

THE
JUDGE
AS
POLITICAL
THEORIST

CONTEMPORARY
CONSTITUTIONAL
REVIEW

DAVID ROBERTSON

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The Judge as Political Theorist

Contemporary Constitutional Review

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Those who write long books cannot quite forget Pascal's apology to his friend for writing a long letter, on the grounds that he did not have time to write a short one. Unfortunately, I have had quite long enough for that excuse not to work. Had I had longer, the book would have grown beyond any publisher's interest. Perhaps the material is just too complex for a shorter work, because I am far more conscious of what I have had to leave out. The book really ought to have had chapters on Australia, India, and Israel at the very least. Or perhaps I am just verbose?

I am a rarity nowadays, not because I am a political scientist writing about courts—there are now quite a lot of us—but because my approach is much nearer than most to the old style of political scientists, often dismissed scornfully by my more hard-edged colleagues as “doctrine scholars.” Comparative work on judicial review is extraordinarily difficult unless one does adopt the methods of modern political science, measuring and seeking quantitative generalizations about external patterns of judicial behaviour. I do not do that here. Nor do I adhere to the currently dominant “rational choice” perspective in analysis. Neither of these methodological failings stems from incompetence. I was, still am, a political sociologist, and most of my work has been quantitative, including the first piece I ever wrote on courts. As for rational choice, I was a fully paid-up member of the gang from my doctoral days. I do not disrespect either quantitative methodology or rational choice theory; they just do not offer answers to the questions that interest me about constitutional review.

No political scientist writing about seven or eight jurisdictions, as I do here, can possibly know as much law as a real lawyer will know about any one of them. Or at least he will not “know the law” as a lawyer knows it. So this book is not one

a lawyer is likely to write, nor is it that of a political scientist—it is not political science, and it is not truly a doctrine study. It is an attempt to understand the core nature of the business of doing judicial review by reading a lot of judicial opinion writing. And it is a speculation about how such activity fits into modern liberal democracy. I believe in judicial review. I have often noticed at conferences that the lawyers trust parliaments, and the political scientists trust the courts. I hope my ultimate trust in constitutional courts is not simply a case of preferring the evil one is familiar with. In the end the book is as it is because I am truly fascinated by constitutional argumentation. I hope some readers may become equally entranced.

A note on errors. There are errors in the book, quite inevitably given its range and my limitations. Sometimes, though, apparent errors are choices of emphasis, and apparent lacunae—a missing caution or shading of argument—are filled in elsewhere in the book. In a study of this size some things need saying more than once, and I may not always have spotted these desirable repetitions. Other apparent errors will turn out to be matters of interpretation. There are, after all, very few actual facts in legal doctrine. Though I have not consciously striven for originality in doctrinal exposition, I must at times have given sincere interpretations that others disagree with. These occasions are not necessarily errors or mistakes.

In writing this big book with a wide scope I have, as all authors admit, benefited from far more people than I can name or properly identify, even to myself. I owe a real debt to the lawyers in my own college—Andrew Burrows, Josh Getzler, Mike McNair, and Derek Wood—who have treated me more courteously than I deserve, talked to me at great length, treated me like an honorary lawyer. Apart from them, I owe many thanks to a perhaps unlikely helper, Peter McDonald, Fellow and Tutor in English, who over many lunches has shared his knowledge of South Africa. I would like to thank the two readers to whom Princeton University Press gave the manuscript for review. I have never really credited authors' expressions of gratitude for such reports, but these two reviewers' supportive but highly acute criticism has been both vital and a real pleasure to receive.

The Oxford scholar who has most influenced my thinking is the late Geoffrey Marshal. I have not achieved his wonderful down-to-earthness, nor managed to retain my Yorkshire accent as well as he did. The biggest of all my debts is owed to my wife Liz, not just for wifely support, but because as a practising corporate lawyer qualified in both the United Kingdom and United States she has been a constant intellectual influence. Finally, an apology to my daughter to whom this book is dedicated. I'm sorry you had to wait longer than your sister to get your book, but it is longer than the one Ellen got.

David Robertson
Oxford
May 2009

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The Nature and Function of Judicial Review

Le Conseil constitutionnel est une juridiction, mais il ne sait pas; mon rôle est de lui faire prendre conscience de sa nature.

—Robert Badinter, president of the Conseil constitutionnel, 1986–95¹

The theme of this book is that modern constitutional review cannot always be adequately understood if seen through the traditional categories of the separation of powers. Constitutional courts do more than can be fitted into the domain allowed to courts exercising the judicial function. Much of what they do in what I call “transforming societies” involves spreading the values set out in the constitution throughout their state and society. Indeed, their idea of what a constitution is does not always fit well with the orthodox idea of a liberal constitution. I try to show that constitutional judges often come near to being applied political theorists, carrying out a quite new type of political function. This first chapter develops some of these concepts and sets out the plan of the book, offering technical information and definitions to be filled out in the substantive chapters.

A few examples always help in setting out a general approach. Though this book is primarily about “new” constitutional review in countries undergoing some form of transformation, I begin with a different sort of example. It is chosen not from a new constitutional court, or one involved in transformative jurisprudence, but from the oldest court doing constitutional review, what is beyond doubt the model court, the US Supreme Court. There are two reasons for this. First, the Supreme Court is familiar—if the reader knows anything about constitutional review, it is likely to be about America’s experience. Second, I hope to show that the patterns and ideas that are relevant in newer jurisdictions have their counterparts even in this oldest and most familiar territory.

¹D Rousseau, *Sur le Conseil constitutionnel: La doctrine Badinter et la démocratie* (Paris: Descartes & Cie, 1997), 19.

In 2003 the Supreme Court overturned one of its own precedents, a precedent that had only stood for seventeen years. The case was *Lawrence v Texas*, which challenged a state law criminalizing some homosexual practices.² The ruling precedent, *Bowers v Hardwick* from 1986, ought to have made the case unnecessary.³ In *Bowers* a Georgia state law that made sodomy punishable by up to twenty years' imprisonment was challenged. Hardwick had been arrested for committing sodomy when a police officer had entered his house and found him with another man. In the end he was not prosecuted, but undertook a civil suit against the state claiming the law was unconstitutional. Though the federal appeals court agreed with Hardwick, the Supreme Court ruled that Georgia was entitled to use the criminal law to impose the majority's moral code.⁴

The Supreme Court is not totally forbidden to overturn its own previous decisions, but puts a very strong value on *stare decisis*, the rule of precedent. Certainly it is rare for the court to change its mind so soon after a major ruling, even one as controversial as that in *Bowers v Hardwick*. That case had raised a huge protest because it clashed with liberalising trends in American society during the 1970s and 1980s. When *Lawrence v Texas* overruled *Bowers*, there was an equivalent uproar from political and judicial conservatives.⁵ When major courts do overturn their own precedents, they usually do so because they think an earlier decision has become inappropriate for a later society. Or they at least shade their disagreement with the past decision. The US Supreme Court of 2003 was much blunter. The majority opinion says outright, "*Bowers* was not correct when it was decided, and it is not correct today. It ought not to remain binding precedent."⁶ This really was a choice by the Supreme Court—it could have held for *Lawrence* without overruling *Bowers*. The majority opinion explicitly says that the justices rejected an alternative approach that would have disallowed the Texas statute on narrower grounds. In fact Justice O'Connor, who voted along with the majority to overturn the Texas law, had been part of the majority in *Bowers* and still thought it correct. To find the law under which *Lawrence* was prosecuted unconstitutional, she used an ap-

²*Lawrence v Texas*, 539 US 558 (2003) (US Supreme Court).

³*Bowers v Hardwick*, 478 US 186 (1986) (US Supreme Court).

⁴The court's own summary of this point is this: "Sodomy laws may not be invalidated under the due process clause of the Fourteenth Amendment on the theory that there must be a rational basis for the law and that majority sentiments about the morality of homosexual sodomy are not an adequate basis." *Bowers v Hardwick*, 3.

⁵There is an extensive journal literature on both cases. As a selection, EM Maltz, "The Court, the Academy, and the Constitution: A Comment on *Bowers v. Hardwick* and Its Critics," 1989 *Brigham Young University Law Review* 59–95, gives a good account of both the first case and its reception, while J Weinstein and T DeMarco, "Challenging Dissent: The Ontology and Logic of *Lawrence v. Texas*," 2003 10 *Cardozo Women's Law Journal* 423–67, is a useful analysis of the judicial logic in the second case. The two cases and intervening decisions are treated together in R Turner, "Traditionalism, Majoritarian Morality, and the Homosexual Sodomy Issue: The Journey from *Bowers* to *Lawrence*," 2004 53 *University of Kansas Law Review* 1–81.

⁶*Lawrence v Texas*, 12. The nine justices on the court were split. Five signed the majority opinion, with a sixth judge concurring in the result but using a quite different approach. The main dissent, joined by two other justices, was by Justice Scalia. Even by the standards of the Supreme Court, it is bitter and confrontational towards the majority.

proach quite different from that offered in the majority opinion. But if the court in 2003 did not have to overrule *Bowers*, the court in 1986 did not have to rule on the constitutionality of the Georgia statute at all—it would have been perfectly possible to overturn the court of appeals by simply ruling, as the Supreme Court was invited to, that the case was moot. Right at the beginning, the first Georgia court to hear the case had ruled that Bowers had no cause of action because he had not actually been prosecuted.

The first point to make is that courts sometimes really do set out deliberately to make major legal statements. No one can avoid the fact that two US Supreme Courts, only seventeen years apart, felt so strongly about the issue of criminalizing homosexual behaviour that they took up challenges that could have been avoided. Both courts, though radically opposed to each other, felt it their duty to make law in this way. The second point to make at this stage is how much personnel changes matter. Since the 1930s the US Supreme Court has always had nine justices; though this number is not prescribed in the constitution and has not always been mandated by law, it may have hardened into a “constitutional convention.” Of the nine men and women who heard *Lawrence*, only three survived from the *Bowers* court, and one of them, O'Connor, effectively changed tack. The six new appointments split four to two against the ruling in *Bowers*. On such minor things as judicial death and retirement can depend something as fundamental as a shift in a nation's public morality. (The route by which people become judges is commented on later, especially, as an example, in chapter 4 on France.)

In other ways this relatively ordinary piece of constitutional adjudication shares many of the features to be discussed at length in this book. The ruling in *Lawrence* is a self-conscious “modernization” of values, and an imposition of them. Much of the disagreement about the case revolves round the question of whether or not public disapproval of private behaviour can justify legal restrictions, but discussion is always admixed with matters of what I have called elsewhere “judicial methodology”—the rules to be applied in deciding such cases.⁷ So those who wanted to overturn the Texas law claimed that there was no important and legitimate government aim served by it. Their opponents said that the law needed no such aim, because that test applies only to rights that are “deeply rooted in this Nation's history and tradition.” Much of what will follow in this book is about what tests are applicable in what circumstances.

Part of the disagreement over *Lawrence* is factual—the two sides differ on the history of legal constraints on homosexuality—and we will see frequent use and misuse of claims to empirical knowledge in other jurisdictions. Much of the disagreement over *Bowers* and *Lawrence* is disagreement over what the cases are actually about. For both sides the issues have little to do with homosexuality in itself. For the majority in *Lawrence* the issue is the right of the citizen to be left alone in private. For the other side, the cases are about the right of the state governments to reflect majority feeling within their territories with no federal intervention. Sociol-

⁷D Robertson, *Judicial Discretion in the House of Lords* (Oxford: Clarendon Press, 1998), especially chapters 3 and 4.

ogists might call this the “framing” of the issues. A matter of framing or perception is the “What is this all about?” question, asked at a lower level. What is it about for the actual people caught up in the legislation? To the majority in *Bowers*, it is only a matter of their sexual activities. To the majority in *Lawrence*, it is a deep matter of human dignity, and the consequences for those liable to be prosecuted are far more onerous than the actual sentences. Indeed, where the protection of dignity is concerned, it does not matter that such laws as the Georgia and Texas statutes are hardly ever invoked. Not only will such framing issues occur in several contexts later in the book, but the concept of dignity will prove to be the most important single value in modern judicial review.

Lawrence, if not *Bowers*, raises the question of whether legal and constitutional thinking outside the United States counts in US courts. The majority in *Lawrence* attach great importance to, inter alia, decisions of the European Court of Human Rights, because they regard moral opinion across developed democracies as an important measure. To the minority, such matters are utterly irrelevant, because only aspects of American moral history are relevant or can legitimately be cited. (The extensive use of foreign judgements, so that a sort of international constitutional law is rapidly developing, will be discussed several times in this book.) These cases are about, and are examples of, what has come to be called “legal culture.” They have to do with the way different generations and groups of judges are socialised or have their “professional formation.” Justice Scalia makes this abundantly clear in one of his harshest condemnations of the *Lawrence* majority. I quote him at length to make this point (lengthy quotations from the judges are a major part of my technique throughout the book):

Today’s opinion is the product of a Court, which is the product of a law-profession culture, that has largely signed on to the so-called homosexual agenda, by which I mean the agenda promoted by some homosexual activists directed at eliminating the moral opprobrium that has traditionally attached to homosexual conduct. I noted in an earlier opinion the fact that the American Association of Law Schools (to which any reputable law school *must* seek to belong) excludes from membership any school that refuses to ban from its job-interview facilities a law firm (no matter how small) that does not wish to hire as a prospective partner a person who openly engages in homosexual conduct. . . . One of the most revealing statements in today’s opinion is the Court’s grim warning that the criminalization of homosexual conduct is “an invitation to subject homosexual persons to discrimination both in the public and in the private spheres.” . . . It is clear from this that the Court has taken sides in the culture war, departing from its role of assuring, as neutral observer, that the democratic rules of engagement are observed. Many Americans do not want persons who openly engage in homosexual conduct as partners in their business, as scoutmasters for their children, as teachers in their children’s schools, or as boarders in their home. They view this as protecting themselves and their families from a lifestyle that they believe to be immoral and destructive. The Court views it as “discrimination”

which it is the function of our judgments to deter. So imbued is the Court with the law profession's anti-anti-homosexual culture, that it is seemingly unaware that the attitudes of that culture are not obviously "mainstream."⁸

Scalia may well be unfair, but the fact remains that matters like a profession's own rules crucially shape the way constitutional law develops. I shall often refer to this idea of a legal, or politico-legal, culture.⁹

Finally, there is one thing that neither *Bowers* nor *Lawrence* is really about. Neither case depends on interpretation of the US Bill of Rights, or any other part of the constitution—or not in any sense of textual interpretation that one would find outside law, and especially constitutional law. Nowhere in the constitution is homosexuality or sodomy mentioned. Indeed, nowhere in that document is any matter of sexual rights or behaviour mentioned. The whole of the more apparently "legal" parts of the opinions in *Bowers* and *Lawrence* are about previous judicial glosses on the constitution. This practice, as the book will show, is true to a large extent everywhere in adjudication. As soon as constitutional issues arise and are given judicial consideration, a rich body of interlinked judicial thought develops. This body of judicial material, part of what the French Conseil constitutionnel calls the *bloc de constitutionnalité*, is both the result of, and a constraint on, judicial review. Judges often decide on constitutionality by relying on what other judges have said more than on the document that is supposed to be controlling.

Introductory Definitions and the Plan of the Book

What is constitutional review? At one level this question is a technical matter of constitutional law. Constitutional review is a process by which one institution, commonly called a constitutional court, has the constitutional authority to decide whether statutes or other decrees created by the rule-making institutions identified by the constitution are valid given the terms of the constitution. It is a highly reflexive process. Such a definition tells us nothing about the purpose of constitutional review in the political system; it tells us nothing about the impact of constitutional review on the governance of the society; it does not describe constitutional review as a functional element in the political complex we usually call a state. Some liberal democracies, probably most by now, have some form of constitutional review, but not all, so it is not just a definitional element of democracy.¹⁰ As long as impeccably democratic nations-states like the Netherlands do without judicial review, its presence and functioning in other countries must invite seri-

⁸*Lawrence v Texas*, 578.

⁹Certainly the *Lawrence* decision has provoked some anxiety about judicial bias: TA Sparling, "Judicial Bias Claims of Homosexual Persons in the Wake of *Lawrence v. Texas*," 2004 *Southern Texas Law Review* 255–309.

¹⁰One count gives 128 countries with judicial review: FR Romeu, "The Establishment of Constitutional Courts: A Study of 128 Democratic Constitutions," 2006 2 *Review of Law and Economics* 1, 104–35. A detailed analysis of such courts can be found at <http://www.concourts.net/comparison.php>.

ous inquiry. Only a very subtle argument would suggest that Norway, which has judicial review, is more democratic than the rest of Scandinavia, which does not. This whole book is really dedicated to answering one question—what does constitutional review *do* for the countries that have it? Ostensive definition can get us started. Constitutional review answers questions like these:

- Can a state pass legislation prohibiting floor-crossing by those elected to its legislature?¹¹
- Can a state forbid a wide range of state officials to join political parties?¹²
- Can the new democratic parliament of a former Communist state pass a law characterising the previous regime as a state of “lawlessness”?¹³
- Can a state decriminalize the actions of doctors and patients involved in terminating a pregnancy?¹⁴
- Can an education authority ban teaching material that treats homosexual partnerships as equivalent to heterosexual families?¹⁵
- Can a state nationalise its banking sector?¹⁶

Yet these are only questions where something exists to make them questions—obviously states can, and do, do all of these things. They become real questions only where two conditions apply: there must be a constitution purporting to restrict what a state can do, and there must be a body independent of the legislature and executive empowered to test state action against that constitution. Where a parliament is entitled itself to decide whether or not its laws satisfy constitutional limitation, the constitution, in this respect at least, cannot be more than advisory or aspirational. There is a rich and complex literature in political theory considering whether a system of independent oversight on parliamentary legislation is fully compatible with democracy.¹⁷ This book will not do more than touch tangentially on some aspects of that debate. It is not, however, irrelevant to the debate, because my concern here is to give a much fuller characterization of what exactly happens in judicial review than the theoretical literature normally concerns itself with. However, my concerns are also much narrower than those of the theoretical debate. I have chosen to concentrate almost entirely on constitutional review mechanisms in societies that have undergone major change, where constitutional review of legislation has been added to an ongo-

¹¹ *United Democratic Movement v The President of the Republic of South Africa* CCT 23/02 (South African Constitutional Court).

¹² *Statutory Prohibitions of Political Party Membership*, K26/00 (2000) (Polish Constitutional Tribunal).

¹³ *Lawlessness*, Pl. US 19/93 (Czech Republic Constitutional Court). All citations are from the website of the court, which is http://angl.concourt.cz/angl_verze/cases.php.

¹⁴ *Abortion Case No 1*, 39 BVerfGE 1 (1975) (German Federal Constitutional Court).

¹⁵ *Chamberlain v Surrey School District No. 36*, 4 SCR 710 (2002) (Canadian Supreme Court).

¹⁶ *Nationalizations*, 81-132 DC (1982) (Conseil constitutionnel).

¹⁷ As examples, only, of the debate, consider the issues and citations in FI Michelman “The Constitution, Social Rights, and Liberal Political Justification,” 2003 1 *International Journal of Constitutional Law* 1, 13–34. Perhaps the main writer associated with an anticonstitutional review position is Jeremy Waldron. See his classic essay “A Rights Based Critique of Constitutional Rights,” 1993 13 *Oxford Journal of Legal Studies* 18–51.

ing society, either in a new constitution or as something grafted on to a continuing constitutional tradition. In essence I am looking to see what constitutional review tries to do, and how it does it, in societies undergoing a form of political transformation. This focus is not new. For example, Bruce Ackerman's seminal study of the international development of constitutional review is based on two general scenarios. One is federalism; the other is what he calls "new beginnings." The latter

operates with a different logic, dealing in expressive symbols, not functional imperatives. Under this scenario a constitution emerges *as a symbolic marker of a great transition in the political life of a nation*.¹⁸

Most of the jurisdictions I talk about hereafter are also covered by Ackerman.

This choice is made for two reasons. First, it is intrinsically important to see how constitutional review functions in such societies, as compared with states, like the United States, where review was built in at the beginning of the constitutional epoch. Second, such transforming constitutional arrangements help me focus on what I take the main function of constitutional review to be. My claim is that constitutional review is a mechanism for permeating all regulated aspects of society with a set of values inherent in the constitutional agreement the society has accepted. This position is developed seriatim throughout the rest of this book. The idea embraces various subthemes. One crucial idea is that modern societies lack other all-embracing moral or ideological commitments as a result of religious secularization, on the one hand, and the victory of a middle-of-the-road political consensus around a form of liberalism, on the other. Consequently, constitutionalism reigns supreme. If a politician wants to attack another politician's policies in a way that seems nonpartisan, the claim that the policy is unconstitutional is the best bet. If constitutionalism is the main overarching value, it is also true that one specific constitutional value often seems to dominate constitutional discourse—the value of nondiscrimination. This is the legal equivalent to saying that equality is the one prime value: in a liberal secular society no value code exists to justify inequality. Equality of opportunity is a requirement for the legitimating of a secular, individualistic, liberal society. Thus constitutional interpretation takes centre stage whoever does it, and where it is done by special courts or tribunals, constitutional review becomes a process of throwing a net of logically derived values over legislation, creating a mesh policies must pass through.

These and related ideas are developed in the following chapters. The plan of the book is simple. There are five case studies of constitutional jurisdictions, chosen to represent different examples of transformative constitutions. There follows a long comparative theme chapter on particular problems in constitutional adjudication. The aim of this chapter is to demonstrate the variance, but also the limitations to variance, in the ways jurisdictions deal with issues none can avoid. The jurisdiction chapters are essentially descriptive. Very little has been published that seeks to describe several jurisdictions side by side, so there ought to be no sense that description is somehow a less valuable academic pursuit. These

¹⁸ B Ackerman, "The Rise of World Constitutionalism," 1997 83 *Virginia Law Review* 4, 771–97, at 784.

accounts are sketches of the state of constitutional review in each jurisdiction, not up-to-date accounts of the exact body of law currently valid within them. As sketches, they highlight what seems to me most importantly characteristic of each jurisdiction's approach to constitutional review. This is the more so because of the methodology I embrace. To call it a methodology is overgrand, but the point is that my descriptions are concerned almost entirely with the actual cases decided, and above all with the judicial argument in them. Far too little attention is paid to what judges actually say in judging, as opposed simply to the decisions they reach. Because I see these courts as involved in the explication of constitutional values, in the making of low-level political theory, I attach huge importance to the arguments crafted by judges. An alternative title for this book would indeed have been "Constitutional Judging as Political Theorising: A Comparative Analysis." The nature of modern democracy is such that governments engage in justification, and judicial opinions constitute an important aspect of what is sometimes called "deliberative democracy."¹⁹

The same sorts of issues substantive and procedural occur in all these societies with judicial review, though with emphases that differ according to national politico-legal culture and the pathways that have brought the courts to importance. Finding out what variety of answers seem possible, and why some are chosen over others, should tell us a great deal about the nature of this obscure activity of judicial review. The first jurisdiction chosen is Germany because of its enormous importance as the first postwar constitutional court with real power, which has given it great influence over later courts. I follow that discussion with a composite chapter that describes judicial review in three of the new Eastern European democracies, Poland, the Czech Republic, and Hungary, which face similar problems in (re)establishing democracy and the rule of law. The differences in their approaches are as revealing as the similarities, and the apparently anodyne concept of the "rule of law" turns out to be richly complicated and various. These chapters are followed by one other European example, the French experience in the Fifth Republic. The most important aspect of the French story is that constitutional review came for the first time in the Fifth Republic, against a background of long-term historical antipathy to the courts in politics. What my sketch highlights here is summed up in the quotation heading the chapter: France really does have a body of complex and thought-out constitutional law, and the Conseil constitutionnel has not merely responded to issues in an ad hoc, partisan way.

Canada follows, vital as an example of a country where a decision was made to import constitutional review into a common-law-based political system with parliamentary supremacy. Canada had previously had constitutional review, but of a limited kind. How its judges coped with the new Charter of Rights and Freedoms,

¹⁹The idea of deliberative democracy has been used and developed by a host of major political theorists, including Elster, Habermas, and Rawls. It probably originated in an article by Joseph M. Bessete, who worked it out most fully in *The Mild Voice of Reason: Deliberative Democracy and American National Government* (Chicago: University of Chicago Press, 1994).

which expanded constitutional review, is an important topic in its own right, but is also worth examination because the problems they faced tell us a good deal about the special nature of the activity and the political role of constitutional review. The final jurisdiction treated is South Africa, the country that has most openly embraced the idea of “transformative jurisprudence,” yet where constitutional review was grafted onto a long history of judicial passivity and a common-law background. Throughout these sketches several concepts occur and reoccur. The best example is the role of “dignity” as a touchstone for constitutionality, which can be found in very nearly every jurisdiction.

After the case studies there are two chapters, one rather long, taking themes in a directly comparative perspective. (I make a good deal of effort to draw useful comparisons within the jurisdiction chapters as well, to illuminate approaches to similar problems.) The longest chapter in the book, and probably the most demanding, is chapter 7. It is long because it offers a comparative study of how the most common and unavoidable issue in the whole of rights enforcement has been handled in different jurisdictions. The problem is simple to state. Whatever a constitution says about rights, it is virtually impossible to guarantee that any right will be absolute; there must always be some circumstances when a right will have to give in to the needs of the state. But how is this restriction of rights to be handled? Above all, what sort of analysis must a constitutional court go through to decide when a right can be trumped by social need? This chapter is unlike the others in that a good part of it considers the constitutional jurisprudence of the United States. The US Supreme Court has the longest experience in the world of dealing with just this question, made all the more difficult because the US Bill of Rights, unlike other statements of rights, does not on the face of it accept that the rights it guarantees cannot be absolute. Chapter 7 is thus, more than other chapters, about the sorts of arguments that can carry respect inside a deliberative democracy. It is also where I give my most sustained discussion of problems rising from antidiscrimination rights, the core value in modern constitutional thinking. The arguments for limiting rights are of the same logical form as those for allowing forms of discrimination between citizens where this allowance is necessary for policy. These themes and considerations are brought together in the concluding chapter, where I sketch a justification for judicial review of constitutionality in light of the fears some express about its lack of democratic legitimacy. In so doing I offer a characterisation of the constitutional judge as a professional political theorist.

The Forms of Judicial Review

There are two basic types of constitutional review. The first type involves questions about how authority to act is distributed by the constitution to various parts of the state, and with federal constitutions, how it is distributed between the national and component unit levels. The case that tradition claims began American judicial review, *Marbury v Madison*, was about such an issue, as were nearly all the major

US Supreme Court decisions until after the Civil War.²⁰ Virtually any constitution that involves a separation-of-powers doctrine, a federal structure, or both, requires some entity to police these boundaries. Although individual decisions by constitutional review bodies on the distribution of authority may be controversial, few observers object to the exercise of this function in general. The exception is perhaps where the reflexive nature of constitutional review is most apparent—where the review body acts to increase its own authority at the expense of other actors. This was the problem with *Marbury* and has been the source of most objections to the activities of the European Court of Justice. The newer constitutions are, on the whole, simpler than the old federal constitutions as far as boundary maintenance is concerned, but major problems have nonetheless required solutions. (In this book this issue is most clearly covered in the first part of the chapter on South Africa, and in some contexts from the Eastern European jurisdictions.) These instances have typically involved separation-of-powers clashes between the legislature and the executive—the power of the constitutional courts themselves has usually been unchallenged.

The second type of constitutional review concerns not who can do something, but what limits may be placed by the constitution on doing certain things, regardless of the actor. This is largely the domain of bills, charters, and declarations of fundamental, human, or citizens' rights. Although the American constitution had a Bill of Rights from its earliest days, it was not until the Fourteenth Amendment, passed after the Civil War in 1868, that it came to apply to the states as well as the federal government. The British North America Act, a nineteenth-century act of the UK Parliament that served as the Canadian constitution until 1982, did not have a binding bill of rights, and the Australian constitution, which came into force in 1900, still does not have one. Nor were equivalent limitations on what could be done found in continental Europe. (Interestingly, Kelsen himself thought it inappropriate to have such limitations enforced by a constitutional court.) The constitutions created after World War II nearly all contain bills of right, and they are often very extensive. The latest wave of constitution writing, in Eastern and Central Europe and South Africa, has added a further complication. The most recent constitutions contain provisions for "social" rights, under which the constitutional courts can order the government or parliament to do something, rather than merely to desist from doing something illiberal. (This problem is discussed mainly in the chapters on Eastern Europe, Canada, and South Africa.)

This distinction between types of review is often more clear in principle than in practice; it is somewhat of an ideal type. It is easy to come up with examples of constitutional adjudication that can be seen as either boundary maintenance, rights enforcement, or both. Boundary cases can be triggered or motivated by

²⁰ *Marbury v Madison*, 5 US 137 (1803) (US Supreme Court). So famous is the case that commentators on any region that is developing judicial review look to find the equivalent case, for example, HK Premph, "Marbury in Africa: Judicial Review and the Challenge of Constitutionalism in Contemporary Africa," 2005 80 *Tulane Law Review* 1239–1323. American legal historians do not see *Marbury* in such a clear architectonic light, but it has come down to modern constitutional commentators worldwide in this way.

disagreement on substantive political or policy goals. An interesting example that conflates all of these considerations is the famous Australian bank nationalisation case.²¹ This case came about when the Labour government tried to make all private banking illegal and give a monopoly to the Commonwealth Bank. Losing the case was a factor in Labour's subsequent electoral defeat, which kept them out of power for over twenty years. As noted above, the Australian constitution has no bill of rights, but does have clauses that can be used as an equivalent if the High Court is so inclined. Where these provisions have applied to ordinary civil rights, they have been largely ignored by the High Court, but one in particular that touches on economic rights was brought to bear on the banks' challenge to the Labour government. This was Section 92, which provided that "trade, commerce, and intercourse among the states should be absolutely free." This constitutional provision can be regarded as, and was surely meant to be, essentially structural—it aimed at preventing trade barriers because a major part of the plan for the whole constitution was the creation of a free trade area. The High Court had previously developed out of it the doctrine that the clause protected the *laissez-faire* rights of individuals. Using this doctrine, which was not fully overturned until 1988, the High Court found any nationalisation to be completely unconstitutional. In a similar way the US Supreme Court has at times used the apparently structural Interstate Commerce Clause to achieve substantive political goals.²² Although there are many other ways of categorising different forms of judicial review, several of which will be canvassed in this book, this simple distinction will be helpful in discussions in this chapter on why some writers have reservations about courts interpreting constitutions.

Types of Constitutional Courts

New methods of constitutional review developed in stages in the second half of the twentieth century. Some of the differences from earlier adjudication are structural; though some of the newly important constitutional review bodies, above all the Canadian Supreme Court, are general courts like that of the United States, most are purpose-built constitutional courts, often so labelled. These courts, like the German Federal Constitutional Court, arguably the most important of all, are often referred to as "Kelsen" courts. Hans Kelsen, an Austrian jurist, was the architect of the earliest purely constitutional court, set up in Austria between 1920 and the rise of the Nazi state in 1934. In jurisprudence he is best known for his idea of

²¹*Bank of New South Wales v Commonwealth*, 76 CLR 1 (1948) (Australian High Court). For a general account of the court and of this case, see B Galligan, *Politics of the High Court: A Study of the Judicial Branch of Government in Australia* (St. Lucia: University of Queensland Press, 1987).

²²As an example of how "political" some commentators see judicial interpretation of such structural matters, see MV Tushnet, "Scalia and the Dormant Commerce Clause: A Foolish Formalism," 1990 12 *Cardozo Law Review* 1717–43. A more general discussion of the way the clause has been used is given in SG Gey, "The Political Economy of the Dormant Commerce Clause," 1989 1 *New York University Review of Law and Social Change* 17–97.

the *Grundnorm*, the highest element in a hierarchy of rules that gives legitimacy to all further derived norms.²³ Kelsen saw the constitution as functioning rather like a *Grundnorm* and argued that a special body, separate from the ordinary hierarchies of courts, should be created to interpret the implication this ultimate rule had for legislation passed under its auspices. Kelsen courts share typical features. First, they deal only with constitutional issues and are not, in theory at least, appellate courts. By this is meant that a case fully decided in one court is not passed up to the constitutional court for a final answer, in which all the arguments are re-heard. Second, they are not staffed by professional judges promoted up the hierarchy but by politically appointed, though legally qualified, people from other sectors. The judges are typically a mixture of academic lawyers and professional politicians with legal experience, though there is usually also a contingent who have come from, or been appointed by, the higher ordinary courts.²⁴ The varied background of judges came from the idea that much more creativity and political nuance was going to be needed in judgements than could be expected from a continental-style professional judiciary used to narrow interpretations of a code. Perhaps the most important difference from the US model is the ways in which issues can come before a constitutional court. Under the US system and those like it, constitutional issues arise in the process of ordinary litigation, usually in the public law or criminal law domains, where one of the litigants is the state. Any of the inferior courts through which the case has risen can have, and probably will have, made its own judgement on the constitutionality of relevant law. The Supreme Court is thus acting as a court of ultimate appeal. The “new” routes to constitutional adjudication vary a good deal between countries, but they include the following, not all of which will be found in all countries; nor is this list exhaustive.

1. A reference from an ordinary court trying a case that appears to involve an issue of constitutional law. This is more nearly like the US-style systems because the issues do arise in the process of ordinary litigation. The constitutional court, however, is limited to answering the constitutional question posed by the referring court, and does not actually decide the case. Once the constitutional court has given its ruling, the original proceedings recommence with the constitutional law applied as now defined by the original judge. This process is the one used by the European Union’s Court of Justice when questions of EU law interpretation are referred to it from a national court.

²³His views on constitutional review are encapsulated in H Kelsen, “Judicial Review of Legislation: A Comparative Study of the Austrian and the American Constitution,” 1942 4 *Journal of Politics* 2, 183–200. The general theory of the *Grundnorm* is best described in H Kelsen, *The Pure Theory of Law* (Berkeley: University of California Press, 1967).

²⁴This sort of detail for most European countries is covered in C Guarnieri and P Pederzoli, *The Power of Judges: A Comparative Study of Courts and Democracy*, Oxford Socio-Legal Studies (Oxford: Oxford University Press, 2002). Subsequent chapters deal with important structural aspects for the various countries studied.

2. A direct request by a citizen to say whether or not a rule under which the citizen has suffered a purported infringement of rights, or the act of some state agent, is constitutionally valid.
3. A reference from some state body or officer to give an a priori or abstract assessment of the constitutionality of a law, without there being any context of litigation or actual complaint. Such referrers can be groups of legislators, prime ministers or presidents, governments of federal subordinate units, public officers like an ombudsman, and various other actors who are deemed to have a special role in seeing that the constitution is observed.

These arrangements make the process of constitutional review much more obvious. The third route, that of a priori or abstract review, in particular makes it very clear that a power relationship exists between the legislative body and some other entity authorised to forbid the legislators to do what they wish to do. This is especially so because abstract review has frequently been a matter of high-profile political conflict. The most common pattern is for a parliamentary minority, having lost the debate and vote in its legislative chamber, to refer the statute to the constitutional court as a last resort. So, for example, in France in the last twenty years it is often claimed that almost all important bills have been referred to the Conseil constitutionnel by the parliamentary minority.

Constitutional Review and Political Science

Political science has real problems with constitutional review, of which it is often deeply sceptical, even when, rarely, it bothers to notice the process at all.²⁵ The scepticism and uncertainty displayed by political science probably stems in large part from the unavoidable reflexivity of the formal definition, combined with the usual political science categorisation of political institutions according to the classic separation-of-powers doctrine. How can a body be authorised by a document to measure the product of another equal ranking body set up by the same document against the document itself? The core problem is this: in the separation-of-powers model all three functions, the legislative, executive, and judicial, are the proper

²⁵ The political science literature on the United States is huge. The political science, as opposed to legal, literature on other courts is sparse, often amounting to one or two books and a handful of articles and chapters. I cite these where relevant in subsequent chapters. Modern comparative work is dominated by the writings of one man, Alec Stone Sweet, and his collaborators. While we take very different positions on many matters, and particularly on France, I note and cite these works in subsequent chapters. To a large extent we simply assess and evaluate the same phenomena differently, and are concerned with different questions. I have no doubt of his scholarship, or of the fact that, without his work, this subfield would hardly exist. I cite one of his most influential books, *Governing with Judges: Constitutional Politics in Europe* (Oxford: Oxford University Press, 2000) at places in this chapter because he epitomises at its best the political science paradigm on constitutional review. I do not mean to use it as a stalking horse or straw man. To criticise it in detail would take too long and essentially be a waste of space in a book that has quite large enough a territory to cover. For what it matters, my critique emerges throughout. The bibliography attempts to cover all the other main comparative work.

provinces of independent and equal ranking entities: parliaments, governmental administrations, and courts. The only way constitutional review can be compassed within that trichotomy is by assuming that constitutional review of legislation is just like any other act of the judiciary. From this perspective constitutional review bodies, whether or not called courts, are just courts. But they are not really very much courts when serving in the constitutional review function. Furthermore, constitutional review bears only superficial similarity to judicial interpretation of legislation or common-law development. The differences are noted by the constituting courts themselves (a point discussed at great length later, especially in the chapter on Canada).

Ignoring both these caveats makes it easy to characterise a constitutional review body as acting “out of role.” Hence much political science and politicians’ rhetoric denounces the misbehaviour of constitutional “courts,” only because the critics make an inappropriate analogy. Theories are developed explaining that these bodies are something else—third chambers of legislatures, for example. Statistical analyses are mounted to “explain” decisions on the premise that these “courts” are motivated not by “legal” factors but by “political values,” that they do not neutrally give “legal answers” but “make” policy.

However valuable some of these analyses and analogies may be, they only work by assuming a tripartite division-of-power model. In other words, they do not ask the fundamental question posed here—just what *is* constitutional review? Political scientists should not be blamed too severely for this failure to take a sharp look at the very nature of judicial review. Those charged with the function—we can call them judges for convenience—have assiduously cultivated the myth that constitutional review and ordinary judging are alike. To do otherwise would be to take a dangerous risk, given that constitutional review can easily seem illegitimate according to theories of liberal democracy.

Contributing to the misapprehension of judicial review is the impact of the United States Supreme Court. Until very recently this was the only well-studied entity that carried out the constitutional review function. The Supreme Court is a court of general appellate jurisdiction, which does constitutional review as well as handle other things. (The Canadian Supreme Court and Australian High Court are even more fully general appellate courts. The nature of American federalism removes much of the nonconstitutional work on civil and criminal law from the federal courts.) Thus the US Supreme Court has had both a need to make its constitutional review activities look like ordinary judging, and the possibility of doing so. At the same time there is sometimes a stark discrepancy between ordinary judging mandated by the Supreme Court’s place in a division of powers, and its constitutional review function. This has encouraged political scientists and politicians to see the latter as a stepping out of role, even, to use an evocative barbarism, as “mission creep.” The problem goes all the way back to the origin of the US Supreme Court’s jurisdiction. As any beginning student of US constitutional history knows, the constitution does not, in any clear words, give the court the power of judicial review. The court recognized that it gave such power in the famous *Marbury v Madison* case of 1803. It was argued then by Chief Justice Marshall, and the

argument has never been successfully countered, that the power to strike down a congressional statute that violated the constitution was necessarily implied by the constitution.²⁶ But the full nature of what was implied was not articulated then and has not been since. Had it been spelled out in the constitution, the logical problem of reflexivity might still not have been noticed; there are plenty of modern constitutions that do explicitly grant constitutional review authority to constitutional courts without facing up to the issue. Furthermore, there are several modern examples of courts deciding cases hailed by commentators as their local equivalents to *Marbury* that have come no nearer to discussing what exactly is the power found implicit in the constitutional order. The early cases decided by the European Court of Justice, especially *Van Gend en Loos* and *Costa v ENEL*²⁷ still tend to shelter behind the analogy between “ordinary judging” and constitutional review. These modern examples—the French Conseil constitutionnel’s decision in 1971²⁸ is another—have, however, been a good deal more controversial, though the controversy has revolved round the claim that courts in question have exceeded their authority. Little recognition has been given to what they are actually doing.²⁹ The strategy of simply denouncing these cases as “political” rather than “legal” has avoided the need to question the nature of constitutional review. The dominance of American constitutional review, both in actuality and in academic study, has not well prepared analysts to think about constitutional review as it appears at the beginning of the twenty-first century. Not only is the Supreme Court a common-law court of general jurisdiction, unlike the important constitutional courts of continental Europe, but its jurisprudence, that is, its dominant legal doctrines and intellectual methodology, is notably different from most of the review bodies that have recently become important. Yet these latter have often been viewed through lenses adapted for looking at their American antecedent.

Of course decisions courts make pursuant to their constitutional review function are “political” rather than “purely legal,” and of course they involve “policy” arguments. So do a great many decisions falling into what I have called “ordinary judging.” It has been argued, for example, that an act of judging is political, or at least legislative, whenever precedents allow for more than one result in a case. Thus Rosenfeld, claiming that constitutional judges in a common-law country are more constrained than in a civil-law country, argues that

²⁶ A good short coverage of the scholarly literature on *Marbury* is given in a review article on two recent books, J O’Neil, “*Marbury v Madison* at 200: Revisionist Scholarship and the Legitimacy of American Judicial Review,” 2002 *Modern Law Review* 792–802.

²⁷ *Van Gend en Loos* (Case 26/62) (1963) ECR 1; *Costa v ENEL* (Case 6/64) (1964) ECR 585. A good survey of EU law often from a political angle is given in P Craig and G De Búrca, eds., *The Evolution of EU Law* (Oxford: Oxford University Press, 1999). The chapter by Martin Shapiro on the European Court of Justice is one of the best general essays on comparative constitutional courts I am aware of.

²⁸ *Associations Law*, 71–44 DC (Conseil constitutionnel).

²⁹ Very occasionally a judge will throw some light on this question in nonbench writings. One of the more interesting is the US appeals court judge and legal theorist Richard Posner: *How Judges Think* (Cambridge: Harvard University Press, 2008). His views are not commonly supported by his brethren, however.

Both civil law and common law adjudication thus involve a legal as well as a political component—where “legal” means the application of a pre-existing rule or standard and “political” means choosing one from among many plausible principles or policies for the purposes of settling a constitutional issue.³⁰

Rosenfeld’s comparative argument takes far more seriously than I do the real binding effect of precedent in common-law countries (and its absence in the civil-law world). This point I have elsewhere argued at length as far as the United Kingdom is concerned.³¹ His position also implies that continental constitutional judges are much less concerned to follow their earlier decisions than in fact they are. This point is considered *seriatim* throughout the rest of this book. But certainly the idea of a necessary “political” element in all judging is only recently accepted. At one stage judges everywhere tried to deny this element, and judges in the code law world still tend to. But “policy” considerations are openly canvassed in much “ordinary” judicial debate, with appropriate self-warnings about not trespassing on the legislative function. The separation-of-powers categories have never been watertight, and the whole American idea of a healthy “check and balance” conflict between the separated powers is predicated on their not being watertight. There can easily be constitutional review decisions that are actually much nearer to being nonpolitical and policy neutral than many routine decisions made by courts in jurisdictions that allow no constitutional review process.

On December 28, 2000, the French Conseil constitutionnel struck down as incompatible with the constitution the Finance Act for 2001.³² By any standards this decision must count as a major act of political power—yet the reasons the court presented were nearer to apolitical, value-neutral argument than much that goes on in the UK courts, and the United Kingdom does not have constitutional review. The French constitution specifies in detail what procedures parliament must use to pass certain types of legislation, especially financial legislation. The French parliament, as is its wont, had disregarded these rules. Earlier that year parts of a law governing hunting, always a tender subject in France, had also been struck down on the ground of irregularities of parliamentary procedure.³³ Both these decisions are full examples of constitutional review by a body that, perhaps more than any other, has been held to be a court functioning in a nonlegal manner: it has been accused of being some sort of legislative “Third Chamber,” and it experiences little but hostility in the academic press. Compare these two cases with *Phelps v London Borough of Hillingdon*,³⁴ also from 2000, a case before the English House of Lords that had at that time not even the circumscribed review power given by the Human Rights Act of 1998.³⁵ In *Phelps* the Law Lords made a massive change

³⁰ M Rosenfeld, “Constitutional Adjudication in Europe and the United States: Paradoxes and Contrasts,” 2004 2 *International Journal of Comparative Law* 4, 633–68, at 637.

³¹ Robertson, *Judicial Discretion*, especially chapters 3 and 4.

³² *Loi de finances pour 2001*, 2000-442 DC (Conseil constitutionnel).

³³ *Loi relative à la chasse*, 2000-434 DC (Conseil constitutionnel).

³⁴ *Phelps v London Borough of Hillingdon*, 2 AC 619 [2001] (House of Lords).

³⁵ The act was passed in 1998 but did not take full effect for several years.

in the extent to which educational authorities, schools, even individual teachers could be liable for negligence in educating pupils. In so doing they overturned a major and fairly recent precedent that had firmly established the immunity of local government against such suits; the decision reversed an important series of decisions from the Court of Appeal, and opened up local authority finance to possible extensive damage claims. In the most useful senses of the word it was a political decision; it was certainly not an inevitable legal conclusion. Yet it was an “ordinary” piece of common-law judging. Ironically it could have been conducted as something close to constitutional judging, because there had shortly before been a ruling from the European Court of Human Rights on an appeal from English courts that many observers thought would determine *Phelps*. Lord Slynn, who gave the leading opinion, went out of his way to insist that the ECHR case, *Osman v UK*,³⁶ had nothing to do with *Phelps*, and that his argument was based purely on English common law. Had it come up only a few months later the Lords would have faced an argument under the Human Rights Act in which *Osman* might be thought to be binding.

The point is that even though *Phelps* is political, expansive of state duties, and probably costly to the treasury, no one would suggest that it fell outside the usual separation of powers. The French cases, purely technical and virtually automatic, what lawyers have sometimes called “slot machine jurisprudence,” are irrefutably examples of constitutional review. The UK parliament could reverse *Phelps* (though not *Osman*), but the French parliament had no choice but to obey *Décision n° 2000-434 DC* and *Décision n° 2000-442 DC*. The latter are exercises of hierarchical power under the constitution. That characteristic, though vital, is not all that separates ordinary judging and constitutional review. For there are real differences between constitutional review, on the one hand, however “innocent” some of its decisions are, and the interpretation and incremental development of statutory, code, or common-law rules by ordinary courts, however expansive. One of the best statements of this distinction comes from an English Law Lord who had been forced to interpret a constitution while sitting on the Privy Council. Lord Wilberforce insisted that a constitution was

sui generis, calling for principles of interpretation of its own, suitable to its character, [and requires] . . . a generous interpretation avoiding what has been called “the austerity of tabulated legalism,” suitable to give individuals the full measure of the fundamental rights and freedoms referred to.³⁷

In the Canadian Supreme Court, Wilberforce was quoted to make the point of how different constitutions are.

Of course the real difference between interpreting an ordinary law and a constitution is irreversibility—a parliament can re-pass an ordinary statute if it does not like the way courts have interpreted it. But it takes a constitutional amendment to

³⁶ *Osman v UK*, 5 BHRC 293 (1998).

³⁷ *Minister of Home Affairs v Fisher*, AC 319 [1980] (Privy Council) The case arose under the constitution of Bermuda, which at that date used the Privy Council as its final appeal court.

undo a constitutional court's interpretation based on that constitution, and such changes are hard to achieve politically. Indeed some parts of some constitutions cannot be amended at all, so a country may be stuck for a very long time with a constitutional doctrine imposed by a court. The chapter on Germany demonstrates one use its constitutional court has made of the irreversibility of part of the constitution.

Constitutional review has developed in such a way as does not fit easily into the division-of-powers doctrine. There is a simple and fundamental reason why constitutional review cannot be just seen as "political" ordinary judging from courts guilty of engaging in policymaking. The liberal-democratic constitutions of the second half of the twentieth century are, in some respects, notably different from the classic constitutions of the eighteenth and nineteenth centuries. If constitutions differ, reviewing them will be a different process. Constitutional review at its most controversial and theoretically problematic occurs in two cases. The first, though relatively rarer, is where the review body strikes down a statute, or forbids executive action aimed at achieving something the reviewer says is forbidden by the rights component of the constitution.

More common, but still controversial, and certainly more theoretically difficult to characterise, is a case in which a statute is struck down not because its overt aim is forbidden, but because it employs means that are seen as constitutionally impermissible. In this latter case some right is being infringed in pursuit of an otherwise acceptable end. The reasons this latter case is the most complex include the fact that as few rights are absolute, the reviewing body is forced to decide just how much of a right can acceptably be trampled on to gain the statute's aim; the court has to weigh and balance goods, rather than protect goods from evil. (This is the domain of chapter 7, on rights limitations.) Perhaps the most intensely troublesome situation is where the right affected by an otherwise acceptable statute is the right not to suffer discrimination or unequal treatment. If I had to select one problem that raises all that is theoretically difficult and politically controversial in constitutional review, it would be this one—measuring the degree and type of discrimination acceptable in furtherance of a goal. This issue comes at the intersection of the logical structure of legislation and a fundamental social fact of modern life. The point about logical structure is simple—nearly all policy requires discrimination. The social fact is that nondiscrimination is possibly the most widely shared and passionately held value in modern secular societies, because, as already suggested, liberal democracy is also, and crucially, egalitarian.

Much of the contrast in the literature between political and policy-oriented adjudication, on the one hand, and purely legal adjudication, on the other, does not work very well. It is not that judges sometimes make politically motivated decisions, or that they sometimes consider policy matters. Most decisions are probably politically motivated in some sense or other, and policy considerations crop up in the law everywhere and are often inevitable.³⁸ It is necessary to look very carefully at the different ways in which a piece of constitutional adjudication may

³⁸J Bell, *Policy Arguments in Judicial Decisions* (Oxford: Clarendon Press, 1983).

be called “political.” In the Australian bank case personal *laissez-faire* ideology almost certainly explains why a terribly vague constitutional provision came to be interpreted the way it was (and possibly why the human rights articles in the Australian constitution have not been developed very far).³⁹ A purist could continue to believe that the decision was improper and politically motivated, and that there could have been, in some abstruse way, a purely “legal” interpretation of Article 92. Such a view would get its credibility from the fact that it is fairly easy to demonstrate that the Australian Constitutional Convention did mean the clause to be about free trade, but for political reasons underdefined it.⁴⁰ This alternative decision only seems to be a neutral “legal” solution because the choice of judicial methodology is itself a value choice. Some argue, of course, that one choice, that of sticking strictly to the language of the text, constitutional or statutory, does allow for “neutrality.” This position is most commonly found amongst judicial conservatives in the United States. Most scholars would, however, agree that such a “textualist” position is no more neutral, if indeed it is possible, than any other.⁴¹ It is entirely proper for a constitutional judge to make such a decision, but the idea that it is neutral is false. Methodologies may not inevitably tend to favour one set of policies over another, though that is likely, but to choose one way of interpreting a constitution over another is to opt for one constitutional design rather than another. One might make a distinction between choosing a judicial methodology just to get a certain end, and choosing it for its own sake. In the former case there is a double value choice, in the latter a single one, but both are judicial impositions of values on the state.

In the end, the most important reason constitutional adjudication is different from ordinary judging lies not in the fact that political factors are involved, but in the fact that it is the job of constitutional adjudication to choose and impose values. The chapters on Germany and South Africa bring out this aspect of a court’s role most clearly, but it is a view no constitutional court can really avoid, however quiet it may be about its actions. Of course judges make choices all the time when interpreting statutes, but there is a huge difference between the narrow and specific sense of value choice in deciding what a phrase in a statute means, constrained as this decision is by countless rules of statutory construction, and the much broader choice of major social value involved in constitutional interpretation.

As to political motivations for decisions, these can be teased out at times. One might guess that Mr. Justice McTiernan, who dissented on Article 92, was in favour of nationalisation (he was a former Labour Party MP), and was therefore motivated to make a different interpretation of the interstate trade clause. In contrast, none of the councillors in the French hunting case could be accused of choosing to rule that the 1789 Declaration of the Rights of Man, and its protection of pri-

³⁹Galligan, *Politics of High Court*.

⁴⁰M Coper, *Freedom of Interstate Trade under the Australian Constitution* (Sydney: Butterworths, 1983).

⁴¹See the many discussions of the issue in modern American legal scholarship, well summarised in K Roosevelt, *The Myth of Judicial Activism: Making Sense of Supreme Court Decisions* (New Haven: Yale University Press, 2005).

vate property, applied to the law, because that had been established as early as the mid-1980s; the view that the Declaration's property protection clause applied to modern French legislation was, as lawyers say, a *res adjudicata*. But this would not rule out the choice to find the restriction on private property was excessive simply because a councillor liked hunting. Any such analysis goes to exploring individual motivations, and much of the political science approach to constitutional review is concerned precisely with such motives. This is a perfectly respectable academic endeavour, though neither strikingly successful nor addressed to the fundamental questions that concern me here. For various reasons that will become apparent as the book proceeds, seeking private motivations tends to direct attention away from something I regard as crucial—the study of the role of judicial argument, methodology, and logic. This investigation requires, and this book unashamedly relies on, actually reading cases rather than looking at judicial votes alone. I seek a general characterisation of what function constitutional review has come to play, and how it works, rather than an account of individual motivations. In the same way that one can study the nature and function of parliaments and leave aside the public and private motivations of parliamentarians, I seek to study constitutional courts.

A Note on My Approach

It is hard to locate my approach within the schools of political science. I regard it as falling within the general approach known as “new institutionalism.” More specifically, I adhere to the subgroup of those sometimes called “value” institutionalists. That is, I think that a political actor is usually best studied as a role incumbent, subject to what has aptly been called “a logic of appropriateness.” I cannot put this position better than in the words of the leaders of the new institutionalist movement, James March and Johan Olsen:

The simple behavioral proposition is that, most of the time humans take reasoned action by trying to answer three elementary questions: What kind of a situation is this? What kind of a person am I? What does a person such as I do in a situation such as this?⁴²

This means that I regard judicial self-perception as crucial: on the whole, judges try to be good judges, or, at least, constitutional judges try to do the job of creating constitutional jurisprudence according to their understanding of their role. The best way to see what this means is to read the reflections of a thoughtful judge. The most powerful I know in this field is a book by Aharon Barak, a recently retired president of the Supreme Court of Israel.⁴³ His account of how he has thought through the process of being a constitutional judge is not only illuminating in

⁴²JG March and JP Olsen, “The Logic of Appropriateness,” in M Moran, M Rein, and RE Goodin, eds., *Oxford Handbook of Public Policy* (Oxford: Oxford University Press, 2006).

⁴³A Barak, *The Judge in a Democracy* (Princeton: Princeton University Press, 2006). It should be said that I came across this book belatedly. Had I read it earlier it would be more often cited in my own analysis.

its own right, but strong support for the thesis that a “logic of appropriateness” governs judicial behaviour to a great extent. Throughout my own book I refer to articles and speeches by constitutional judges for enlightenment about their perceptions of their role. (Barak’s ideas form part of my concluding argument in chapter 8.)

This book is rather different from most work by political scientists on courts, not because I think other work wrongly conceived, but because I am much more concerned with judicial argument, which I take to be the core of judges’ activity, and central to understanding the role courts play in complex societies. But I owe it to the reader to describe the more usual work, even if I leave it largely to others to decide whether my approach is compatible with such work, and if it is not compatible, which approach should be preferred. My method is to take judicial argument seriously as one of the major, if not the sole, determinant of the decisions courts make. I prefer my approach because it simply seems beyond credibility that so many thousands of professionally socialized and able men and women should be lying or deluding themselves in their arguments. They just cannot all, or even many of them, be like that. One thing seldom recognized is this: even if judges were bent on forcing into decisions their own ideological views, these are views honed by decades of professional legal “formation.” Legal and constitutional values inevitably take a high priority for such people, even as political actors. In a previous book of mine I recount the way English Law Lords talk in terms of “not cheating,” of being intellectually honest. One of those I interviewed said, in all seriousness, that in his entire career he had only come across one judge who personally believed in the legal realist model. It is an old dictum that “politicians bargain, judges argue.” Of course judges bargain with each other to get majorities on multimember courts—but the currency they trade in is itself argument. However, my views of what judges are up to are not shared by most of the (very small) part of the political science profession that studies courts.

The first characteristic of most political science research on courts is that it is American. It is either written by Americans (about American courts—the largest single category by a long way—or about other courts) or, less common, written by non-Americans about other courts but in a way heavily influenced by American paradigms.⁴⁴ The opening sentence of a recent study of courts outside the United States highlights the dominance of scholarship on the American Supreme Court.

Two decades ago, Martin Shapiro urged public law scholars to expand their horizons and begin studying “any public law other than constitutional law, any court other than the Supreme Court, any public lawmaker other than the judge, and any country other than the United States.”⁴⁵

⁴⁴ A fuller presentation on modern political science approaches to the courts is given in “Appeal Courts,” my contribution to P Cane and B Kritzer, eds., *The Oxford Handbook of Empirical Legal Research* (Oxford: Oxford University Press, forthcoming 2010).

⁴⁵ T Ginsburg and T Moustafa, eds., *Rule by Law: The Politics of Courts in Authoritarian Regimes* (Cambridge: Cambridge University Press, 2008), 1.

In itself the prevailing scholarly orientation is a neutral fact, and it is easily explicable. Americans have lived for more than two centuries under a Supreme Court that no one has ever been able to claim was not a political institution. In the most obvious senses the courts of other countries have not seemed so much a part of the political system except in the last few decades (leaving aside the traditional sense of common-law courts making the law in the days before statutes became so extensive and important). Given that American political science has been the technical leader in the academic world of the discipline, and that it was attuned to courts, and that there are so many American political scientists, it was perhaps inevitable that studies of courts would end up being dominated by US paradigms and assumptions.

What are the assumptions? The first is that judges are primarily policy-oriented political actors in very much the same way that congressmen are; they vote for their preferred policy outcomes, constrained loosely by purely “legal” matters of doctrine and procedure. At the level of individual judges, therefore, the main efforts have been addressed to demonstrating this policy preference voting, characterizing it and measuring it. At the level of courts as institutions, this approach has led also to the study of what might be called judicial coalition making, an account of how individual judicial policy preferences lead to group decisions.

The second main assumption, which follows in part from the first, is that courts themselves as institutions are not different in important ways from other institutions in the policymaking world, be they congressional committees or bureaucratic offices. Courts are assumed to have and pursue collective interests in wielding influence and protecting their status and power. This assumption leads to studies of court decisions in terms of the court’s strategic concerns. It is interesting to note that this approach has been highly influential in the literature on one court that has largely been written about by non-American political scientists, the European Court of Justice. Because the ECJ has inevitably been so influential in developing the European Union as a power, and in creating the legal framework within which it works, its political nature can hardly be denied. It does not follow, though, and it cannot be said to have been proved, that the decisions of the ECJ follow political imperatives other than those that derive from the court’s conception of the nature and meaning of the relevant treaties. This is not cavilling—if the ECJ develops its jurisprudence because of such an understanding, it has severe restrictions on what it can do, even if only those set by itself. These argumentative restrictions and imperatives are the stuff of judicial argument, and of my book.

A further area of research has stemmed from these joint assumptions, the need to explain why, to what extent, and under what conditions the other actors in the political system will tolerate the policy role of courts. This question takes particular resonance in the American literature because it touches closely on a long-running normative concern of theorists of democracy, again especially those with a characteristic American conception of democracy. This is the problem of the legitimacy of courts as policymakers seen against a relatively simple conception of democracy as the rule of majority preferences, at least as articulated by democratically elected legislators. Indeed the most usual phrase for this is that politically

influential courts are “counter-majoritarian” institutions. An American researcher is likely to find it problematic that the rest of the political system has put up with what can be seen as illegitimate power, a theme running through much of the work in what has come to be known as the study of “American political development.” The same sense of puzzlement is transferred to other countries. Or the assumption is that courts will always try to act in this way, and the research question becomes how and when they can get away with it. An otherwise sensible extension of political science to the study of courts in authoritarian countries increases the tendency to think that courts are tolerated only to the extent that they are useful to other political institutions.⁴⁶ An alternative interpretation is that if even authoritarian rulers have to tolerate courts a little, democratic leaders may have no option about tolerating them.

The early literature on judicial behaviour was addressed to the first question—can it be shown that judges are policy-seeking actors? Originally, American political science studies of the Supreme Court were as much “doctrinal” and normative as were legal studies. As was the case in Europe, many political science departments began inside law schools—but they escaped their parents much earlier, and perhaps more completely, than was the case elsewhere. In any case in America the lawyers themselves, and not only academic lawyers, came to take a more sceptical stance towards the courts with the rise of legal realism in the early twentieth century, making it highly likely that political scientists could fail to treat the courts simply as political institutions not radically different from Congress, the presidency, or any other part of the political system. Authors like Karl Llewellyn, Felix Cohen, and Jerome Frank made assumptions about judges being result oriented and about rules and doctrine being “constructed” post hoc to reach results, assumptions of the sort that have since become common in political science. Books like Frank’s *Law and the Modern Mind* “de-mystified” judicial argument; “rule scepticism” was almost an invitation to a certain social science model of judicial behaviour.⁴⁷

This model is based on certain assumptions, not always well articulated: that judges are free to decide cases any way they wish; that they use this freedom to try to further their own ideological or policy preferences; that as a collectivity, courts are focused on maximizing their own power in conflict with other institutions in their political system; and (though this is not always assumed) that judges vote “strategically” according to the political context and in the light of these aims. What nearly all political science approaches reject is what they sometimes describe as “slot machine jurisprudence,” the idea that a judge’s job is, and a judge thinks his or her job is, merely to give a technical legally correct answer to a legal question of the sort the judge is technically trained to do. Some studies, for example, aim at demonstrating that a core aspect of the judicial craft, identify-

⁴⁶ See T Ginsburg, *Judicial Review in New Democracies: Constitutional Courts in Asian Cases* (Cambridge: Cambridge University Press, 2003); Ginsburg and Moustafa, *Rule by Law*.

⁴⁷ J Frank, *Law and the Modern Mind* (New York: Brentano, 1930).

ing and applying precedents, does not account for judicial decisions.⁴⁸ Segal and Spaeth, who carried out the first study purporting to show that precedent does not constrain judges, are leaders in one of the dominant American schools, using what is usually called the “attitudinal” model.⁴⁹ Even those who support the model for American courts are beginning to have doubts about its transferability to other countries, even one as ideologically and legally similar as Canada.⁵⁰ No one, to my knowledge, has ever convincingly applied such an attitudinal model to, for example, a European court, though in the early days some less than powerful analyses were carried out on Australia. Not all American political scientists, even those given to seeing judges as policy dominated, deny the importance of their role perceptions; important work of a considerably more nuanced nature was done as early as the 1970s and 1980s.⁵¹ It is still the case that virtually no attention is paid to, nor credibility given to the importance of, the detailed arguments judges make to each other (other than in legal journals, of course). Since the advent of rational choice scholarship, in much of political science the focus has been on what is most usually called the “strategic model.”⁵² These studies still regard judges as free of anything like “legal” constraints, and still see them as in pursuit of their own policy goals, either as individuals or as collective actors. Scholars seek to understand courts as operating in complex political environments of other goal-directed rational actors such as legislatures, and their work can be subtle. Courts, in their eyes, do as much as they can get away with, but will at times make decisions to please or placate other actors so as to retain their power. This model has been applied outside the United States, perhaps best on the European Court of Justice.⁵³ In America something like this approach has been enthusiastically taken up by scholars working on “American political development.” One of the questions they are concerned with, and echoed elsewhere in the political science fraternity,

⁴⁸JA Segal and HJ Spaeth, “The Influence of Stare Decisis on the Votes of United States Supreme Court Justices,” 1996 40 *American Journal of Political Science* 4, 971–1003. This, however, is severely criticized, even within the US public law fraternity, as in S Brenner and M Stier, “Retesting Segal and Spaeth’s Stare Decisis Model,” 1996 40 *American Journal of Political Science* 4, 1036–48.

⁴⁹The best study I am aware of comparing precedent usage in US and UK courts does suggest that both systems take them seriously, but that the Law Lords are more deferential to legal authority: RP Caldarone, “Precedent in Operation: A Comparison of the Judicial House of Lords and the US Supreme Court,” 2004 *Public Law* 759–87.

⁵⁰ME Wetstein, CL Ostberg, DR Songer, and SW Johnson, “Ideological Consistency and Attitudinal Conflict: A Comparative Analysis of the U.S. and Canadian Supreme Courts,” 2009 42 *Comparative Political Studies* 6, 763–92.

⁵¹JL Gibson, “Judges’ Role Orientations, Attitudes, and Decisions: An Interactive Model,” 1978 72 *American Political Science Review* 3, 911–24; HM Scheb, TD Unga, and AL Hayes, “Judicial Role Orientation, Attitudes and Decision Making: A Research Note,” 1989 42 *Political Research Quarterly* 427–35; L Baum, “What Judges Want: Judge’s Goals and Judicial Behaviour,” 1994 47 *Political Research Quarterly* 3, 749–68.

⁵²This approach is not entirely new, of course—the seminal article was probably Robert Dahl’s in 1957, discussed in L Epstein, J Knight, and AD Martin, “The Supreme Court as a Strategic National Policy Maker,” 2001 50 *Emory Law Journal* 583–611.

⁵³A good example is G Garrett, RD Kelemen, and R Schulz, “The European Court of Justice, National Governments, and Legal Integration in the European Union,” 1998 52 *International Organization* 1, 149–76.

is how courts “get away with it,” why politicians put up with reversal from the courts. As noted above, this is not a question felt with the same urgency outside the United States, probably because Europeans assume their politicians believe in the constitution as much as their judges. As has been said of democracy in the transition countries, but as is equally true elsewhere in Europe, “Democracy is the only game in town.” And to a European, obeying a court is a democratic rule. But also, of course, non-American courts are much less obviously political actors, and much more cautious ones. Without doubt judges outside America take care not to flout clearly popular governments. *Fiat justitia ruat caelum*, “Let justice be done though the heavens fall,” is nowhere an absolute in the judicial mind. Even decisions concerning quite ordinary pieces of legislation, interpreted by courts without the power of judicial review, are replete with judicial reminders to themselves not to trespass too far into overtly political domains.⁵⁴ Nonetheless, courts may gain self-confidence because they do not think of themselves as political actors in the same sense as, for example, elected politicians. How otherwise could the following judicial statement be relatively orthodox?

The proper constitutional relationship between the courts and executive government is that the courts will respect all acts of the executive within its lawful province, and the executive will respect all decisions of the courts as to what that province is.⁵⁵

And this from a case where the home secretary himself was held in contempt of court? The real problem with the idea of strategic decisions is that it is difficult to see that any particular case has been decided strategically. One can frequently come up with a plausible post hoc account of why a decision could have been strategic, whatever the judges claimed as their reasoning. *Dolphin Deliveries* in Canada was an early Charter case in which the Supreme Court declined to broaden its own power.⁵⁶ This decision might have been out of fear the government would oppose such an extension. That is not the reason the judges gave, which involved a traditionally limited theory of constitutional review. Why should political scientists privilege their own guess about motivation over the court’s account? Such problems are well demonstrated in the more thoughtful work of the American political development scholars, as in Mark Graber’s assessment of the US Supreme Court in the Civil War period.⁵⁷

This book, however, stands apart from this tradition because it takes the existential position that if so many judges worldwide spend so much time arguing

⁵⁴See, for example, the way Lord Millet cautions his colleagues to be careful of pushing the government too far in *R v Secretary of State for the Home Department, Ex parte Fire Brigades Union*, 2 AC 513 [1995] (House of Lords).

⁵⁵Nolan in *M v Home Office*, QB 270 [1992] (Court of Appeal).

⁵⁶*Retail, Wholesale and Department Store Union v Dolphin Delivery Ltd*, 2 SCR 573 (1986) (Canadian Supreme Court).

⁵⁷M Graber, “Legal, Strategic, or Legal Strategy: Deciding to Decide during the Civil War and Reconstruction,” in R Kahn and KI Kersch, eds., *The Supreme Court and American Political Development* (Lawrence: University Press of Kansas, 2006).

with each other, and act as though these arguments matter to them, they ought to be taken at face value. If I am simply wrong, then I can only say, along with Leonard Cohen, “Your vision is right, my vision is wrong / I’m sorry for smudging the air with my song.”⁵⁸

It is worth speculating a little on why the American model is so different from ones that apply elsewhere, because later in this book I do analyze some US opinions side by side with similar opinions from other jurisdictions. A host of factors in American political and legal practice and culture might account for American judges being more openly “political” in their behaviour, or indeed being forced into more obviously ideological decision-making. Political science models may more effectively apply to American than to non-American courts simply because those models are assessing a different reality. Therefore, they should be exported with care. Practitioners of the attitudinal model are sometimes prepared to say that their models may need to be more complex to deal with “courts that are not as ideologically polarized as the US Supreme Court.”

Indeed, our approach calls for a much greater degree of skepticism on the part of researchers and for a much greater degree of testing unidimensional assumptions in other cultural, legal, and political settings. If our Canadian findings from the high court illustrate a broader indictment of the unidimensional hypothesis, then comparative legislative, executive, and bureaucratic scholars, in addition to public law researchers, may find a much higher level of ideological complexity in the decisions of non-U.S. policymakers.⁵⁹

While this is undoubtedly true, it might also be the case that the motivational and role conception differences are so great that even a common dimensionality would not make US-inspired models fit. Some of the possible factors that distinguish American from non-American courts are quite subtle, and could only be teased out with serious research. One good candidate is differences in professional socialization of lawyers all the way from law school to life as a partner in a US-style law firm. Another is both the extent and nature of political input into judicial selection.

A really obvious candidate to explain differences in judicial decision-making, however, is curiously understudied, seldom even commented on, and might be crucial even if there are no cultural, institutional, and practical differences between courts. The US constitution is unlike most of those interpreted by the constitutional courts studied in this book. Above all, it is shorter—the Bill of Rights runs to only 485 words. Interestingly, the all-important Fourteenth Amendment is almost as long at 437, reflecting perhaps a greater understanding of the problems of constitution writing in 1868 than in 1791. Overall, fewer than 1,000 words—the Bill of Rights plus the Fourteenth Amendment—provide the material on which a huge number of major constitutional cases hang. The Canadian Charter, itself a relatively nonverbose document, is more than two and a half times as long. It

⁵⁸ Leonard Cohen, “A Singer Must Die,” from the album *New Skin for the Old Ceremony*.

⁵⁹ Wetstein et al., “Ideological Consistency,” 786.

is the language of the US Bill of Rights as much as its terseness that may cause problems because, as I argue in a later chapter, it is absolutist in its depiction of rights, while modern constitutions accept the inevitability of limitations on rights. US judges therefore have to interpret a much more opaque and much older, pre-industrial, document. This certainly allows, and maybe requires, far more judicial creativity, and therefore allows, and may require, more intrusion of private judicial ideology.

The Nature of Modern Review

The nature of many modern constitutions, and the view their appointed review bodies take of their role, sometimes differs from the classic model in a further respect. Jurists in older courts have tended to express a modest notion of their job, and of the reach of constitutional rights. Rights are seen as a largely unconnected set of specific limitations that have to be applied seriatim to legislation when it is very clearly in breach of them. There is little or no sense, however, of the rights as instantiations of a broader ideology that it is the court's duty to develop. Typically such courts do not try to create a hierarchy of the rights, and may even be opposed to such a consideration. Where a case involves a clash of rights, they are prone to see no conflict, or to "balance" the rival claims in a pragmatic way that does not involve reference to an overall moral vision. Another way of saying much the same thing is that older courts seldom refer to the reason a right is protected—rights are taken as black-and-white restrictions on government, not as aspects of an articulated "good life." An example of this predilection is the difference in development of "free speech" rights in continental European jurisdictions compared with the United States and Australia.⁶⁰ Freedom of speech is well protected in the latter as a necessary aspect of competitive democracy. In the former, speech is equally well protected, but much more as a right involved in human self-development and personal dignity.

There is little sense, with the older courts, of the constitution as embodying values for the whole of society. Individual rules are strictly brought to bear on governments, or governments are excused obedience because of pressing national policy requirements. Never, though, are the constitutional values allowed to permeate legal relations between other legal actors. Yet one of the most pressing issues in many courts is the question of "horizontal effect"—the extent to which a constitution, if it forbids the government to do something, ought to also protect the individual from similar depredations by other private actors. While the German constitutional court since its earliest cases has talked about the "radiating effect" of constitutional values throughout society, the US Supreme Court still insists that the Bill of Rights applies only to federal and state governments, even in areas like

⁶⁰ I take up the Australian doctrine on speech rights again in the last chapter, with special reference to the most recent case, *Coleman v Power*, 220 CLR 1 (2004) (Australian High Court), where the whole question of the ideological justification for the right is hotly contested on the bench.

racial discrimination.⁶¹ Again, the US Supreme Court has upheld a state law forbidding the religious use of drugs to members of the Native American Church on the grounds that a “religious exception” for such drug users is held by the state in question to be impossible to organise while admitting that several other states do allow precisely such an exception.⁶² The German court, also working in a federal system, would never allow such diversity because its decision, whatever it might be, would be seen as drawing out the implications for the whole society of the complex of religious freedom rights in the constitution.

Almost every decision of the South African Constitutional Court is backed by an explication in terms of its mission in helping to build a new nonracist, nonsexist moral consensus in the society.⁶³ The French Conseil constitutionnel regularly refers to itself as developing “French Republican Principles” and building a “bloc de constitutionnalité.”⁶⁴ Most of the courts in the former Soviet bloc are self-conscious about their role in creating a new rule of law that, again, must permeate society.⁶⁵ The post-Franco Spanish constitutional court, in a more muted way, talks about its role in the development of a democratic culture. Even the Canadian Supreme Court has begun to see itself as enunciating the values of the Charter rather than merely applying its rules as neutrally as possible.⁶⁶

The actual texts of the respective constitutions facilitate this new approach, but hardly force the judges to adopt it; much depends on the interaction between the new groups of judges and the new contexts. Both the texts and the judicial will are necessary, and together they are sufficient to produce a form of constitutional review that is the focus of this book. The older courts and the older constitutions are not as innocent of this form of constitutional review as the description here might imply—but to the extent that a similar function is performed, it is less obvious.⁶⁷ The lack of obviousness has contributed to political scientists feeling comfortable treating constitutional review as fully within the judicial function of the classic division of powers.

⁶¹BS Markesinis, *Always on the Same Path: Essays on Foreign Law and Comparative Methodology* (Oxford: Hart 2001), chapters 7 and 8 for the German ideas. More generally, M Tushnet, “The Issue of State Action / Horizontal Effect in Comparative Constitutional Law,” 2003 1 *International Journal of Constitutional Law* 1, 79–98.

⁶²*Employment Div., Dept. of Human Resources of Oregon v Smith*, 494 US 872 (1990) (US Supreme Court). But compare: *Garreth Anver Prince v The President of the Law Society of the Cape of Good Hope*, 2002 (2) SA 794 (South African Constitutional Court).

⁶³M Chanock, “A Post-Calvinist Catechism or a Post-Communist Manifesto? Intersecting Narratives in the South African Bill of Rights Debate,” in P Alston, ed., *Promoting Human Rights through Bills of Rights* (Oxford: Oxford University Press, 1999), gives a good account of the surrounding ideology. A better sense of what I mean can be found by reading one of the early cases, for example, *Garreth Anver Prince*.

⁶⁴J Bell, *French Constitutional Law* (Oxford: Clarendon Press, 1992).

⁶⁵D Robertson, *Democratic Transitions and a Common Constitutional Law for Europe* (Oxford: Europaem, 2001).

⁶⁶P Beyer, “Constitutional Privilege and Constituting Pluralism: Religious Freedom in National, Global, and Legal Context,” 2003 42 *Journal for the Scientific Study of Religion* 3, 333–39.

⁶⁷See, for example, the perceptive account of all the functions the US Supreme Court carries out in P Bobbitt, *Constitutional Interpretation* (Oxford: Blackwell, 1991).

It is not modernity itself that has led to constitutional courts being willing and able to take up what can look like a wholly new function in society. More likely, constitutional and political change is the driver—above all transition from some form of autocracy to liberal democracy. It cannot be accidental that all of the countries mentioned above where constitutional courts see themselves as developing a culture of democracy are creatures of political change, though not always rapid and extreme. With most of the examples the transition is obvious, starting with the most influential of all such courts, the German Federal Constitutional Court, set up in the aftermath of the Nazi regime and the 1945 defeat. Others may seem less obvious; is the French Conseil constitutionnel the beneficiary of regime change? Can the Canadian Supreme Court be seen in this light? I would argue that the answer is yes, in both cases. The French Conseil constitutionnel is part of the Fifth Republic constitution, which was revolutionary in French republican history. That republic took more than a decade to become established, during which it was dependent on de Gaulle's leadership. Throughout that period the Conseil acted as the constitution's drafters intended—it kept parliament under check vis-à-vis the executive, and was otherwise passive. It began to be active in 1971 shortly after de Gaulle's demise, and thrust itself into French politics forcefully after a constitutional amendment in 1974 opened access to it to all parliamentarians. The whole period from the beginning of the Fifth Republic constitution for perhaps twenty years was a lengthy but major adaptation of French politics in a way never before experienced. It is hardly surprising that the historically unprecedented idea of allowing constitutional review of legislation should get out of the control of the drafters and become a new force in politics as part of this transition.

The argument on the Canadian case is weaker, but still real. Canada “repatriated” its constitution in a time of stress and near breakup; the Charter was without doubt a dramatic break from an English-style history of parliamentary supremacy. (Indeed, sixteen years after the Charter came into force, the Canadian Supreme Court had to rule on the legality of a possible secession by Quebec.)⁶⁸ It could have amounted to very little, but the combination of demand from diverse publics and eagerness on the part of the judiciary presented the opportunity for the growth of serious constitutional review of this new form in an uneasy society. There can be little doubt that merely introducing a form of legislative review absent a fully fledged national creation of a new constitution would have had much less impact. Canada already had a nonenforceable bill of rights; had the whole constitution not been re-created in the name of the national sovereignty of a disunited nation, the Charter itself might have been no more important than the New Zealand or United Kingdom's Human Rights Acts.⁶⁹ It is hardly surprising that some form of national remaking seems to have been crucial in the launching of serious constitutional review. After all, the US constitution and its Supreme Court were

⁶⁸ *Reference re Secession of Quebec*, 2 SCR 217 (1998) (Canadian Supreme Court).

⁶⁹ For a comparison of the New Zealand and UK experience of their Human Rights acts, which concludes that in New Zealand the judges have been far from activist, see P Butler, “Human Rights and Parliamentary Sovereignty in New Zealand,” 2004 35 *Victoria University Wellington Law Review* 341–67.

themselves the product of a revolution. The classic eighteenth-century individualist liberalism that court helped entrench into American political culture was in its day as radical as anything a modern constitutional review body is doing in the twenty-first century. It is largely because the basic principles of that ideology are now so completely accepted in the United States that it is easy not to see the Supreme Court as anything but a routine practitioner of the judicial branch of the state. In fact it is precisely where that ideology still finds opposition in parts of the society that the US court most obviously carries out constitutional review in a full-blooded way—as for example where state-religion connections, or religiously loaded issues like abortion, arise. It is pertinent that the impact of the Canadian Charter has been criticised by some precisely for importing an American “rights culture” into a “communal” society.⁷⁰

Transition status alone will not bring about the development of serious constitutional review. If it did, then the Italian Constitutional Court should have been as effective as the German court, for they were created at roughly the same time in very similar historical contexts. I referred earlier to judicial willpower; not a good phrase, but it connotes a desire and intention to pick up the burdens of constitutional review that may be missing for many reasons. The most common reason for review courts not to be eager to impose constitutional values is that the members may have much in common with sectors of society well entrenched in legislatures and executives—they may, that is, not strongly share the ideology that the constitution, or part of it, encodes. To some extent the Italian Constitutional Court in its earlier days shared with all other Italian political institutions one characteristic—domination by the Christian Democrats, whose interests were not well represented in either the structural or the “rights” aspects of the constitution despite their ability to dominate the actual politics carried out under it.⁷¹ It is a measure of how that court has changed its orientation that its main political enemies are now on the right.

Again this fate of being staffed with people who shared the dominant values of those in control of both the executive and legislative powers befell the French Conseil constitutionnel in its first decade and a half. There was no reason why the Conseil could not have “discovered” the sources of constitutional doctrine it began to use so effectively from 1971 at any earlier date after 1958. As the political Right in France began to fragment after de Gaulle left power, and as regular replacements of councillors took effect, the Conseil was much readier in the early 1970s to take on a constitutional review role. In contrast one of the reasons some of the Central and Eastern European courts leapt immediately into quite passionate value enforcement through constitutional review was the fact that many of the first generation of judges had been members of the constitutional creation movements and were already eager exponents of the values they had fought for in these earlier arenas.

⁷⁰See, for one example of a common complaint, WA Bogart, *Courts and Country: The Limits of Litigation and Social and Political Life of Canada* (Toronto: Oxford University Press, 1994).

⁷¹See ML Volcansek, *Constitutional Politics in Italy* (London: Macmillan, 2000). A comparative approach is given in A Stone Sweet, “Constitutional Courts and Parliamentary Democracy,” 2002 25 *West European Politics* 1, 77–100.

Part of the French story has to do with the paucity of chances the early Conseil had to be effective, as it has been in Italy. One of the greatest concerns for the exponents of constitutional review in Eastern Europe was a fear that the institutional mechanisms inherited from the past, together with the attitudes of members of the judicial ancien régime would similarly starve the new courts of subject matter. Effects like this, including institutional restrictions on the review bodies, are a matter of detail—though crucially important detail—and must be left for later exposition. It should be clear, though, that effective constitutional review is no mere matter of a rich constitutional text and an eager court being combined.

Technical Aspects of Judicial Review

What constitutional review is cannot properly be described without some description of how it is done. The courts work on texts—initially the constitution itself and other sources identified by the constitution as having authority. Thus the French Conseil constitutionnel has used both the preamble to the constitution of the Fourth Republic and the 1789 Declaration of the Rights of Man as authorised by the text of the Fifth Republic constitution. Many of the East European courts have referred to the European Convention on Human Rights because their own constitutions tell them so to do. Secondly, courts refer to their own previous decisions and, often prompted by their own constitutions, they consider the decisions of other similar courts. They may also consult more amorphous bodies of legal writing, especially things with titles like “principles of international law” or “general principles of law.” Again, the French Conseil consults “general principles of French republican law.”

The national constitution is the starting place. To say that these constitutional review bodies “interpret” the constitution is largely empty. It is easier to think in terms of their trying to answer questions posed to them by others by looking at these documents. There are at least two rather different sorts of problems the constitutional review bodies can be asked because of the various routes by which they can be directed to an issue. If it is a court to which issues arising in real litigation are referred or appealed, the context of the litigation forms the precise question. For example, can the state government prevent a retailer from opening his shop on a Sunday even though, being a devout Jew, he must also close on Friday, and given that there is a clause in the constitution forbidding the state to interfere with its citizens’ freedom of religion (from the United States, Canada, and with variations, South Africa)?⁷²

If the constitutional review is a priori or abstract, there is less of a context. The question may be quite precise in one sense, but lacking any story. So, from Hungary, are the provisions of the criminal code that provide for the death penalty unconstitutional given Article 54 of the constitution?⁷³ This case was brought

⁷² A typical US case on this question is *Braunfeld v Brown*, 366 US 599 (1961) (US Supreme Court).

⁷³ *Decision of 31st October 1990 on Capital Punishment*, 23/1990 AB (Hungarian Constitutional Court). Much of the Hungarian argument was adopted by the South African Court in *S v Makwanyane and Another*, CCT 3/94 (South African Constitutional Court).