

LOOKING SIDEWAYS, LOOKING BACKWARDS, LOOKING FORWARDS: JUDICIAL REVIEW VS. DEMOCRACY IN COMPARATIVE PERSPECTIVE

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I. THE CONTEXT OF *TAKING THE CONSTITUTION AWAY FROM THE COURTS*

In a recent article, Daniel Lazare argues that:

For the [past] two centuries, the Constitution [has been] as central to American political culture as the New Testament was to medieval Europe. Just as Milton believed that "all wisdom is enfolded" within the pages of the *Bible*, all good Americans, from the National Rifle Association to the ACLU, have believed no less of this singular document.¹

Indeed, remarkably profound effects, symbolic and practical, are often attributed to the American Bill of Rights and judicial review by scholars, legal practitioners, and political activists. Mark Tushnet's splendid book, *Taking the Constitution Away from the Courts*,² is perhaps the best of a recent spate of critical studies that have sought to revisit the optimistic albeit untested and abstract court-centric consensus of the post-*Brown* generation in American constitutional law scholarship.

Most of these critical works are preoccupied with four fundamental issues. First, many political theorists criticize the notion of rights, emphasizing the impoverished, individualistic, and solipsistic view of society that rights-discourse tends to reflect and promote, as opposed to a more desirable communitarian ideal of human

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1. Daniel Lazare, *America the Undemocratic*, 232 *NEW LEFT REV.* 3, 9-10 (1998).
2. MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* (1999).

fulfillment.³ The current “culture of rights,” these scholars argue, leads people to see in others the limitation of their freedom and promotes a morally distorted conception of human relations whereby “my fulfillment, my freedom and my self-realization depend upon my self-assertive capacity to place limits on yours.”⁴ Mary Ann Glendon argues that:

A rapidly expanding catalogue of rights extending to trees, animals, smokers, non-smokers, consumers and so on, not only multiplies the occasions for collisions, but it risks trivializing core democratic values. A tendency to frame nearly every social controversy in terms of a clash of rights (a woman’s right to her own body versus a fetus’ right to life) impedes compromise, mutual understanding and the discovery of common ground.⁵

Second, other critical studies of American constitutional law and politics focus on the history of judicial interpretation of constitutional rights by the U.S. Supreme Court. According to this body of literature, the U.S. Supreme Court is inclined to rule in accordance with national meta-narratives, prevailing ideological and cultural propensities, and the interests of ruling elites.⁶ While canonical constitutional law scholarship sees the Bill of Rights and judicial review as holding American political institutions to a paramount commitment to protect fundamental freedoms of minorities against the tyranny of the majority, critical scholars of American constitutional law suggest that in times of crisis and panic, and despite the *de jure* protection of minorities by bills of rights, judges are likely to

3. See RONALD BEINER, WHAT’S THE MATTER WITH LIBERALISM? 80-97 (1992). See generally MARY ANN GLENDON, RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE 171-83 (1991); NONSENSE UPON STILTS: BENTHAM, BURKE AND MARX ON THE RIGHTS OF MAN 151-209 (Jeremy Waldron ed., 1987) [hereinafter NONSENSE UPON STILTS]; Chantal Mouffe, *Hegemony and New Political Subjects: Toward a New Concept of Democracy*, in MARXISM AND THE INTERPRETATION OF CULTURE (Cary Nelson & Lawrence Grossberg eds., 1988); Mark Tushnet, *An Essay on Rights*, 62 TEX. L. REV. 1363 (1984).

4. NONSENSE UPON STILTS, *supra* note 3, at 196.

5. GLENDON, *supra* note 3, at xi.

6. The literature on this subject is voluminous. For examples representing different theoretical approaches, see generally ROGERS M. SMITH, CIVIC IDEALS: CONFLICTING VISIONS OF CITIZENSHIP IN U.S. HISTORY (1997); MARK TUSHNET, RED, WHITE AND BLUE: A CRITICAL ANALYSIS OF CONSTITUTIONAL LAW (1988); Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J. PUB. L. 279 (1957); Jack Knight & Lee Epstein, *On the Struggle for Judicial Supremacy*, 30 L. & SOC’Y REV. 87 (1996); Harold H. Koh, *Why the President (Almost) Always Wins in Foreign Affairs*, 97 YALE L.J. 1255 (1988); and William Mishler & Reginald S. Sheehan, *The Supreme Court as Counter-majoritarian Institution? The Impact of Public Opinion on Supreme Court Decisions*, 87 AM. POL. SCI. REV. 87 (1993).

be swept along by the same tide of emotion and prejudice that moves legislators, the media, and the public. As Tushnet's closely reasoned and well-researched work suggests, "[l]ooking at judicial review over the course of U.S. history, we see the courts regularly being more or less in line with what the dominant national coalition wants."⁷ Indeed, the widely celebrated Bill of Rights did not prevent the U.S. Supreme Court from reconfirming the legal status of slavery and servitude before the Civil War,⁸ or from blocking anti-laissez faire initiatives aimed at protecting workers in the first decades of the twentieth century.⁹ The Supreme Court did not protect Japanese Americans who were detained in concentration camps during World War II,¹⁰ nor did the First Amendment prevent the Supreme Court from upholding the persecution of Communist Party members during the McCarthy period through legislation stating that "[w]hoever knowingly or willfully advocates, abets, advises, or

7. TUSHNET, *supra* note 2, at 153.

8. See *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 469 (1856). In this famous case, the Court held that "[the Negro is] bought and sold, and treated as an ordinary article of merchandise and traffic," *id.* at 407, and therefore, "the power of Congress over the person or [slave] property of a citizen can never be a mere discretionary power." *Id.* at 449.

9. See *Lochner v. New York*, 198 U.S. 45, 57 (1905). It is important to note in this regard that the legal interpretation of bills of rights under market liberalism shows a marked tendency to reflect that ideological atmosphere by protecting liberty and property rather than supporting state-underwritten regulatory employment laws. The best known example of this occurred during the era of "Lochnerism" in the United States, when a profoundly conservative Supreme Court used the Constitution's "Contract Clause," the "Takings Clause," and the Fourteenth Amendment to block socially progressive legislation for more than 30 years. During the *Lochner* era, roughly the period from 1885 to 1930, the U.S. Supreme Court struck down some 150 pieces of legislation concerning labor relations, labor conditions, and working hours. In the famous *Lochner* ruling, the Court invalidated a state law that limited the working hours of bakers, claiming that the safety of bakers provided "no reasonable ground for interfering with the liberty of person or the right of free contract." *Id.* at 57. During the *Lochner* era, the Court declared unconstitutional laws banning "yellow dog" contracts. See *Adair v. United States*, 208 U.S. 161, 179 (1908) (concluding that "[t]here is no connection between interstate commerce and membership in a labor organization as to authorize Congress to make it a crime against the United States for an agent of an interstate carrier to discharge an employee because of such membership on his part"); *Coppage v. Kansas*, 236 U.S. 1, 26 (1915) (holding that a contract that forbids membership in a labor organization is "repugnant" to the Fourteenth Amendment). The Court also declared unconstitutional laws requiring minimum wages for women and children, see *Adkins v. Children's Hosp.*, 261 U.S. 525, 558 (1923) (concluding that fixing wages for women and children in the District of Columbia "exact[s] from the employer an arbitrary payment for a purpose and upon a basis having no causal connection with his business, or the contract or the work the employee engages to do"), and laws restricting child labor. See *Hammer v. Dagenhart*, 247 U.S. 251, 276 (1918) (concluding that Congress cannot regulate "local matters" by prohibiting "the movement of commodities in interstate commerce"). A host of other laws similar in nature were also declared unconstitutional.

10. See, e.g., *Korematsu v. United States*, 323 U.S. 214, 244 (1944) (concluding that Congress's actions were justified).

teaches the duty, necessity, desirability, or propriety of overthrowing or destroying any government in the United States [shall be fined or imprisoned].”¹¹ After convictions based on little more than proof of adherence to Communist Party doctrine—presented by the Court as “substantive evil” and as a “clear and present danger”—leading party officials were imprisoned for three to five years and defense attorneys were cited for contempt, imprisoned, and later disbarred. From *Dred Scott v. Sandford*¹² to *Bowers v. Hardwick*,¹³ from *Lochner v. New York*¹⁴ to *Buckley v. Valeo*,¹⁵ from *Gregg v. Georgia*¹⁶ to *McCleskey v. Kemp*¹⁷ to *United States v. Lopez*,¹⁸ and with the often-cited exception of the Warren Court, the Supreme Court maintained its historic position on the Right of the American political spectrum.¹⁹

11. The Smith Act, 18 U.S.C. § 2385 (1940); see *American Communications Ass’n v. Douds*, 339 U.S. 382, 396 (1950) (holding that section 9(h) of the Management Labor Relation Act, which required an affidavit stating that one is not a communist and not a member of an organization that advances the overthrow of the U.S. government, is constitutional because of Congress’s interest in protecting the flow of commerce); *Dennis v. United States*, 341 U.S. 494, 514 (1951) (holding that the Smith Act may be applied where there is a “clear and present danger” of substantive evil). In *Yates v. United States*, 354 U.S. 298 (1957), the Court, in a six to one decision, overturned the convictions of several members of the Communist Party for conspiracy to violate the Smith Act. See *id.* at 315 (holding that even where the philosophy being taught is rejected by a majority of the American public, the proponents have the right to assemble peaceably to promote their views). For rulings on First Amendment issues during the *Lochner* era, see *Gitlow v. New York*, 268 U.S. 652 (1925); *Debs v. United States*, 249 U.S. 211 (1919); and *Schenck v. United States*, 249 U.S. 47 (1919).

12. 60 U.S. (19 How.) 393 (1856).

13. 478 U.S. 186 (1986).

14. 198 U.S. 45 (1905).

15. 424 U.S. 1 (1976).

16. 428 U.S. 153 (1976).

17. 481 U.S. 279 (1987).

18. 514 U.S. 549 (1995).

19. In *Bowers v. Hardwick*, 478 U.S. 186 (1986), the U.S. Supreme Court refused to declare the State of Georgia’s sodomy laws unconstitutional, making it a criminal offense, punishable by imprisonment, for two consenting men to engage in homosexual activity in private. In a five to four decision that has been widely criticized, the Chief Justice, concurring in judgment, drew inspiration for sustaining the law from the condemnation of homosexuality that he said was firmly rooted in Judeo-Christian moral and ethical standards. See *id.* at 196 (Burger, C.J., concurring). In so doing, he referred to homosexual lovemaking as “the infamous crime against nature” and as an offense of “deeper malignity” than rape, a heinous act, “the very mention of which is a disgrace to human nature” and “a crime not fit to be named.” *Id.* at 197 (Burger, C.J., concurring). In *Buckley v. Valeo*, 424 U.S. 1 (1976), the Court struck down campaign finance reform that put spending limits on political candidates and so-called third parties, on the ground that such limits violate the First Amendment’s guarantee of free speech. See *id.* at 54. In *Gregg v. Georgia*, 428 U.S. 153 (1976), the Court put its stamp of approval on the death penalty, after calling it into question a few years previous in *Furman v. Georgia*, 408 U.S. 238 (1972). See *Gregg*, 428 U.S. at 207. In *United States v. Lopez*, 514 U.S. 549 (1995), the Court held that Congress had exceeded its constitutional authority in forbidding students from carrying handguns in local public schools. See *id.* at 551. In

Recent studies of judicial decision-making also suggest that the U.S. Supreme Court Justices may primarily be framers of legal policy, but they are also strategic actors who may realize when the changing preferences of other influential political actors, as well as changes in the institutional context, might allow them to strengthen their own institutional position by expanding their involvement in crucial policymaking arenas.²⁰ According to these studies, landmark decisions of the U.S. Supreme Court, for example, have not merely been apolitical jurisprudence, or a reflection of its Justices' ideological preferences and values as "attitudinal" models of judicial behavior suggest,²¹ but also a reflection of their strategic behavior as rational actors who seek to enhance the Court's institutional position vis-à-vis other major national decision-making bodies such as Congress and the President.

The third major branch of critical studies of constitutional law questions the ability of the U.S. Supreme Court to introduce practical (as opposed to merely symbolic) changes into American society through landmark judgments on constitutional rights.²² In

McCleskey v. Kemp, 481 U.S. 279 (1987), the Court upheld Georgia's death penalty even in the face of an undisputed statistical study showing racial bias in its application. *See id.* at 297.

20. *See, e.g.*, SUPREME COURT DECISION-MAKING: NEW INSTITUTIONALIST APPROACHES (Cornell W. Clayton & Howard Gillman eds., 1999); LEE EPSTEIN & JACK KNIGHT, THE CHOICES JUSTICES MAKE (1998); Lee Epstein & Thomas Walker, *The Role of the Supreme Court in American Society: Playing the Reconstructing Game*, in CONTEMPLATING COURTS 315 (1995); William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 YALE L.J. 331 (1991); John Ferejohn & Charles Shipan, *Congressional Influences on Bureaucracy*, 6 J.L. ECON. & ORG. 1 (spec. ed. 1990).

21. *See, e.g.*, JEFFEREY SEGAL & HAROLD SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL (1993).

22. For studies analyzing the symbolic impact of the U.S. Supreme Court's landmark constitutional rights judgments, see, for example, MARTHA MINOW, MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION, AND AMERICAN LAW (1990); PATRICIA WILLIAMS, THE ALCHEMY OF RACE AND RIGHTS (1991); and Kimberlie Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331 (1988).

For studies examining the practical impact of judicial review and constitutional rights litigation, see, for example, JOEL HANDLER, SOCIAL MOVEMENTS AND THE LEGAL SYSTEM: A THEORY OF LAW REFORM AND SOCIAL CHANGE (1978); DONALD HOROWITZ, THE COURTS AND SOCIAL POLICY (1977); LEVERAGING THE LAW: USING THE COURTS TO ACHIEVE SOCIAL CHANGE (David A. Schultz ed., 1998) [hereinafter LEVERAGING THE LAW]; MICHAEL McCANN, RIGHTS AT WORK: PAY EQUITY REFORM AND THE POLITICS OF LEGAL MOBILIZATION (1994); GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? (1991); STUART SCHEINGOLD, THE POLITICS OF RIGHTS (1974); N. Dometrius & L. Sigelman, *Modeling the Impact of Supreme Court Decisions: Nygant v. Board*, 50 J. POL. 131 (1988); Robert F. Drinan, *Are the Expectations for the Religious Freedom Restoration Act Being Realized?*, 39 J. CHURCH & ST. 53 (1997); Malcolm M. Feeley, *Hollow Hopes, Flypaper and Metaphors*, 17 L. & SOC. INQUIRY 745 (1993); Mark Galanter, *The Radiating Effects of Courts*, in EMPIRICAL THEORIES

his polemic against the “dynamic court” approach, Gerald Rosenberg, for example, demonstrates the gap between the alleged promises and the actual achievements of liberal reform litigation.²³ According to Rosenberg’s “constrained court” thesis, the U.S. Supreme Court’s role in producing social reforms (at least in the domains of racial desegregation and abortion) has been far less significant than conventional wisdom would have it. In fact, hostile opposition forces were able to completely neutralize the Court’s seemingly ground-breaking ruling in *Brown v. Board of Education*²⁴ in the first decade after the decision; moreover, the limited progress made after the ruling was due to a shift in political forces that had everything to do with the changing economic role of African-Americans and their own extra-legal activism and little or nothing to do with the Supreme Court. In this context, Rosenberg argues that

[t]o ask [courts] to produce significant social reform is to forget their history and ignore their constraints. It is to cloud our vision with a naive and romantic belief in the triumph of rights over politics. And while romance and even naivete have their charms, they are not best exhibited in court rooms.²⁵

Other empirical studies of the effects of U.S. rights-litigation also make a compelling argument against the commonly held belief that supreme courts can bring about effective policy change, and show that while rights-litigation victories may have a symbolic significance, they do not necessarily have any immediate impact on people’s lives.²⁶

Still other scholars, most notably Mark Tushnet, emphasize the counter-majoritarian tendency embedded in rigid constitutional

ABOUT COURTS 117 (Keith Doyum & Lynn Mather eds., 1983); Mark Galanter, *Why the ‘Haves’ Come out Ahead: Speculations on the Limits of Legal Change*, 9 L. & SOC’Y REV. 97 (1974); Charles Lawrence, ‘One More River to Cross’—Recognizing the Real Injury in *Brown*: A Prerequisite to Shaping New Remedies, in SHADES OF BROWN: NEW PERSPECTIVES ON SCHOOL DESEGREGATION 49 (Derick Bell ed., 1980); Michael W. McCann, *Reform Litigation on Trial*, 17 L. & SOC. INQUIRY 716 (1993); Gerald N. Rosenberg, *Judicial Independence and the Reality of Political Power*, 54 REV. OF POL. 369 (1992); Gerald N. Rosenberg, *The Real World of Constitutional Rights: The Supreme Court and the Implementation of Abortion Decisions*, in CONTEMPLATING COURTS, *supra* note 20, at 390; Peter H. Schuck, *Public Law Litigation and Social Reform*, 102 YALE L.J. 1763 (1993); Reva B. Siegel, *The Rule of Love: Wife Beating as Prerogative and Privacy*, 105 YALE L.J. 2117 (1996); and Donald Songer, *Alternative Approaches to the Study of Judicial Impact: Miranda in Five State Courts*, 16 AM. POL. Q. 425 (1988).

23. See ROSENBERG, *supra* note 22.

24. 347 U.S. 483 (1954).

25. ROSENBERG, *supra* note 22, at 343.

26. See, e.g., sources cited *supra* note 22.

arrangements in general, and in judicial review (the courts' power to invalidate federal and state statutes and administrative acts on the grounds that the challenged statute or act is in conflict with the Constitution) in particular. They question the legitimacy of transferring important policy-making prerogatives from elected and accountable politicians, parliaments, and other majoritarian decision-making bodies to the judiciary.²⁷ The "democracy vs. juristocracy" debate has produced voluminous literature over the years, which can be characterized in terms of a simple paradox. On the one hand, the separation of power and its implementation by judicial review are an indispensable element of liberal democracy because it ensures that the legislature and the executive are not acting *ultra vires*. On the other hand, if judicial review evolves so that political power in its judicial guise is limited only by a constitution whose meaning courts alone define, then the judicial power, which had previously acted as a restraint, is no longer constrained by constitutional limits. The apparent paradox here is that in the name of liberal constitutionalism, active judicial review may destroy the most important political right that citizens in liberal democracies possess: the right to participation and self-government.

All of these works are skeptical about the place of constitutionalism and judicial review in the pursuit of social justice. They argue for a smaller role for courts and a more robust one for democratic politics in defining and interpreting principles of equality, freedom, and democracy.²⁸ Some of these works also try to develop strategies for overcoming the apparent tension between rigid constitutionalism and judicial review on the one hand, and

27. The literature on the question of legitimacy of judicial review and the "counter-majoritarian" essence of judicial review is voluminous. For critiques of judicial review on democratic grounds, see TUSHNET, *supra* note 2; James Allan, *Bills of Rights and Judicial Power—A Liberal's Quandary*, 16 OXFORD J. LEGAL STUD. 337 (1996); Jeremy Waldron, *A Rights-Based Critique of Constitutional Rights*, 13 OXFORD J. LEGAL STUD. 18 (1993); and Jeremy Waldron, *Judicial Review and the Conditions for Democracy*, 6 J. POL. PHIL. 335 (1998).

For attempts to justify constitutional rights-based judicial review, see 1 BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* (1992); ALEXANDER BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* (1962); RONALD DWORKIN, *A MATTER OF PRINCIPLE* (1985); RONALD DWORKIN, *LAW'S EMPIRE* (1986); RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* (1978); JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980); and JOHN RAWLS, *POLITICAL LIBERALISM* (1993).

28. See, e.g., ROBERT A. BURT, *THE CONSTITUTION IN CONFLICT* (1992); AMY GUTMANN & DENNIS THOMPSON, *DEMOCRACY AND DISAGREEMENT* (1996); IAN SHAPIRO, *DEMOCRATIC JUSTICE* (1999); JEREMY WALDRON, *THE DIGNITY OF LEGISLATION* (1999); JEREMY WALDRON, *LAW AND DISAGREEMENT* (1999).

fundamental democratic values of political participation and representation on the other.²⁹

In his insightful discussion in *Taking the Constitution Away from the Courts*, for example, Mark Tushnet argues against a view that sees constitutional law as the principal domain of courts (as opposed to the domain of politics), and calls for a “populist constitutionalism,” one that “is committed to the principle of universal human rights justifiable by reason in the service of self-government,”³⁰ and “creates space for a politics oriented by the Declaration’s principles by taking constitutional law away from the courts.”³¹ He further supports this view arguing that “[s]uch a politics actually can have real bite, but no one can guarantee that it will produce specific results.”³² In short, Tushnet argues, it is ultimately “We the People” who must interpret the Constitution.³³

Indeed, the evidence provided by Tushnet and other prominent constitutionalists and social scientists suggests that simple and sweeping claims about the positive effects of the constitutional catalogues of rights and judicial review ought to be viewed skeptically. There is much to question regarding assertions that the constitutionalization of rights and the establishment of judicial review have been or are likely to be agencies of effective reform and offer substantive protection for the disadvantaged. In practice, and despite an abundance of rhetoric to the contrary, proponents of judicial review cannot point to any deep and enduring evidence that the constitutional entrenchment of rights or the existence of active judicial review practices have ever been responsible for long-lasting and effective social change. The United States, the source of many claims on behalf of constitutional rights and active judicial review, and the first modern democracy erected on the premise that its reason for being was to secure the rights of its citizens through constitutionally entrenched rights, is perhaps the clearest contemporary example of a long and established tradition of constitutional protection of rights and active judicial review that does not disturb

29. See, e.g., DAVID DYZENHAUS, *JUDGING THE JUDGES, JUDGING OURSELVES* (1998); CHARLES EPP, *THE RIGHTS REVOLUTION: LAWYERS, ACTIVISTS, AND SUPREME COURTS IN COMPARATIVE PERSPECTIVE* (1998); MARTHA MINOW, *BETWEEN VENGEANCE AND FORGIVENESS* (1999); CASS R. SUNSTEIN, *ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT* (1999).

30. TUSHNET, *supra* note 2, at 181.

31. *Id.* at 187.

32. *Id.*

33. See *id.* at 194.

the basic political and economic organization of American society. It has the most unequal distribution of income among Organization for Economic Cooperation and Development ("OECD") countries, with vast social disparity and de facto racial segregation, and is controlled to a large extent by the sheer power of corporate capital. Moreover, there can be little doubt that the indiscriminate use of the language of constitutional rights has led at times to an almost narcissist individualism and irresponsibility in American social and political life, dividing American society into self-serving, insular human enclaves. I would speculate (although this can never be proven) that, in general, the de facto status of rights in Britain (one of the last bastions of the Westminster system), for example, has not been significantly lower during the past two centuries than in the United States, which has had more than two centuries of experience with a widely celebrated Bill of Rights and almost two centuries of active judicial review.

II. LOOKING SIDEWAYS: THE "NEW CONSTITUTIONALISM"

While the four major categories of critical studies outlined above succeed in undermining the complacent view that judicial review is unequivocally positive, they all draw exclusively on the experience of the American "rights revolution" and history of judicial review. It is remarkable how rarely books and articles on American constitutional law and politics, for example, refer to constitutions and bills of rights in other countries. As George P. Fletcher notes, "[a] striking feature of the American jurisprudential debate is its provinciality. The arguments [are put] forward as though [the American legal system were] the only legal system in the world."³⁴ Indeed, many American scholars of constitutional law and politics treat the term "Constitution" as though it were a proper name, rather than a concept whose nature, origins, and consequences could best be understood by examining and comparing a variety of instances of constitutionalism. American parochialism with regard to other countries' constitutional arrangements and practices is especially remarkable given the fact that more than eighty countries

34. George P. Fletcher, *Comparative Law as a Subversive Discipline*, 46 AM. J. COMP. L. 683, 691 (1998). For a recent critique of American parochialism in this regard, see, for example, HERBERT JACOB ET AL., *COURTS, LAW AND POLITICS IN COMPARATIVE PERSPECTIVE* (1996); Bruce Ackerman, *The Rise of World Constitutionalism*, in 3 YALE LAW SCHOOL OCCASIONAL PAPERS (1997); and Martin Shapiro, *Public Law and Judicial Politics*, in *POLITICAL SCIENCE: THE STATE OF THE DISCIPLINE* 365 (Ada Finifter ed., 1992).

and several supranational entities have engaged in fundamental constitutional reform over the past three decades alone. These countries range from the Eastern Bloc to Canada, from new democracies in Latin America to South Africa, and from the EU to Israel. Significantly, nearly every recently adopted constitution or constitutional revision contains a bill of rights and establishes some form of active judicial review.³⁵ In most countries in which a constitutional bill of rights has been recently enacted, as well as in many established democracies that adopted a variety of administrative and judicial review procedures in the postwar decade (for example, Germany, India, Italy, and France), national high courts have become increasingly important, if not crucial, public policy-makers. In all of these countries there has been an increasing intrusion of the judiciary into the prerogatives of legislatures and executives, and a corresponding acceleration of the process whereby political agendas have been judicialized, thus bringing about a growing reliance on adjudicative means for clarifying and settling crucial public-policy issues and normative debates. By and large, American scholarship on constitutional politics tends to ignore these worldwide phenomena. And whereas several single polity studies concerning the constitutional politics of other established democracies (for example, Britain, Germany, and France) and supranational entities (such as the European Union) have appeared over the past few years, genuinely comparative studies of judicial politics and

35. The full list of countries that have undergone fundamental constitutional reform since the early 1970s is too long to cite. For example, Canada adopted a Charter of Rights in 1982. *See* CAN. CONST. (Constitution Act 1982) pt. I (Canadian Charter of Rights and Freedoms). New Zealand did likewise in 1990, *see* New Zealand Bill of Rights Act, 1990, as did Hong Kong in 1991, *see* Hong Kong Bill of Rights Ordinance, No. 59 (1991). Almost all the new democracies in eastern Europe (for example, Hungary (1990), Bulgaria (1991), Romania (1992), Poland (1992), the Czech Republic (1993), Russia (1993), and Slovakia (1993)) adopted bills of basic rights as part of their new constitutions. *See generally* CONSTITUTIONS OF THE COUNTRIES OF THE WORLD (Gisbert H. Flanz ed., 2000). Israel adopted new Basic Laws protecting certain fundamental rights in 1992. *See* Basic Law: Freedom of Occupation, 1992, S.H. 1387, Basic Law Human Dignity and Liberty, 1992, S.H. 1391. Denmark incorporated the provisions of the European Convention on Human Rights into its domestic law in 1993, followed by Sweden in 1995. South Africa adopted a Bill of Rights as part of its new constitution in 1994, and established a new Constitutional Court in 1995. *See* S. AFR. CONST. § 167. Even Britain, one of the last bastions of the Westminster system, has recently enacted the Human Rights Act, 1998, ch. 42 (Eng.) (effective October 2, 2000), which effectively incorporates the provisions of the European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221, art. 1 (1950) into British constitutional law; this enactment marks the first rights legislation to be introduced in the U.K. in 300 years.

constitutional rights jurisprudence of other countries are still extremely rare, ill-informed, and lack a coherent methodology.

The dearth of comparative research into the origins and consequences of constitutionalization has an important methodological implication. Because few studies by American constitutionalists examine the origins and consequences of constitutionalization and judicial review in countries other than the United States, critics of judicial review often fail to address a common counterargument made by proponents of judicial review, namely that we know what the U.S. Supreme Court has done in the name of judicial review, but we do not know what legislatures would have done if the Supreme Court had eschewed or disclaimed the power of judicial review.³⁶

Because the American constitutional legacy of active judicial review is nearing its bicentennial anniversary, diachronic, quasi-experimental, prelegislation/post-legislation empirical research into the impact of the constitutionalization of rights and the establishment of judicial review is indeed difficult, if not impossible, to conduct. This is in direct contradistinction to countries with a relatively short experience of judicial review where such a diachronic, prelegislation/post-legislation study would be possible to conduct while holding other variables to a manageable level. While the extremely rich and diverse constitutional jurisprudence of the U.S. Supreme Court over the past two centuries provides us with an abundance of data pertaining to judicial interpretation and behavior, the American constitutional legacy is perhaps the least appropriate for assessing the function of judicial review in the pursuit of social justice as there is no alternative domestic model against which to measure the achievements of the Constitution. In contrast, the fact that numerous countries have undergone a transition to "juristocracy" over the past few decades, primarily through the constitutionalization of rights and the establishment of judicial review, provides a fertile terrain for investigating the political origins of the increasingly popular transfer of policymaking from legislatures and executives to the judiciary, as well as for measuring empirically the effects of using the courts as fora for vindicating fundamental social values. Moreover, the recent global wave of

36. See generally LEVERAGING THE LAW, *supra* note 22; MCCANN, *supra* note 22; Eskridge, *supra* note 20; Feeley, *supra* note 22; Thomas Marshall, *Policymaking and the Modern Court: When Do Supreme Court Rulings Prevail?*, 42 W. POL. Q. 493 (1989); David A. Schultz & Stephen E. Gottlieb, *Legal Functionalism and Social Change: A Reassessment of Rosenberg's The Hollow Hope: Can Courts Bring about Social Change?*, 12 J.L. & POL. 63 (1996).

constitutionalization should allow scholars, legislators, and jurists to compare the experiences of the "New Constitutionalism," its pitfalls and successes, in an attempt to develop innovative judicial strategies for maximizing the democratic potential of judicial review.

To provide a rough taxonomy, four broad scenarios of constitutionalization have been most commonly employed in the past three decades: (1) the "incorporation" scenario, in which constitutionalization was part of an incorporation of international and transnational legal standards and supranational regimes into domestic law;³⁷ (2) the "dual transition" scenario, in which constitutionalization was part of a dual transition to a Western-model democracy and a market economy;³⁸ (3) the "single transition" scenario, in which the constitutionalization of rights and the expansion of judicial power have been the byproducts of a transition to democracy;³⁹ and (4) the "no apparent transition" constitutionalization scenario, in which constitutional reforms have neither been accompanied by, nor have resulted from, fundamental changes in political or economic regimes.⁴⁰ Each of these types of constitutional reform pose their own puzzles for scholars of public law and judicial politics. It is the "no apparent transition" scenario of constitutional revolutions, however, that I find the most attractive from a methodological standpoint.

The recent constitutional revolutions in Canada, which in 1982 adopted a new Constitution Act that includes the Charter of Rights and Freedoms,⁴¹ New Zealand, which enacted the New Zealand Bill of Rights Act in 1990,⁴² and Israel, which adopted two new Basic

37. An example of this is the recent enactment in the U.K. of the Human Rights Act of 1998, ch. 42 (Eng.).

38. An example of this scenario is the transition that has occurred in Eastern Bloc countries.

39. An example of this scenario is the transition in South Africa.

40. Examples of this scenario include Canada in 1982, New Zealand in 1990, and Israel in 1992.

41. See CAN. CONST. (Constitution Act, 1982) pt. 1 (Canadian Charter of Rights and Freedoms). The full text of the 1982 Constitution Act and the Charter of Rights and Freedoms is reproduced in many books dealing with Canadian constitutional law and politics. See, e.g., PETER W. HOGG, CONSTITUTIONAL LAW OF CANADA 1109-41 (1999).

42. New Zealand Bill of Rights Act, 1990. The full text of the Act is reproduced in many books dealing with New Zealand's constitutional law and politics. See, e.g., RIGHTS AND FREEDOMS: THE NEW ZEALAND BILL OF RIGHTS ACT 1990 AND THE HUMAN RIGHTS ACT 1993 (Grant Huscroft & Paul Rishworth eds., 1995).

Laws protecting various civil liberties in 1992,⁴³ provide a nearly ideal testing ground for identifying the political origins and consequences of the constitutionalization of rights and the fortification of judicial review. First, all three countries have undergone major constitutional reform over the past few years, which has included, among other things, a constitutionalization of rights and substantive judicial empowerment through the fortification of judicial review. Unlike many former Eastern Bloc countries, for example, the dramatic constitutional changes in all three countries have neither been accompanied by, nor resulted from, major changes in their political and economic regimes. It is hence possible to disentangle the political origins of constitutionalization from other possible explanations for constitutional change, and to distinguish the impact of judicial empowerment through constitutionalization on changes in judicial interpretation and the judicialization of politics. Second, the constitutional revolutions in Canada, Israel, and New Zealand have taken place in societies deeply divided along political, economic, and ethnic lines. A study of these three constitutional revolutions therefore allows us to assess how far the move toward judicial empowerment through constitutionalization had its political origins in pre-existent socio-political struggles within each given polity. Third, the recent constitutionalization of rights and fortification of judicial review in these three countries marks a departure from the Westminster model of parliamentary supremacy and the established British legal tradition of judicial restraint in these countries—thus providing the Canadian Supreme Court, the New Zealand Court of Appeal, and the Israeli Supreme Court with the necessary institutional framework for becoming more vigilant in protecting basic rights and liberties. Indeed, these three national courts have reacted with great enthusiasm to the constitutionalization of rights and the fortification of judicial review in their respective domains by adjudicating many landmark constitutional rights cases over the past decade. Fourth, all three polities possess a strong British common-law legal tradition. This common inheritance eliminates variations in legal tradition as possible explanations for differences in legal activity, judicial

43. Basic Law: Freedom of Occupation, 1992, S.H. 114, was officially enacted on March 3, 1992, and amended two years later, on March 9, 1994. See Basic Law: Freedom of Occupation, 1994, S.H. 90. Basic Law: Human Dignity and Liberty, 1992, S.H. 155, was officially enacted by the *Knesset* (the Israeli Parliament) on March 17, 1992, two weeks after the enactment of the Basic Law: Freedom of Occupation Act. The official English version of the new Basic Laws is available at the Israel Ministry of Foreign Affairs Web site, see *Israel Ministry of Foreign Affairs* (visited Mar. 28, 2000) <<http://www.mfa.gov.il/mfa/go.asp/>>.

interpretation, and the judicialization of politics among the three countries. At the same time, these three countries embody different models of judicial review as well as distinct variances in the status of constitutional rights. The significance of formal institutional factors can thus be assessed while also accounting for variations in legal and political outcomes of constitutionalization as experienced by all three polities. For these reasons, the constitutional revolutions of Canada, Israel, and New Zealand (among others) provide a nearly ideal testing ground for assessing the impact of constitutionalization upon prevalent patterns of judicial interpretation, the de facto status of historically disenfranchised groups and individuals, and the judicialization of politics.⁴⁴

But the transformation of judicial institutions into major political actors is not limited to the national level. At the supranational level, the European Court of Justice interprets the treaties upon which the European Union ("EU") is founded, and has been awarded an increasingly important status by legislators, executives, and judiciaries in EU member-states dealing with interstate legal and economic disputes. The European Court of Human Rights in Strasbourg, the judicial arm of the forty-one-member Council of Europe, has, in effect, become the final court of appeal on human-rights issues for most of Europe. The judgments of both European courts carry great weight and have forced many countries to incorporate transnational legal standards into their domestic legal system. Present calls for the adoption of a global constitution and for the establishment of an international tribunal for war crimes and human rights violations also suggest that law and courts in general, and the constitutionalization of rights in particular, are becoming key factors in international politics as well.

The delegation of policymaking authority to semiautonomous, professional bodies has also expanded in other, nonjudicial realms over the past three decades. In many countries, for example, there has been a general move toward granting greater independence to

44. I embark on a comprehensive comparative inquiry into the political origins and consequences of judicial empowerment through the constitutionalization of rights and the establishment of judicial review in a book I am currently completing. For two articles presenting parts of this work, see Ran Hirschl, *Negative Rights vs. Positive Entitlements: A Comparative Study of Judicial Interpretations of Rights in an Emerging Neo-Liberal Economic Order*, 22 HUM. RTS. Q. (forthcoming Aug. 2000); Ran Hirschl, *The Political Origins of Judicial Empowerment through Constitutionalization: Lessons from Four Constitutional Revolutions*, 25 L. & SOC. INQUIRY 91 (2000) [hereinafter Hirschl, *The Political Origins of Judicial Empowerment through Constitutionalization*].

central banks.⁴⁵ Countries such as Belgium, Britain, France, Spain, Brazil, and Argentina (to mention only a few examples) have all increased the autonomy of their respective central banks.⁴⁶ In these (and many other) countries, democratically elected governments can no longer exclusively control the process of monetary policymaking. Supranational policymaking bodies, mostly EU-affiliated, have increasingly dealt with many aspects of everyday life in the European continent over the past three decades. The hallmarks of this process have been: (1) the establishment of the new European Central Bank; (2) the recent launch of the single European currency; (3) the emergence of a complex nexus of supranational legal provisions regulating production, import and export of goods, taxation, and customs throughout the continent; (4) the reconstruction and expansion of NATO; and (5) the emergence of transnational bodies dealing with problems of immigration, natural resources, labor relations, food and drug licensing and regulation, environmental preservation, and so forth. A similar process has also taken place, albeit at a slower pace, in other continents (for example, the emergence of transnational trade treaties such as NAFTA in North America,⁴⁷ MERCOSUR in South America,⁴⁸ and ASEAN in Asia⁴⁹), as well as at the intercontinental level (for example, the rise of supranational bodies such as the IMF and the WTO that monitor substantive aspects of global trade and international monetary policies). In short, a large-scale transfer of crucial policymaking prerogatives from majoritarian decision-making arenas to domestic and transnational semiautonomous and relatively insulated policymaking bodies such as national high courts, central banks, supranational trade organizations, monetary funds, and judicial tribunals has established itself over the past few decades.

These and other phenomena similar in nature provide “Americanists” and “comparativists” alike with fertile terrain for studies concerning various normative and empirical aspects of the question Tushnet is concerned with, namely the “democratic deficit” inherent in the transfer of policymaking power from elected and

45. See, e.g., ROBERT ELGIE & HELEN THOMPSON, *THE POLITICS OF CENTRAL BANKS* (1998); Robert Elgie, *Democratic Accountability and Central Bank Independence: Historical and Contemporary, National and European Perspectives*, 21 W. EUR. POL. 53 (1998); *Central Bankers*, *ECONOMIST*, Feb. 19, 2000, at 106.

46. See sources cited *supra* note 45.

47. North American Free Trade Agreement, Dec. 17, 1992, U.S.-Can.-Mex., 32 I.L.M. 289.

48. Treaty Establishing a Common Market, Mar. 26, 1991, Arg.-Braz.-Para.-Uru., 30 I.L.M. 1041.

49. Association of Southeast Asian Nations Declaration, Aug. 8, 1967, 6 I.L.M. 1223.

accountable politicians in legislatures and executives to semi-autonomous, relatively insulated, and seemingly apolitical policy-making bodies.

III. LOOKING BACKWARDS: THE POLITICAL ORIGINS OF JUDICIAL EMPOWERMENT THROUGH CONSTITUTIONALIZATION

The expansion of judicial power through constitutionalization, the increasing intrusion of the judiciary into the prerogatives of legislatures and executives, and the corresponding acceleration of the judicialization of politics in so many countries over the past few decades may shed light on an often ignored aspect of the judicial review versus democracy debate—the *political origins of constitutionalization*. Because both the constitutionalization of rights and judicial review limit the institutional flexibility of political decision-makers, the increasingly common phenomenon of judicial empowerment through these reforms seems, *prima facie*, to run counter to the interests of power-holders in legislatures and executives. How, then, can we explain the voluntary transfer of power from majoritarian policymaking arenas to national high courts through constitutionalization?⁵⁰

I would argue that the constitutionalization of rights and the establishment of judicial review in Canada, Israel, New Zealand, and South Africa (to mention only four countries in which a major constitutional reform has taken place in the past few years), could not have developed and cannot be understood in isolation from the major political and cultural struggles that structure the political systems of these countries. A close analysis of the political origins of the recent constitutional revolutions in these countries suggests that politicians representing social and economic elites, in cooperation with the judicial elite, determined the timing, extent, and nature of constitutional reform in these countries. Political actors representing hegemonic social, political, and economic forces usually attempt to shape the legal system to suit their interests. To do so effectively in rule-of-law polities, they must secure the cooperation of the judicial elite with whom the political elite often have close social ties. The changes that emerge reflect a combination of political and economic preferences and professional interests. To be

50. For a critical survey of extant theories of constitutional transformation and their drawbacks, see Hirschl, *The Political Origins of Judicial Empowerment through Constitutionalization*, *supra* note 44.

sure, demands for constitutional change often emanate from various groups within the body politic, but if hegemonic political and professional elites and their parliamentary representatives do not foresee gain from a proposed change, the change is likely to be blocked.

Political institutions produce differential distributive effects: they privilege some groups and individuals over others. Prominent political actors are therefore likely to favor the establishment of institutions that will benefit them the most.⁵¹ Although constitutions and judicial review hold no independent pursestrings, they nonetheless limit the institutional flexibility of political decision-makers. Thus, the voluntary transfer of policymaking authority to the courts through constitutionalization seems, *prima facie*, to run counter to the interests of power-holders in legislatures and executives. Because judicial empowerment through constitutionalization places limits on legislative power, the most plausible explanation for such voluntary, self-imposed reforms is that political power-holders who either initiate or refrain from blocking them estimate that it serves their interests to abide by the limits imposed by the new constitutional arrangements, and that the implementation of the constitutionalization of rights and judicial review are likely to enhance their relative power *vis-à-vis* other elements in the political system. In other words, the political actors who voluntarily establish self-enforcing institutions such as constitutions and judicial review must assume that their costs under the new institutional structure will be compensated by the limits it might impose on rival political elements.⁵²

51. See generally JACK KNIGHT, *INSTITUTIONS AND SOCIAL CONFLICT* (1992); Terry Moe, *Political Institutions: The Neglected Side of the Story*, 6 J.L. ECON. & ORG. 213 (1990).

52. My argument here finds striking parallels in works concerning the political origins of empowerment of other, similar semi-autonomous institutions such as central banks, environmental regulatory bodies, and supranational tribunals. For example, in her study of the political origins of the variance in the degree of central bank authority among developing countries, Sylvia Maxfield argues that the interests and capacities of early central banking institutions in such countries are shaped by the changing financial interests of those in a position to voluntarily delegate authority to central banks: government politicians and private banks. See Sylvia Maxfield, *Financial Incentives and Central Bank Authority in Industrializing Nations*, 46 WORLD POL. 556 (1994). Drawing upon a similar logic, Michael T. Maloney and Robert E. McCormick suggest that the variance in the level of support by existing firms towards proposed environmental regulatory policies can be explained by the different limits and costs such policies impose upon new firms. See Michael T. Maloney & Robert E. McCormick, *A Positive Theory of Environmental Quality Regulation*, 25 J.L. & ECON. 99 (1982). Because environmental regulation typically imposes more stringent controls on new firms, it restricts entry and potentially enhances the competitive position of existing firms. Another example is the "intergovernmentalist" thesis which suggests that member

As I have shown elsewhere, a detailed account of the political origins of the constitutional revolutions in Canada (1982), New Zealand (1990), Israel (1992), and South Africa (1993), for example, suggests that judicial empowerment through constitutionalization is, more often than not, the result of a conscious strategy undertaken by threatened elites, seeking to preserve their hegemony vis-à-vis a growing influence of “peripheral” groups and interests in majoritarian policymaking arenas. When their hegemony is increasingly challenged in such arenas, elites who possess disproportionate access to, and influence over, the legal arena may initiate a constitutional entrenchment of rights in order to transfer power to supreme courts. There, based primarily on the courts’ record of adjudication and on the justices’ ideological preferences, these elites can safely assume that their policy preferences will be less contested. In other words, increasing judicial intrusion into the prerogatives of the legislature and the executive may provide an efficient institutional solution for influential groups who seek to preserve their hegemony, and who, threatened by an erosion of their popular support, may find strategic drawbacks in continuing to adhere to majoritarian decision-making processes.

This type of hegemonic preservation through the constitutionalization of rights or an interest-based judicial empowerment is likely to occur (1) when the judiciary’s public reputation for

states are the central institution builders of the European Community (“EC”), and that they provide autonomy to the European Court of Justice (“ECJ”) to serve their own purposes. According to this approach member-states choose to create (and selectively abide by the limits imposed by) supranational institutions because these institutions help them surmount problems raised by the need for collective action and overcome domestic political problems. The political power version of this thesis suggests that national governments from the European Union (“EU”) member-states have not been passive and unwilling victims of European legal integration; they consciously transferred power to the court, and where the ECJ has been proactive, the member governments have supported this. *See, e.g.*, Geoffrey Garrett et al., *The European Court of Justice, National Governments, and Legal Integration in the European Union*, 52 INT’L ORG. 149 (1998); Geoffrey Garrett, *International Cooperation and Institutional Choice: The European Community’s Internal Market*, 46 INT’L ORG. 533 (1992). In a similar spirit, the party-based electoral market thesis understands judicial empowerment in a given polity as derivative of the level of competitiveness of the electoral market in that polity. When a ruling party expects to consistently win elections, the likelihood of increased judicial empowerment is low. Only when a ruling party has low expectations of remaining in power might it support judicial empowerment to ensure that the next ruling party cannot use the judiciary to achieve its policy goals. *See, e.g.*, Mark Ramseyer, *The Puzzling (In)Dependence of Courts: A Comparative Approach*, 23 J. LEGAL STUD. 721 (1994); *see also* William Landes & Richard Posner, *The Independent Judiciary in an Interest-Group Perspective*, 18 J.L. ECON. 875 (1975). For a critical survey of the electoral market thesis see Hirschl, *The Political Origins of Judicial Empowerment through Constitutionalization*, *supra* note 44.

professionalism, political impartiality, and rectitude is relatively high; (2) when judicial appointments are controlled to a large extent by hegemonic political elites; and (3) when the courts' constitutional jurisprudence predictably mirrors the cultural propensities and policy preferences of the hegemonic elites. Under such conditions, judicial empowerment through the constitutional fortification of rights may provide an efficient institutional means for political elites to insulate their increasingly challenged policy preferences from popular political pressure, especially when majoritarian decision-making processes are not operating to their advantage.⁵³

The widespread transition to democracy, the growth of popular demands for political representation, the ultimate triumph of universal suffrage (including breaking the historical dependence of voting rights upon property ownership, gender, or ethnic origin), the global decline in formalized instances of racial and gender segregation, the unprecedented scope of immigration to many Western countries over the past three decades that threatens to change the "demographic balance" in these countries thus increasing demands by local communities for greater self-government, and the growing dependence of politicians upon the idiosyncratic whims of their constituencies, as well as the growing presence of "peripheral" interests and policy preferences (for example, environmentalism, disarmament, multiculturalism, non-mainstream sexual preferences, regional and religious separatism) in crucial majoritarian policy-making arenas—all these recent phenomena imply a growing potential threat to established interests. The growing representation of "peripheral" interests in majoritarian policymaking fora over the past few decades further emphasizes the tension on the state

53. Judicial empowerment through the constitutionalization of rights may also serve the interests of influential coalitions of domestic economic elites (for example, powerful industrialists and conglomerates given added impetus by global economic trends). Such elites may view the constitutionalization of rights, especially property, mobility, and occupational rights, as a means of promoting economic deregulation, and of fighting what its members often perceive to be harmful "large government" policies of an encroaching state. The transfer of power to the courts may also serve the interests of a supreme court seeking to enhance its political influence and international profile. As the sources cited *supra* note 20 illustrate, national high courts may primarily promote legal policy, but they are also strategic actors, who may realize when the changing preferences of other influential political actors, as well as changes in the institutional context might allow them to strengthen their own institutional position by expanding their involvement in crucial policymaking arenas. See KNIGHT, *supra* note 51, at 10-11. Moreover, the constitutionalization of rights and the establishment of judicial review may support the interests of a supreme court seeking to increase its symbolic power, by fostering its alignment with a growing community of liberal democratic nations engaged in rights-based discourse.

between powerful centripetal forces of convergence (for example, formal democracy, global capitalism, economic neoliberalism, and converging media consumption) acting from outside, and re-emerging centrifugal forces of divergence (for example, regionalism, differentiated citizenship, and growing economic inequality) acting on the state from the inside. In the face of such potential challenges, threatened but still dominant elites may choose to limit the policymaking authority of majoritarian decision-making fora by gradually transferring authority from such fora to semiautonomous, relatively insulated, professional and seemingly impartial policymaking institutions such as national high courts, central banks, transnational trade organizations and supranational tribunals.

By keeping popular decision-making mechanisms at the forefront of the formal democratic political process, and simultaneously removing more and more policymaking authority from majoritarian policymaking arenas to semiautonomous, insulated, professional policymaking bodies, those who possess disproportionate access to, and have a decisive influence upon such bodies may minimize the potential threat to their hegemony. I would therefore speculate that the current global trend toward judicial empowerment through constitutionalization is *part and parcel of a broader process*, whereby hegemonic but threatened political, economic, and cultural elites increasingly choose to tie their hands in order to insulate policymaking from the vicissitudes of democratic politics. The combination of formal popular decision-making mechanisms and substantially insulated policymaking bodies controlled to a large extent by hegemonic interests is perhaps the least dangerous *modus vivendi* for the established oligarchies of wealth, power, and cultural hegemony given the growing presence of “peripheral” interests in majoritarian policymaking arenas.

IV. LOOKING FORWARDS: STRATEGIES FOR MITIGATING THE COUNTER-MAJORITARIAN DIFFICULTY

Taking the Constitution away from the courts by establishing what Mark Tushnet calls “populist constitutionalism” might indeed overcome the tension between constitutionalism and judicial review on the one hand, and fundamental democratic principles of political participation and self-government on the other.⁵⁴ However, some-

54. See TUSHNET, *supra* note 2, at 177-94.

what less-utopian and abstract strategies for mitigating the counter-majoritarian nature of judicial review have already been at work in established democracies that have undergone judicial empowerment through constitutionalization over the past few decades. I would argue that we should look to these other examples and move to a comparative view of constitutionalism in order to illuminate the various aspects of the tension between judicial review and democracy; a study that concentrates solely on the singular American constitutional legacy is necessarily going to produce idiosyncratic conclusions, not readily transferable to other political and legal contexts.

Precisely because many recent constitutional revolutions have taken place in established democracies, the framers of the new constitutional arrangements in these countries could not ignore the counter-majoritarian tendency embedded in constitutionalism and judicial review. Persisting political traditions of public deliberation and parliamentary sovereignty had to be taken into account by those who initiated the constitutionalization of rights and judicial review in Britain, Canada, France, Israel, and New Zealand (to mention only a few examples). The result has been the development of a variety of innovative institutional mechanisms aimed at compensating for the counter-majoritarian difficulty embedded in judicial review. Consider the following brief examples.

The rights protected by the Canadian Charter of Rights and Freedoms,⁵⁵ for example, are subject to three important limitations. First, the Charter applies only to the actions of the government.⁵⁶ It is intended to protect individuals from abuses of state power and is not meant to regulate behavior between private individuals.⁵⁷ Second, section 1 of the Charter (the "Limitation Clause") states that the rights protected by the Charter are guaranteed, subject to "such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."⁵⁸ In other words, if any limits are to be put on rights, then the government must establish to the satisfaction of the courts that those limits can be justified in

55. See CAN. CONST. (Constitution Act, 1982) pt. I (Canadian Charter of Rights and Freedoms).

56. See *id.* § 32.

57. See *id.*

58. *Id.* § 1.

a free and democratic society.⁵⁹ Third, a significant limitation to rights and freedoms lies in section 33—the “Notwithstanding Clause.”⁶⁰ This clause enables elected politicians, in either the federal parliament or the provincial legislatures, to legally limit rights and freedoms under section 2 (fundamental freedoms) and sections 7 to 15 (due process and equality rights) of the Charter, by passing overriding legislation valid for a period of up to five years.⁶¹ This means that any invocation of section 33 essentially grants parliamentary fiat over these rights and freedoms. This, in turn, means that, at least in theory, both the federal Parliament (with regard to federal matters) and the provincial legislatures (with regard to matters within provincial jurisdictions) are ultimately sovereign over these affairs. True, since the Charter’s enactment in 1982, there have been only five instances (and only two outside Québec) where provincial governments have either invoked or attempted to invoke the Notwithstanding Clause. However, in light of the accelerated judicialization of politics in Canada and the increasing political prominence of the Canadian Supreme Court, prominent political critics have urged the use of the Charter’s section 33 to override recent controversial court decisions dealing with equality rights in the context of sexual preference, and with the constitutionality of future unilateral secession by Québec.⁶²

59. In the landmark judgment of *The Queen v. Oakes*, [1986] 1 S.C.R. 103, the Supreme Court of Canada developed a two-pronged approach to interpreting the Charter’s Limitation Clause. *See id.* at 138-39. The first inquiry is whether the challenged law or conduct violates, denies, or infringes any right. *See id.* at 138. This requires an analysis of the scope and definition of the right, as well as the purpose and effect of the legislation and conduct. *See id.* The second inquiry is whether there has been a justifiable limitation on the right concerned. *See id.* at 139. A similar “Limitation Clause” is part of South Africa’s new constitutional catalogue of rights adopted in 1996. *See S. AFR. CONST.* (1996) ch. II, § 36(1).

60. *See CAN. CONST.* (Constitution Act, 1982) pt. I (Canadian Charter of Rights and Freedoms) § 33(1).

61. *See id.* § 33(1)-(3).

62. For a list of such calls, see, for example, F.L. MORTON & RANIER KNOPFF, *THE CHARTER REVOLUTION AND THE COURT PARTY* (2000). Three recent judgments of the Supreme Court of Canada triggered the bulk of these calls (and therefore the political revival of section 33 over the past two years). *See M. v. H.*, [1992] 2 S.C.R. 3 (stating that section 15(1) of the Charter also entitles same-sex couples to sue for spousal support on the same basis as common-law heterosexual couples); *Reference re Secession of Québec*, [1998] 2 S.C.R. 217 (holding that unilateral secession would be an unconstitutional act under both domestic and international law; that a majority vote in Québec is not sufficient to allow the French-speaking province to legally separate from the rest of Canada; and that if and when secession is approved by a clear majority of the people of Québec voting in a referendum on a clear question, the sides must negotiate in good faith on the terms of the breakup); *Vriend v. Alberta*, [1998] 1 S.C.R. 493 (holding that Alberta’s Individual Rights Protection Act contravened the Charter’s section 15(1) equality rights because it failed to include sexual orientation as a prohibited ground of discrimination; and ordering that the words “sexual

Like the Canadian Charter, Israel's new Basic Laws protecting fundamental rights and liberties contain a limitation clause forbidding infringement of the declared rights, except by legislation that is deemed to be in accordance with the values of the State of Israel, and intended for an appropriate purpose, and even then the infringement is permitted only to the extent necessary.⁶³ Moreover, in 1994, two years after its enactment, Basic Law: Freedom of Occupation was amended by the *Knesset* (the Israeli parliament) in the spirit of the Canadian "notwithstanding" override clause to allow for future modifications by ordinary laws in the instance of an absolute majority of *Knesset* members declaring support for the amendment.⁶⁴

Unlike the Canadian Charter and other constitutional catalogues of rights adopted over the past few decades, the New Zealand Bill of Rights Act ("NZBOR") of 1990 is an ordinary statute that does not formally empower the courts to nullify legislation inconsistent with its provisions.⁶⁵ Nevertheless, the operational provisions of the Bill were designed to reduce the likelihood of legislation unreasonably infringing upon the rights protected by the NZBOR, and in practice set the basis for an active judicial review system in New Zealand. Section 5 of the Bill provides that "the rights and freedoms contained in this Bill of Rights may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."⁶⁶ Section 6 of the Bill requires courts to interpret laws in a manner consistent with the Act.⁶⁷ There are clear signs that the New Zealand Court of Appeal may accord the NZBOR a de facto entrenched status.⁶⁸ In addition, section 7 of the NZBOR

orientation" be read into the Act, effectively expanding its scope to cover lesbians and gay men).

63. See Basic Law: Human Dignity and Liberty, 1992, § 8; Basic Law: Freedom of Occupation, 1992, § 4. Significantly, both laws authorize judicial review. However, article 10 of Basic Law: Human Dignity and Liberty grants immunity from scrutiny to all previously existing legislation. Thus, the supremacy of this Basic Law is only as regards future legislation that may infringe on rights guaranteed by the Basic Law.

64. See Basic Law: Freedom of Occupation, 1994, S.H. 90 § 8.

65. See New Zealand Bill of Rights Act, 1990.

66. *Id.* § 5.

67. See *id.* § 6.

68. In a landmark decision in 1994, for example, the Court observed that lack of entrenchment and constitutional status "makes no difference to the strength of the Bill of Rights where it is to be applied." *Simpson v. Attorney General*, [1994] 3 N.Z.L.R. 667, 706. This and other recent decisions of the Court of Appeal indicate that the Bill of Rights, though unentrenched, may gradually gain sufficient legal and political authority to allow the courts to practically exercise most of the powers of scrutiny and control they would have had under a system of full-scale judicial review.

requires the Attorney General to advise the House of Representatives whenever he or she believes that any provision in a bill introduced to Parliament would infringe upon a right.⁶⁹ This procedure has been invoked several times since 1990, generally having the effect of preventing the provision from being enacted.⁷⁰ Taken together, these provisions established a new model of judicial review in New Zealand that I call the *preferential* model. This compromise model of judicial review that has been established over the past decade in several common-law countries with a long tradition of parliamentary supremacy, such as Britain, gives preference to legislation or a court judgment that is consistent with the Bill of Rights over one that is not, and instructs legislators to avoid enacting laws that contradict, *prima facie*, constitutional provisions protecting basic rights. This model enables a limited judicial review on the one hand, and accords with the parliamentary tradition in these countries on the other.

The British Human Rights Act, 1998,⁷¹ which will become effective in October 2000, presents another version of the “preferential” model. The Act, which is based, *inter alia*, on New Zealand’s experience with non-entrenched bill of rights, will require the courts to interpret existing and future legislation as much as possible in accordance with the European Convention on Human Rights.⁷² According to the Act, if the higher courts in Britain decide that an Act of Parliament prevents someone from exercising his or her human rights, judges will make what is termed a “declaration of incompatibility.”⁷³ Such a declaration would then put ministers, so it is hoped, under political pressure to change the law. Formally, the European Convention will not override existing Acts of Parliament, but ministers will have to state whether each new piece of legislation they introduce complies with the European Convention on Human Rights.⁷⁴

The *Conseil Constitutionnel*, which was established by the 1958 constitution of France’s Fifth Republic,⁷⁵ has limited preenactment

69. See New Zealand Bill of Rights Act, § 7, 1990.

70. See, e.g., Paul Rishworth, *Civil Liberty and Democracy, in NEW ZEALAND POLITICS IN TRANSITION* (1998).

71. Human Rights Act, 1998, ch. 42 (Eng.).

72. See *id.* § 2.

73. *Id.* § 4.

74. See *id.*

75. See FR. CONST. (1958), tit. VII.

constitutional review powers.⁷⁶ The principal power of the Council has been to control the constitutionality of legislative bills passed by Parliament but not yet promulgated by the President of the Republic.⁷⁷ In addition, the council (1) ensures the regularity of presidential elections;⁷⁸ (2) rules on disputes in parliamentary elections;⁷⁹ and (3) rules on the constitutionality of laws before they are promulgated if requested by the president, the premier, the president of the houses of the legislature, or, since an amendment in 1974, sixty members of either house.⁸⁰ Unlike the courts in the United States, Canada, and Germany for example, the council has no power to nullify a law after it is enacted by the legislature.⁸¹

Numerous other mechanisms such as (1) relatively flexible constitutional amendment procedures; (2) national commissions of inquiry (for example, the Truth and Reconciliation Committee in South Africa or the Royal Commission on Aboriginal Peoples in Canada) whose deliberations are open to the public; (3) constituent assemblies, referenda, and plebiscites concerning constitutional reform; (4) greater emphasis on state-level constitutionalism; (5) innovative judicial appointment processes; (6) broad standing and intervenor rights; and (7) generous legal aid programs targeted at historically disenfranchised groups, have been introduced by several established democracies over the past few decades. All of these new mechanisms (as well as other, less-formal strategies such as close monitoring of the judiciary by the media, frequent and widely publicized public opinion polls measuring levels of concrete and diffuse popular support of national high courts, and the increasingly popular constitutional dialogue between national high courts and

76. See, e.g., ALEC STONE, *THE BIRTH OF JUDICIAL POLITICS IN FRANCE: THE CONSTITUTIONAL COUNCIL IN COMPARATIVE PERSPECTIVE* (1992); Doris M. Provine, *Courts in the Political Process in France*, in *COURTS, LAW AND POLITICS IN COMPARATIVE PERSPECTIVE* (1996).

77. See FR. CONST. (1958), tit. VII, art. 61.

78. See *id.* art. 58.

79. See *id.* art. 59.

80. See *id.* art. 61.

81. Preventative control of the constitutionality of nonpromulgated legislation is exercised by the *Conseil Constitutionnel* in two ways: (1) Obligatory control of "organic" laws and parliamentary regulations—all "organic" laws and the rules of procedure of the Assembly and the Senate must be submitted to the *Conseil Constitutionnel* before they are promulgated to enable the *Conseil* to rule on constitutionality; and (2) Facultative control of the constitutionality of ordinary laws and of international treaties—the President of the Republic, or the Prime Minister, or the President of either house of Parliament, or 60 members of either house of Parliament may submit a law before it to the *Conseil Constitutionnel*. See *id.* When requested, the Council must also decide whether an international treaty contains clauses that are contrary to the constitution. See *id.* art. 54.

legislatures) can be viewed as innovative strategies for mitigating the counter-majoritarian difficulty embedded in judicial review and enhancing the constitutional dialogue between elected politicians and the courts, thereby reducing the apparent tension between judicial review and principles of democratic governance.

Despite this spate of constitutional innovation, the bulk of American critical constitutional studies continues to conceptualize the counter-majoritarian difficulty in oversimplified and dichotomous, "either/or" type terms, portraying the gap between rigid constitutions and political participation as irreconcilable and insurmountable. I would suggest, however, that a better acquaintance with at least some of the strategies introduced by the "new constitutionalism" for minimizing the effects of the counter-majoritarian difficulty would enrich the ongoing scholarly debate between mainstream and critical American constitutionalists concerning various normative and empirical merits and drawbacks of American constitutionalism.

V. CONCLUSION

In his recently published review of Akhil Reed Amar's *The Bill of Rights: Creation and Reconstruction*,⁸² Mark Graber convincingly argues that Amar's work is professionally disturbing as it illustrates the lack of interest that prominent legal scholars display in what political scientists have to say about American constitutionalism.⁸³ *Taking the Constitution Away from the Courts* is a direct reply to Graber's justified concern. In contrast to Amar's book, it is full of fascinating insights and observations from history, philosophy, and political science that support Tushnet's thought-provoking arguments.

That said, I believe that most American constitutional law scholarship would benefit from taking another step in a "universalist" or "cosmopolitan" direction. After all, what Tushnet views as a necessary and sufficient set of constitutional principles aimed primarily at protecting formal equal treatment and individual liberty (the "thin Constitution"), may seem to non-American constitutionalists as merely secondary to fundamental constitutional

82. AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* (1998).

83. See Mark Graber, *The Constitution as a Whole: A Partial Political Science Perspective*, 33 U. RICH. L. REV. 343, 344 (1999).

principles concerning separation of powers, federalism, and responsible government.

Mark Tushnet concludes one of the chapters of his book with the following words:

[J]udicial review basically amounts to noise around zero: It offers essentially random changes, sometimes good, sometimes bad, to what the political system produces. On balance, judicial review may have some effect in offsetting legislators' inattention to constitutional values. The effect is not obviously good, which makes us lucky that it is probably small anyway.⁸⁴

Such a compelling "grand thesis" concerning one of the most powerful ideas of our times ought to inform and be informed by political and judicial contexts other than the United States's exceptional, if not outright idiosyncratic, constitutional legacy.

84. TUSHNET, *supra* note 2, at 153.

