities than legislatures. Once we set aside the deterministic accounts of the legislature as responding automatically to preferences of the majority, as I have argued for above, then the question of whether judges or legislators have a better capacity to protect minority interests could rightly be considered in an historical dimension

⁹⁸ *ibid* 15.

that informs our anticipation of likely outcomes. Dworkin, as we have seen in section V strongly predicts the inability of elected legislatures to protect minority rights and the capacity of unelected judges to do so. In this section I will engage in a comparative analysis of legislative and judicial interventions into efforts to promote racial equality, looking in some detail at the US and briefly at the UK. This is the situation that many would consider as providing the strongest argument for judicial review as a counter-majoritarian check on the legislature.

Dworkin goes so far as to argue that in the absence of *Brown v Board of Education* (1954), legal segregation in the US might have endured into the late twentieth century. He makes the claim as part of an argument that courts should take an active, robust approach to constitutional interpretation: ‘we would have more to regret if the Court had accepted passivism wholeheartedly: southern schools might still be segregated, for example.’⁹⁹ *Brown* is a useful test case for whether we need counter-majoritarian courts to effect social reform that benefits minorities. The black minority in the US has often been the prime example of a ‘discrete and insular’¹⁰⁰ minority, lacking in political power. And *Brown* has widely been considered as the paradigm case of courts’ ability to produce reform—the ‘principal inspiration to others who seek change through litigation.’¹⁰¹

Historical and empirical studies of the civil rights movement have forcefully countered this view of *Brown* and reached conclusions about its historical impact nearly opposite to Dworkin’s.¹⁰² In 1964, a decade after *Brown*, schools remained almost completely segregated in the 17 southern states whose laws mandated segregation in 1954.¹⁰³ Only 1.2 per cent of black school children in those states attended schools with white school children.¹⁰⁴ In the decade after *Brown* the US Congress was mostly inactive with regard to racial equality. Then Congress enacted the 1964 Civil Rights Act, the 1965 Voting Rights Act, and the 1965 Elementary and Secondary Education Act, the last of which provided funding for schools with a high percentage of low-income children. It was at this point that the number of black children attending integrated schools finally began to increase substantially, rising steadily over the next decade. By 1973, over 90 per cent of black children in the South attended integrated schools.¹⁰⁵

⁹⁹ R Dworkin, *Law’s Empire* (Cambridge, Mass, Harvard University Press, 1986) 375.

¹⁰⁰ *US v Carolene Products Company* 304 US 144, 152 fn 4 (1938).

¹⁰¹ J Greenberg, *Litigation for Social Change: Methods, Limits, and Role in Democracy* (Association of the Bar of the City of New York, 1974) 331.

¹⁰² See especially Gerald N Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change?*, 2nd edn (Chicago, University of Chicago Press, 2008); Michael J Klarman, *From Jim Crow to Civil Rights: The Supreme Court and the Struggle for Racial Equality* (Oxford, Oxford University Press, 2004).

¹⁰³ Rosenberg, *The Hollow Hope*, above n 102, 52.

¹⁰⁴ *ibid.*

¹⁰⁵ *ibid* 52–53.

Gerald Rosenberg attributes this change squarely to Congress and other political actors, and provides data for the view that a similar pattern obtained across other areas regarding racial equality.¹⁰⁶ His conclusion is stark:

[B]efore Congress and the executive branch acted, courts had virtually no direct effect on ending discrimination in the key fields of education, voting, transportation, accommodations and public places, and housing. Only when Congress and the executive branch acted in tandem with the courts did change occur in these fields ... *Brown* and its progeny stand for the proposition that courts are impotent to produce significant social reform.¹⁰⁷

Michael Klarman reinforces Rosenberg's conclusions about *Brown*'s lack of direct, causal effect in ending segregation.¹⁰⁸ His research shows that Supreme Court decisions involving racial equality consistently reflected the national consensus, both in several cases that upheld segregation such as *Plessy v Ferguson* (1896) and in the few pre-*Brown* cases that struck down isolated state laws.¹⁰⁹ Where public opinion is evenly divided, Klarman says the Court is apt to move in the direction of the opinion of the elite class from which the justices are drawn. *Brown* was such a case: national opinion polls following the decision found that half of Americans accepted it.¹¹⁰ What swayed the Court, Klarman argues, is that the justices believed that racial segregation was an immoral institution that should eventually be eliminated throughout the US.¹¹¹ This view was increasingly common—particularly among educated elites and the governing class¹¹²—following World War II, where blacks had fought alongside whites to defend democracy. To deny full equality to blacks was increasingly seen as not only intrinsically unjust, but as harmful to US interests in countering the rise of communist regimes, who highlighted racial segregation in the US to characterise its commitment to democratic equality as a pretence.¹¹³

Klarman's and Rosenberg's arguments about the inefficacy of *Brown* have been challenged,¹¹⁴ as has Rosenberg's more general argument about the inability of courts to produce social reform. But for purposes of my argument about the relative capacity of courts and legislatures to protect minorities, I do not need

¹⁰⁶ *ibid* Ch 2.

¹⁰⁷ *ibid* 70–71.

¹⁰⁸ Klarman, *From Jim Crow to Civil Rights*.

¹⁰⁹ See *ibid* 448–50.

¹¹⁰ *ibid* 450.

¹¹¹ *ibid* 447–48.

¹¹² Reflecting the attitude of this class, the US Government filed an amicus brief in *Brown*, which stated: 'The problem of racial discrimination is particularly acute in the District of Columbia, [the] window through which the world looks into our house. ... Foreign officials and visitors naturally judge this country and our people by their experiences and observations in the nation's capital; and the treatment of colored persons here is taken as the measure of our attitude toward minorities generally'. See Peter H Irons, *Jim Crow's Children: The Broken Promise of the Brown Decision* (New York, Penguin, 2004), 135.

¹¹³ Klarman, *From Jim Crow to Civil Rights* 443–45.

¹¹⁴ But see TM Keck's observation that 'Klarman's insistence on the limited relevance of *Brown* is now approaching scholarly consensus': 'Does the Court Follow the Election Returns?' (2004) 32 *Reviews in American History* 602, 608.

to argue that courts are unable to produce social reform or to claim that *Brown* had no beneficial causal effect on segregation in schools. The points I draw from Rosenberg's and Klarman's work are that legislatures *are capable* of producing social change that benefits minorities, and that courts have a strong tendency to reflect the national consensus on issues relevant to minority interests.

The simplistic view of legislatures as inevitably biased against minorities, as in Dworkin's view, is usually accompanied by an optimistic view of the judiciary's capacity to resist this. Klarman's contrary view can be buttressed with further examples. The most infamous anti-minority decision of the Supreme Court is *Dred Scott v Sandford* (1857),¹¹⁵ in which the Court attempted to provide a legal, constitutional settlement to the political question of whether slavery would expand westward as US settlers entered territories that were to become new states. Dred Scott was a slave in Missouri, a slave state, who sued for freedom because he had once been held in a territory where slavery was forbidden. The Court denied his claim and issued a wide-ranging opinion on the federal government's power to regulate slavery and on the legal status of black slaves. The Court held that black slaves could not be citizens under the Constitution because, *inter alia*, the Founders had considered blacks as 'beings of an inferior order, and altogether unfit to associate with the white race, either in social or political relations, and so far inferior that they had no rights which the white man was bound to respect'.¹¹⁶ Instead, slaves had the legal status of property. In a novel interpretation of the 5th Amendment, the Court held that slaveholders in western territories held property rights in slaves, which would be deprived without due process of law if a territory banned slavery.¹¹⁷ This had the effect of overturning the 1854 Kansas-Nebraska Act, which Congress had enacted to allow settlers in the territories to vote on whether the territory would become a free state or slave state. The Court effectively ruled that, as a matter of constitutional law, new states admitted to the union must be slave states, so long as slaveholders were present. This prevented political compromise and tilted the balance of power in the Senate to southern states, and the Court's opinion thus took its place among the causes driving the US toward civil war.

After the Civil War, which lasted from 1861 to 1865, Congress proposed the 13th Amendment, which abolished slavery; the 14th Amendment, which provided for equal protection of the law and established civil and political rights on a national basis, prohibiting individual states from denying 'the privileges or immunities of citizens of the United States'; and the 15th Amendment, which provided that the right to vote could not be denied on account of race. They were ratified by the states. Each amendment specifically empowered Congress to enact further appropriate legislation for the enforcement of its provisions, thus adding to the original list of enumerated federal powers in the Constitution.

¹¹⁵ *Dred Scott v Sandford* 60 US 393 (1857).

¹¹⁶ *ibid* 407.

¹¹⁷ *ibid* 450.

In pursuance of the new powers granted to it, Congress passed a series of Civil Rights Acts in 1866, 1870, 1871, and 1875.¹¹⁸ These Acts sought to go beyond the mere abolition of slavery and to establish the full protection of civil and political rights for former slaves.¹¹⁹ The US Supreme Court struck down the 1875 Civil Rights Act in the *Civil Rights Cases* (1883),¹²⁰ and in other cases it adopted a narrow reading of the Reconstruction Amendments that denied Congress the power to enforce against private individuals the full range of rights that the various Acts had sought to protect.¹²¹ The Court held that the Amendments empowered the federal government only to counteract action taken specifically by the state. The larger threat to the rights of former slaves, however, came from private individuals.¹²² When the Reconstruction Amendments were being debated, they were understood both by proponents and opponents to grant Congress legislative power to address the subject matter in the manner that it did in the series of Civil Rights Acts between 1866 and 1875, and to make laws applicable to individuals.¹²³

In 1890, seven years after the Court struck down the Civil Rights Act 1875, Louisiana enacted a law requiring separation of blacks and whites on railroads—which would have been contrary to the 1875 Act. The Supreme Court upheld the Louisiana law in *Plessy v Ferguson* (1896),¹²⁴ which established the ‘separate but equal’ doctrine that endured until *Brown*. While some historians have argued that *Plessy* led to the expansion of segregation, Klarman argues that there is no direct evidence of this.¹²⁵ Rather, *Plessy* reflected the new national consensus and was part of a trend during the 1880s and 1890s departing from the efforts at integration that marked the Reconstruction era.¹²⁶ These examples—*Dred Scott*, the *Civil Rights Cases*, and *Plessy*—show that in many key cases involving minorities, the Court has (contrary to the role envisioned for it by Dworkin) failed to take a counter-majoritarian position. As Klarman remarks: ‘[D]uring the time period covered by this book [ie from the *Plessy* era to *Brown* and its aftermath], not a single Court decision involving race clearly contravened national public opinion.’¹²⁷

Moving forward to the modern era, the main flash point between the Court and legislatures on racial equality in recent decades has been over the constitutionality of affirmative action legislation. Cases on this have repeatedly involved Congress and state governments attempting to promote the interests of minorities through various kinds of affirmative action laws and programmes, while the Supreme Court

¹¹⁸ 14 Stat. L. 27 (1866); 16 Stat. L. 140 (1870); 17 Stat. L. 13 (1871); 18 Stat. L. 335 (1875).

¹¹⁹ See E Gressman, ‘Unhappy History of Civil Rights Legislation’ (1951) 50 *Michigan Law Review* 1323.

¹²⁰ *Civil Rights Cases* 109 US 3 (1883).

¹²¹ See especially *The Slaughter-house Cases* 83 US 36 (1873), and discussion in Gressman, ‘Unhappy History of Civil Rights Legislation’ 1336–38.

¹²² *ibid* 1330.

¹²³ *ibid* 1332–36.

¹²⁴ *Plessy v Ferguson* 163 US 537 (1896).

¹²⁵ Klarman, *From Jim Crow to Civil Rights* 47.

¹²⁶ *ibid* Ch 1.

¹²⁷ *ibid* 450.

and other federal courts have often used the Equal Protection Clause to curtail or strike down those efforts.¹²⁸ A similar pattern obtained in *Shelby v Holbrook* (2013),¹²⁹ which struck down portions of the Voting Rights Act of 1965.

When the historical record is thus expanded to take account of the century before *Brown* (beginning with *Dred Scott*) and the decades following it, the argument that the Supreme Court was the key institution in bringing about racial equality looks hollow. Cass Sunstein, in an article reviewing scholarship on *Brown*, concisely summarises that historical record:

Fifty years later, *Brown* does seem increasingly anomalous. Before the Warren Court, the justices were almost never a force for social reform, and they have rarely assumed that role in the past two decades. Most of the time, the judiciary has been an obstacle to racial equality. Before the Civil War, the Supreme Court, in the *Dred Scott* case, interpreted the Constitution so as to entrench slavery. After the Civil War, the Court sharply limited Congress's power to protect the newly freed slaves. During the first half of the twentieth century, the Court did little to promote racial justice (and for much of that time, as Frankfurter and Jackson were painfully aware, it was hostile to legislative attempts to reduce economic inequality); in the last quarter of the century, the Court's most important racial-discrimination decisions struck down affirmative-action programs.¹³⁰

If Sunstein's general claim is correct—'Most of time, the judiciary has been an obstacle to racial equality'—then Dworkin's theory of institutional capabilities must be rejected as applied to the US Congress and the US Supreme Court.

The tragic history of the US with regard to racial equality can be contrasted to the record of the UK. In 1833, 24 years before the *Dred Scott* decision, the UK Parliament ended slavery throughout the Empire. Parliament had earlier abolished the slave trade in 1807, but not slavery itself. As in the US, slavery played a large role in economic activity in the UK. Before 1807, British ships transported around 3.4 million slaves to the Americas (only a small portion of whom were taken to North America).¹³¹ When the Slavery Abolition Act 1833 was enacted, there were 800,000 recognised slaves in the British Empire, most in the West Indies.¹³² In the late 1700s and early 1800s, slavery was backed by powerful financial interests in Parliament and tolerated by the majority of people, many of whom directly or indirectly benefited from it economically.¹³³ Nonetheless, a long, persistent political campaign for abolition, led by William Wilberforce and Thomas Clarkson,¹³⁴ eventually persuaded Parliament to adopt the 1807 and 1833 Acts. All this took place without judicial review of legislation.

¹²⁸ See KR Johnson, 'The Last Twenty Five Years of Affirmative Action?' (2004) 21 *Constitutional Commentary* 171.

¹²⁹ *Shelby v Holbrook* 570 US 2 (2013).

¹³⁰ CR Sunstein, 'Did Brown Matter?' *The New Yorker* (3 May 2004).

¹³¹ D Richardson 'The British Empire and the Atlantic Slave Trade, 1660–1807' in PJ Marshall and others (eds), *The Oxford History of the British Empire: The Eighteenth Century* (Oxford, Oxford University Press, 1998) 441.

¹³² P Levine, *The British Empire: Sunrise to Sunset* (Harlow, Pearson Education, 2013) 27.

¹³³ C Hall, *Legacies of British Slave-ownership: Colonial Slavery and the Formation of Victorian Britain* (Cambridge, Cambridge University Press, 2014).

¹³⁴ Wilberforce made his first speech on the subject in the House of Commons in 1789.

The argument that we must look to courts to protect minority rights because legislatures are institutionally incapable of doing so has little grounding in the historical record on the issue of racial equality just reviewed—which is often taken to be the case that presents the most compelling need for counter-majoritarian judicial power.

VII. An Historical Perspective

The history reviewed in section VI gives reason for rejecting the common belief that empowering judges to review legislation is necessary for the protection of minorities. The cases also raise a more general issue, which is the propensity of courts to make moral errors in constitutional rights cases. While *Brown v Board of Education* (1954) looms large in constitutional narratives, the unfortunate fact is that for the century before it, beginning with *Dred Scott v Sanford* (1856), the US Reports are replete with cases on constitutional rights that reflect errors in moral reasoning that did lasting damage. Apart from the cases dealing with race in section VI above, these include the many cases in the *Lochner* era where the Court protected the prerogatives of capital and industry and struck down legislation designed to protect workers and improve wages and labour conditions (see chapter four, section I). In a number of cases the Court failed to strike down legislation or executive action under reasoning that was arguably legally correct, but that nonetheless showed (through the Court's rhetoric and what it chose to emphasise) a lack of moral perspicacity or, indeed, hostility to vulnerable groups. In these cases the greater blame should be laid at the door of the legislature or executive, but the Court's failure to intervene nonetheless calls into question its counter-majoritarian capacity.

One such case is *Buck v Bell* (1927),¹³⁵ in which the Court upheld a Virginia statute that allowed an order for the sterilisation of Carrie Buck, who as a pregnant 17-year-old was committed to an institution in Virginia called the Colony for Epileptics and Feeble-minded. Writing for an 8-1 majority, Oliver Wendell Holmes lent the authority of the Court to eugenic theory and to the classification of some people as 'unfit'. Describing Miss Buck as a 'feeble-minded white woman [and] the daughter of a feeble-minded white woman [and] the mother of an illegitimate feeble minded child', he wrote:

It is better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind. The principle that sustains compulsory vaccination is broad enough to cover cutting the Fallopian tubes.

Three generations of imbeciles are enough.¹³⁶

¹³⁵ *Buck v Bell* 274 US 200 (1927).

¹³⁶ *ibid.*

If a man considered by some to be the greatest Supreme Court justice could write such words about a member of a vulnerable minority, and draw only one dissent, we should question whether the Court is an intrinsically counter-majoritarian institution with the special mission of protecting minorities.

Another theme of this chapter relevant to *Buck v Bell* is the fragility of social science: its susceptibility to mistake, bias, and misuse. The term *eugenics* was coined by Francis Galton, who described it as ‘the science which deals with all influences that improve the inborn qualities of a race [and] develop them to the utmost advantage.’¹³⁷ Galton was one of the founders of the discipline of statistics, and one of its early applications was to find correlations between ‘feeble-mindedness’ and criminality, prostitution, and other social problems.¹³⁸ In eugenic theory, tests were developed to classify people according to their mental age (‘idiot’, ‘moron’, and ‘imbecile’ were technical labels for different kinds of feeble-mindedness), and it was concluded that the cause of feeble-mindedness was largely or solely hereditary.¹³⁹ Environmental factors were dismissed and education considered an ineffectual remedy; many eugenicists advocated mandatory sterilisation of the ‘unfit’ on a widespread basis. One was Dr Harry Laughlin, who drafted a model law that was the basis for the statute in *Buck v Bell*, and called for sterilising annually 200,000 members of the ‘socially inadequate’ classes in the US, which included several conditions besides feeble-mindedness.¹⁴⁰ He also served as an expert in the case and diagnosed Carrie Buck as feeble-minded. Though the theory of hereditary transmission in eugenics is now discredited, it was widely accepted and taught in universities at the time.¹⁴¹

While legislatures are more to blame for the uptake of eugenic theory than the judiciary, the Supreme Court’s decision in *Buck v Bell* may have had the effect of spurring it on. Holmes’s rejection of the challenge to the law under the Equal Protection Clause reasoned that states could promote equal treatment by taking measures to bring the ‘multitudes outside’ institutions such as Virginia’s Colony inside them; and implied they should do this with deliberate speed.¹⁴²

¹³⁷ F Galton, ‘Eugenics: Its Definition, Scope, and Aims’ (1904) 10 *American Journal of Sociology* 1.

¹³⁸ D Kevles, *In the Name of Eugenics: Genetics and the Uses of Human Heredity* (Cambridge Mass, Harvard University Press, 1998) 13–19, 46, 71.

¹³⁹ *ibid* 78–79, 110.

¹⁴⁰ ‘This model law called for the sterilization, regardless of etiology, of the following inadequate classes: (1) feeble-minded; (2) insane (including the psychopathic); (3) criminalistic (including the delinquent and wayward); (4) epileptic; (5) inebriate (including drug habitues); (6) diseased (including the tuberculous, the syphilitic, the leprous, and others with chronic, infectious, and legally segregable diseases); (7) blind (including those with seriously impaired vision); (8) deaf (including those with seriously impaired hearing); (9) deformed (including the crippled); and (10) dependent (including orphans, ne’er-do-wells, the homeless, tramps, and paupers)’: HH Laughlin, *Eugenical Sterilization: 1926* (New York, The American Eugenics Society, 1925) 64.

¹⁴¹ E Black, *The War against the Weak*, 2nd edn (Washington, DC, Dialog Press, 2012) 75–76.

¹⁴² Holmes wrote: ‘But, it is said, however it might be if this reasoning [ie the eugenic theory regarding sterilisation] were applied generally, it fails when it is confined to the small number who are in the institutions named and is not applied to the multitudes outside ... But the answer is that the law does all that is needed when it does all that it can, indicates a policy, applies it to all within the lines, and seeks to bring within the lines all similarly situated so far and so fast as its means allow’: 274 US 200, 208 (1927).

After *Buck v Bell*, several states adopted laws modelled on Virginia's, and the number of sterilisations in the US increased dramatically.¹⁴³

It might be objected that the cases examined in this and the previous section are from long ago, from one country, and from a regrettable period in that country. It might be thought that we live in a more enlightened, liberal age, and that courts today can avoid the mistakes of the past. That is, of course, precisely how Oliver Wendell Holmes viewed himself: in the vanguard of a progressive movement, at a time when law was burdened by archaic, arbitrary rules and benighted traditions.¹⁴⁴ The historical perspective taken in these sections is the appropriate one for an argument of the kind in this book. Any attempt to gauge the propensity of courts to make correct moral decisions in the context of currently controversial moral issues will be subject to the fact that people disagree widely over decisions made by supreme courts and constitutional courts in recent decades, in cases around the globe. The advantage of looking at the US is that it provides by far the longest history of constitutional rights cases. Focusing on the earlier period provides a perspective relatively free from current political disagreement. Writing in 1949, Robert Jackson, one of the US Supreme Court's most respected justices, observed that

time has proved that [the Court's] judgment was wrong on the most outstanding issues upon which it has chosen to challenge the popular branches ... In no major conflict with the representative branches on any question of social or economic policy has time vindicated the Court.¹⁴⁵

VIII. Conclusion

This chapter has analysed the institutional capacities of courts and legislatures to engage in empirical and moral reasoning of the kind at issue in constitutional rights cases. It has shown that the capacity of legislatures to acquire and assess general facts about society is far superior to that of courts. By drawing on the diverse background and professional experience of their members, and on information gained through interaction with constituents, legislatures begin with a broader base of collective knowledge than courts. They supplement this through active engagement with experts and with intermediaries who help to interpret studies. Legislatures can commission research, appoint investigators, and question their findings; and they do this on a daily basis. Courts, in contrast, are usually capable

¹⁴³ Black, *The War against the Weak*, above n 141, Ch 6.

¹⁴⁴ See T Leonard, *Liberal Reformers: Race, Eugenics and American Economics in the Progressive Era* (Princeton, Princeton University Press, 2016) 11, Ch 7.

¹⁴⁵ R Jackson, *The Struggle for Judicial Supremacy* (New York, Alfred Knopf, 1949) ix–x.

only of passive, occasional engagement with empirical research through Brandeis briefs, without the specialised staff and other resources available to legislatures.

The meagre capacity of courts for empirical research is not a defect, however, when seen in light of the fundamental purpose of courts, which is to resolve disputes between parties in accordance with law laid down in the past. The institutional structures of common law courts, including appellate and supreme courts, are designed for this purpose, leading to the ‘artificial world’ of the trial in which the rules and general approach to evidence are designed not just for acquiring evidence but for *excluding* evidence not strictly relevant to the case at hand. The Kelsenian constitutional court is not subject to the same strictures as common law courts, because it is not designed for resolving disputes between parties and because of its centralised nature. The advantages of the Kelsenian court are explored in chapter seven, but it still lacks the broad reach of legislatures in empirical reasoning.

With regard to moral reasoning, this chapter has analysed the performance of courts and legislatures respecting the rights of racial minorities in the US and UK. Under the counter-majoritarian theory of judicial review, this should be the area in which courts are most able to correct moral errors of the legislature. But a broad historical perspective shows that the UK Parliament abolished slavery without the help of judicial review, while in the US judicial review was used in support of slavery in *Dred Scott* and since then has often been used to strike down legislation made for the benefit of racial minorities. As Cass Sunstein has observed, *Brown v Board of Education* seems to be an anomalous result against a background in which the Supreme Court has generally been an obstacle to racial equality. The historical perspective on the US shows that the Supreme Court has also made moral errors in cases dealing with the rights of workers, those in mental institutions, and many other vulnerable persons. We have also seen that the background and training of judges does not make them particularly qualified to decide moral issues, and that judicial structures for deliberation of moral issues are not superior to those of legislatures. Independence from elections does not eliminate external pressure or guarantee that deliberation will be guided by reason. Collegial courts decide by majority vote, and decision-making is influenced by strategic considerations.

The need for judges to justify decisions through legal reasons means that judges are less capable than legislatures at engaging in transparent, open-ended deliberation about all the reasons relevant to a decision to adopt or to reject a law. The form and structure of legislative deliberation allows for wide-ranging debate from a variety of perspectives, and the diversity of its membership can reduce the effects of correlated biases. The legislature is better able than courts to see the interplay between moral reasoning and factual considerations, and to adjust the content of law to empirical realities.

Legislatures are, of course, prone to making moral and factual mistakes. From the perspective of constitutional design, however, the question is not simply

whether courts or legislatures are more likely to make correct decisions. As we will see in the next chapter, the costs of mistakes in judicial decisions to strike down legislation are high because of the difficulty of reversing those decisions. One of the important issues in institutional capacity is whether an institution can correct its own mistakes, and in this legislatures are clearly superior to courts. Thus, the question for constitutional framers, which is pursued in the next two chapters, is whether we trust courts so much more than legislatures that we are willing to make their judgments part of the enduring—potentially permanent—law of the constitution.