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SQUARING THE CIRCLE: DEMOCRATIZING JUDICIAL REVEW AND THE COUNTER-CONSTITUTIONAL DIFFICULTY

Miguel Schor[1]

I. Introduction: the Counter-Constitutional Difficulty

> Among the numerous advantages promised by a well-constructed Union, none deserves to be more accurately developed than its tendency to break and control the violence of faction. The friend of popular government never finds himself so much alarmed for their character and fate, as when he contemplates their propensity to this dangerous vice. He will not fail, therefore, to set a due value to any plan which, without violating the principles to which he is attached, provides a proper cure for it. The instability, injustice, and confusion introduced into public councils, have, in truth, been the mortal diseases under which popular governments have everywhere perished.[2]

A season in the appointments war

Justice Sandra Day O'Connor was the swing vote in a closely divided Supreme Court. In decisions decided five to four from 1994 through 2005, Justice O'Connor had the highest batting average of all the justices as she voted with the majority seventy-seven percent of the time.[3] The announcement of her retirement on July 1, 2005 launched a barrage of interest group activity.[4] The sense of urgency was heightened by the death of

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[2] THE FEDERALIST NO. 10, at 129 (James Madison) (Benjamin F. Wright ed., 1996).

[3] Linda Greenhouse, *Consistently a Pivotal Role,* N.Y. TIMES, July 2, 2005, at A1.

[4] Robin Toner, *After a Brief Shock, Advocates Quickly Mobilize,* N.Y. TIMES, July 2, 2005, at A1 ("By midday [of her announcement], nothing less than a national political campaign had begun."); David E. Rosenbaum & Lynette Clemetson, *In Battle to Confirm a New Justice, Both Sides Get Troops Ready Again,* N.Y. TIMES, July 3, 2005, at A19 (noting presciently that this battle might be different than previous ones because Christian conservatives were "springing into action" and were "far better organized and sophisticated than they were when the first President Bush named Justice Thomas to the court"); and Thomas B. Edsall, *Court Fundraising Fury Underway,* WASHINGTON POST, ,

Chief Justice William Rehnquist on September 3, 2005. The Rehnquist Court had gone eleven years without any change in its membership[5] and President Bush now had two vacancies to fill. Although hot button issues such as abortion[6] and same-sex marriage[7] mobilized the ideological forces arrayed in the appointments brawl engendered by Chief Justice Rehnquist's death and Justice O'Connor's retirement, the Rehnquist Court reflected broader ideological conservative currents that look askance at the growth of federal power.[8]

The opening salvo was fired by conservative groups who met within hours of Justice O'Connor's retirement. They sought to prevent President Bush from nominating his attorney general, Alberto R. Gonzales, because they believed his views on abortion to be suspect.[9] The debate became so heated that President Bush and the Senate Republican leadership asked conservatives to avoid divisive cultural issues such as abortion and same-sex marriage in discussing nominations and to use language that tested well in polls such as a "fair and dignified confirmation process."[10] President Bush's nomination of Judge John Roberts dampened down the fighting as Roberts had both a distinguished resume and a thin record on divisive social issues.[11] During the Senate hearings on his appointment, Judge Roberts articulated a pragmatic and eclectic approach to interpreting

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July 5, 2005, at A04 (observing that the "effort to fill the Supreme Court seat being vacated by Justice Sandra Day O'Connor has already become a fundraising magnet for both left and right").

[5] Linda Greenhouse, *Under the Microscope Longer Than Most,* N.Y. TIMES, July 10, 2005, at __.

[6] A Pew research center analysis states "Clearly, Americans believe that no single issue before the court has greater importance" than abortion. The Pew Research Center For the People & The Press, *Abortion, the Court and the Public,* Oct. 3, 2005, http://people.org/commentary/pdf/119.pdf.

[7] Conservatives have mobilized in opposition to gay marriage which they see as the "new abortion" as it is a "culture-altering change being implemented by judicial fiat." Russell Shorto, *What's Their Real Problem with Gay Marriage (It's the Gay Part),* N.Y. TIMES, June 19, 2005, at __.

[8] Thomas Keck writes that when it comes to federal power, the Rehnquist Court "has been the least deferential of any in the history of the U.S. Supreme Court striking down thirty provisions from 1995 to 2001." THOMAS M. KECK, THE MOST ACTIVIST SUPREME COURT IN HISTORY: THE ROAD TO MODERN JUDICIAL CONSERVATISM 2 (2004).

[9] Adam Nagourney et al., *Conservative Groups Rally Against Gonzales as Justice,* N.Y. TIMES, July 3, 2005, at A1.

[10] David D. Kirkpatrick & Carl Hulse, *G.O.P. Asks Conservatives to Cool Rhetoric Over the Court,* July 6, 2005, at A1 and Richard W. Stevenson, *Bush Urges Civility in Debate Over Supreme Court,* N.Y. TIMES, July 6, 2005, at __.

[11] Linda Greenhouse, *A Judge Anchored in Modern Law,* N.Y. TIMES, July 20, 2005, at A1; Adam Nagourney, *The Strategy for a Successful Nomination: Disarm Opposition,* N.Y. TIMES, July 20, 2005 at A14; and Todd S. Purdum, *In Pursuit of Conservative Stamp, President Nominates Roberts,* N.Y. TIMES, July 20, 2005, at A1.

the Constitution that put him at variance with Justices Scalia and Thomas.[12] The only real opposition President Bush might have faced in nominating Judge Roberts to the Supreme Court was among social conservatives. The White House, however, had carefully prepared for this possibility by spreading the word for at "least a year" before Judge Roberts's nomination that he was safe on issues such as "abortion, same-sex marriage, and public support for religion."[13] Roberts was confirmed by a vote of seventy-eight to twenty-two.

President Bush's nomination of White House Counsel Harriet Ellan Miers on October 3, 2005, however, led to a firestorm on the President's right flank. Editorials were written by prominent public intellectuals criticizing Miers's closeness to the President and lack of talent.[15] Conservatives broke decisively with the President over her nomination even though the White House and its allies repeatedly sought to reassure social conservatives.[16] Social conservatives had long sought to remake the Court and believed that Harriet Miers lacked the judicial DNA they desired in a justice.[17] The interest group activity revolving around her nomination had a surreal quality. Liberal interest groups largely held their fire while conservatives paid for television advertisements featuring Robert Bork that opposed her nomination.[18] Conservative

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[12] *Hearing before the Senate Judiciary Committee on The Nomination of John G. Roberts to be Chief Justice of the United States,* Sept. 12, 2005.

[13] David D. Kirkpatrick, *A Year of Work to Sell Roberts to Conservatives,* N.Y. TIMES, July 22, 2005, at A14.

[15] Randy E. Barnett, *Cronyism: Alexander Hamilton Wouldn't Approve of Justice Harriet Miers,* WALL ST. JOURNAL, Oct. 4, 2005, at A26 and George F. Will, *Can This Nomination Be Justified,* WASHINGTON POST, Oct. 5, 2005, at A23.

[16] David D. Kirkpatrick, *The Crisis of the Bush Code*, N.Y. TIMES, Oct. 9, 2005, at __ (noting the disappointment of many conservatives by Miers's nomination even though Karl Rove telephoned "prominent conservative Christians . . . to enlist their support" before her selection was announced to the public); Fred Barbash, *Religion Was a Factor in Miers's Nomination,* WASHINGTON POST, Oct. 12, 2005, at __ (observing that President Bush sought to reassure conservatives by suggesting that Miers's religion was part of the reason he nominated her); and John H. Fund, *Judgment Call,* WALL ST. JOURNAL, Oct. 17, 2005, at A20 (stating that two close friends of Harriet Miers's, both of whom were judges, opined in a conference call made by religious conservatives the day her nomination was announced that she would overrule *Roe v. Wade*).

[17] Dan Balz, *Right Sees Miers as a Threat to Dream,* WASHINGTON POST, Oct. 7, 2005, at A01 (reporting that social conservatives are united by a "passionate desire to change the Supreme Court" and fear Harriet Miers because "so little is known" about her). *See* Part II(A) *infra*.

[18] Brennan Center for Justice, Three Nominations Reveal Contrasting Influence of Interest Groups in High Court Nomination Process, Jan. 26, 2006, www.brennancenter.org/presscenter/releases_2006.

opposition played an important role in Miers's decision to withdraw her nomination on October 27, 2005.[19]

Miers's withdrawal was quickly followed by the nomination of Judge Samuel A. Alito, Jr. His impeccable conservative record mobilized interest groups along more natural fault lines than had Miers's nomination.[20] The caliber of his intellectual credentials meant that his nomination would have to be opposed on mainly ideological grounds.[21] A pair of memorandums written by Alito opposing abortion when he had been a member of the Reagan administration, however, did not lead to an all out ideological fight,[22] even though interest groups on the left and the right sought to mobilize their supporters.[23] Judge Alito explained that the memos were his personal rather than his judicial views which successfully dampened some of the opposition.[24] His measured words during his Judiciary Committee hearings further defused the

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[19] Robin Toner et al., *Steady Erosion in Support Undercut Nomination,* N.Y. TIMES, Oct. 28, 2005, at A16 (Senator Brownback noted that social conservatives were unwilling to support Miers because "'They had been burnt so many times before. . . . They really wanted to know.'"); Howard Kurz, *Conservative Pundits Packed a Real Punch,* WASHINGTON POST, Oct. 28, 2005, at C01 ("As newspapers began digging out past speeches and writings by Miers on such subjects as affirmative action and abortion, right-leaning pundits grew even more alarmed that she was insufficiently conservative."); Peter Baker & Amy Goldstein, *Nomination was Plagued by Missteps From the Start,* WASHINGTON POST, Oct. 28, 2005, at A01 (William Kristol opposed Miers in spite of Karl Rove's entreaties and opined "'What this shows is that for conservatives, the Supreme Court is so central' that they were unwilling to stay silent."); and Jonathan Weisman, *The Rift's Repercussions Could Last Rest of Term,* WASHINGTON POST, Oct. 28, 2005, at A08 (Richard A. Viguerie, an "architect of the conservative movement, . . . [stated] 'But we [opposed Miers] because it was all about the courts, all about the courts. . . . Then when [President Bush] betrayed us on a Supreme Court nominee, that just woke us all up.'")

[20] Charles Lane, *Alito Leans Right where O'Connor Swung Left,* WASHINGTON POST, Nov. 1, 2005, at A01 and Todd S. Purdum, *Potentially, the First Shot in an All-Out Ideological War,* N.Y. TIMES, Nov. 1, 2005, at __.

[21] Scott Shane, *Ideology Serves as a Wild Card in Senate Debate on Court Pick,* N.Y. TIMES, Nov. 4, 2005, at A1.

[22] Samuel A. Alito, Memorandum to the Solicitor General re Thornburgh v. American College of Obstreticians and Gynecologists, May 30, 1985 and Samuel A. Alito, Personal Qualifications Statement, Nov. 15, 1985.

[23] David D. Kirkpatrick, *One Nominee, Two Very Different Portraits in a New Round of Ads,* N.Y. TIMES, Nov. 18, 2005, at A26 and Jo Becker, *Television Ad Wars on Alito Begins,* WASHINGTON POST, Nov. 18, 2005, at A03. Interest groups spent $2,407,392 on television advertisements for Alito's nomination which, while significantly lower than some initial estimates, was almost twice which was spent on Roberts's nomination. Brennan Center for Justice, *supra* note __.

[24] Charles Babington, *Alito Distances Himself From 1985 Memos,* WASHINGTON POST, Dec. 3, 2005, at A01 and Charles Lane, *For Alito, a Tricky Question of Statements vs. Thoughts,* WASHINGTON POST, Dec. 4, 2005, at A08.

opposition.[25] There was much stronger opposition to Judge Alito in the Senate, however, than there had been to Judge Roberts because of Judge Alito's conservative track record and his embrace of originalism in constitutional interpretation.[26] Judge Alito was confirmed by a divided Senate vote of fifty-eight to forty-two largely along party lines.[27]

The appointments of John Roberts and Samuel Alito represent the culmination of two decades of efforts by conservatives to remake the Supreme Court.[28] The mobilization of social conservatives has been fueled by opposition to abortion and same-sex marriage, and a desire for a greater role for religion in public life.[29] The extraordinary split among conservatives over the appointment of Harriet Miers illustrates the importance that social conservatives attach to judicial nominations. By opposing Miers's nomination, social conservatives made it clear that they would not be satisfied by a conservative nominee who lacked a clear track record on issues important to them. There is, of course, no assurance that either Justice Roberts or Justice Alito will vote in ways that please social conservatives. Predicting how a justice will vote based on an ideological label is an uncertain science, as political scientists Lee Epstein and Jeffrey Segal concede.[30] The internal dynamics of the Supreme Court sometimes lead Justices to change their ideology over time. In spite of this uncertainty, however, the heightened role that interest groups play in judicial nominations is helping to create a more ideological and partisan Court.[31] As the events of the current appointments season draw to a close, it is clear that constitutional politics is being transformed by the efforts of interest groups to place their partisans on the nation's highest court. This Article will compare judicial review in the United States with Western Europe and Canada to argue

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[25] Charles Babington & Amy Goldstein, *Alito Stresses the Rule of Law in Opening Statement,* WASHINGTON POST, Jan. 10, 2006, at A01.

[26] Adam Liptak, *Few Glimmers of How Conservative Judge Alito Is*, NEW YORK TIMES, Jan. 13, 2006, at A1 and Charles Lane, *A Right Cautious Nominee,* WASHINGTON POST, Jan. 13, 2006, at A06.

[27] Charles Babington, *Alito is Sworn in on High Court,* WASHINGTON POST, Feb. 1, 2006, at A01 and David D. Kirkpatrick, *Alito Sworn In as Justice After Senate Gives Approval,* N.Y. TIMES, Feb. 1, 2006, at A21.

[28] David D. Kirkpatrick, *Conservatives See Court Shift as Culmination,* N.Y. TIMES, Jan. 29, 2006, at A1; David D. Kirkpatrick, *In Alito, G.O.P. Reaps Harvest Planted in '82,* N.Y. TIMES, Jan. 30, 2006, at A1; and Adam Liptak, *A Court Remade in the Reagan Era's Image,* N.Y. TIMES, Feb. 2, 2006, at A19.

[29] NOAH FELDMAN, DIVIDED BY GOD 5-7 (2005) and JAMES A. MORONE, HELLFIRE NATION: THE POLITICS OF SIN IN AMERICAN LIFE 453-90 (2003).

[30] Lee Epstein & Jeffrey A. Segal, *Changing Room: The Court's Dynamics Have a Way of Altering a Justice's Approach to the Law,* WASHINGTON POST, Nov. 20, 2005, at B01.

[31] Professor Lawrence Tribe recently wrote a letter to Justice Breyer and his readers explaining that he was unable to continue work on the third edition of his influential treatise on constitutional law. He explained that the number of cases decided by 5-4 votes "reflect a . . . fundamental and seemingly irreconcilable division within legal and popular culture that is not amenable to the treatment that a treatise might hope to give to such cases." Laurence H. Tribe, *The Treatise Power*, 8 GREEN BAG 291, 302 (2005).

that American exceptionalism in the rules governing judicial appointments facilitates the role that interest groups play in shaping the meaning of the Constitution.

The counter-constitutional difficulty,
the problem of constitutional theory, and democratizing judicial review

In what has become the most famous of the Federalist Papers, James Madison argued that the new republic had a number of mechanisms that would alleviate the problem of faction that had undermined so many democracies throughout time.[32] The solution was, in part, to entrench the Constitution from the channels of ordinary political change. Majorities might rule when it came to political matters[33] but a supermajority would be required to change the Constitution.[34] Constitutions play a key role in facilitating democratic politics. Democracies require the alternation in power between opposing groups.[35] Competing groups or factions mistrust each other, however. That mistrust is lessened if a constitution limits what a group may do once in power. Maintaining the distinction between constitutions and ordinary laws is critical for the longevity of democracy as constitutions protect the interests of those not in power. The political stakes in gaining power rise and democracies become unstable when constitutions can be as readily changed as ordinary legislation.[36]

This Article argues that the trust needed for democratic politics to function well is threatened by the recent appointments wars. The constitutional politics facilitated by the rules governing judicial appointments[37] have undermined the stiff supermajority requirements for amending the Constitution built into Article V. There is even less democratic protection built into the appointments process than in enacting legislation since the former requires only Senate approval. As the battles during the current appointments season illustrate, presidents pay attention to factions that are important to their coalition and that care deeply about the ideology of who sits on the Court. The counter-constitutional difficulty is that the struggle by interest groups to place their partisans on the United States Supreme Court introduces the problem of faction into constitutional politics and renders hollow the protection afforded by Article V of the Constitution.

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[32] THE FEDERALIST NO. 10 (James Madison).

[33] "Might" is the operative word since, as Robert Dahl pointed out in his long critique of THE FEDERALIST NO. 10, majorities sometimes elect presidents but minorities have the key voice in interelection issues. ROBERT A. DAHL, A PREFACE TO DEMOCRATIC THEORY 124-51 (1956).

[34] U.S. CONST. art. V.

[35] ROBERT A. DAHL, POLYARCHY: PARTICIPATION AND OPPOSITION 16-41 (1971).

[36] Constitutions in Latin America, for example, were readily changed which contributed to breakdown of democracy in the region. No group could trust the advent to power of another group if constitutions can be readily changed. Constitutionalism in Latin America can be seen as a grand experiment in the consequences of making constitutions as easy to change as ordinary legislation. Miguel Schor, *Constitutionalism Through the Looking Glass of Latin America*, 41 TEX. INT'L L. J. 1 (2006).

[37] U.S. CONST., art. II, § 2.

[39] ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS (2d ed., 1962).

Under the long intellectual shadow cast by Alexander Bickel, however, constitutional theory has paid little attention to the tension between the Supreme Court and the Constitution and focused instead on the tension between the Supreme Court and democratically elected legislatures. Bickel asked how the power of a non-elected branch of government to thwart the decisions of elected officials can be justified in a democracy.[39] Although Bickel raised the issue almost half a century ago, the countermajoritarian difficulty remains a vital issue in constitutional theory.[40] As Professor Brown artfully describes Bickel's legacy, at "Bickel's instigation, contender after contender has stepped forward to try a hand at pulling the sword of judicial review from the stone of illegitimacy."[41]

The solutions proposed by Bickel's interlocutors to the countermajoritarian difficulty assume that the problem dissolves when the correct theory is crafted that explains when judicial review is an exercise in law rather than in politics.[42] The legal scholarship that has clustered around Bickel's issue focuses, therefore, on the internal, cultural software that judges should be programmed with if judicial review is to be legitimate in a democracy.[43] As a consequence of Bickel's influence, constitutional

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[40] Barry Friedman's seminal five part series as well as a recent major edited book illustrate the continuing salience of the countermajoritarian difficulty. Barry Friedman, *The History of the Countermajoritarian Difficulty, Part One: The Road to Judicial Supremacy,* 73 N.Y.U. L. REV. 333 (1998); *The History of the Countermajoritarian Difficulty, Part Two: Reconstruction's Political Court,* 91 GEO. L.J. 1 (2002); *The History of the Countermajoritarian Difficulty, Part Three: The Lesson of Lochner,* 76 N.Y.U. L. REV. 1383 (2001); *The History of the Countermajoritarian Difficulty, Part Four: Law's Politics*, 148 U. PA. L. REV. 971 (2000); *The Birth of an Academic Obsession: The History of the Countermajoritarian Difficulty, Part Five,* 112 YALE L.J. 153 (2002); and THE JUDICIARY IN AMERICAN DEMOCRACY: ALEXANDER BICKEL, THE COUNTERMAJORITARIAN DIFFICULTY, AND CONTEMPORARY CONSTITUTIONAL THEORY (Kenneth D. Ward & Cecilia R. Castillo eds., 2005).

[41] Rebecca L. Brown, *Accountability, Liberty, and the Constitution*, 98 COL. L. REV. 531, 531 (1998).

[42] STEPHEN M. GRIFFIN, AMERICAN CONSTITUTIONALISM: FROM THEORY TO POLITICS 13-14 (1996) (arguing that American constitutionalism rests on an analogy between the constitution and ordinary law).

[43] The debate has splintered over whether the cultural understandings that inform judicial decision-making afford judges too much discretion when interpreting the Constitution. Justice Scalia, for example, argues that the common law method of legal reasoning provides too much leeway for judges as it allows the Constitution to be interpreted according to current understandings of the text. He argues that a more austere interpretive method is needed that examines the text of the Constitution in light of how its language was understood by the Framers if judicial review is to be compatible with democracy. Antonin Scalia, *Common Law Courts in a Civil-Law System: the Role of United States Federal Courts in Interpreting the Constitution and Laws, in* A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 3 (1997). Other scholars argue that the Constitution is an evolving document, that the text should be interpreted according to contemporary understandings, and that the common law method of reasoning sufficiently

theory has paid too much attention to interpretive niceties while ignoring the problem of how courts should be made politically accountable.[44] The problem of judicial review, however, is not that it is *countermajoritarian*[45] but that it is potentially *counter-constitutional*.

Rather than explore how judges ought to interpret the Constitution, this Article will examine the external hardware of democratic checks on judicial review by comparing the American experience with that of other successful, long-term democracies in Western Europe and Canada. Part II of this Article examines why the American model of weak democratic checks on judicial review—lifetime tenure after nomination by the President and confirmation by a bare majority of the Senate—has not worked well.[46] The appointments process for the Supreme Court has long been politicized but the influence that factions now play is a recent and troubling trend. Long-term historical and institutional changes that transformed the Court into a powerful political institution have led to a political backlash as interest groups vie to influence nominations. Presidents now understand that they can use nominations as political coinage to build support and help fashion factions. Appointments battles have become part of the landscape of American constitutional battles.[47]

The solution to an overly democratized nomination process lies paradoxically in democratizing judicial review by strengthening the tools by which citizens may hold

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binds judicial discretion so that judicial review is compatible with democracy. Thomas C. Grey, *Do We Have an Unwritten Constitution?,* 27 STAN. L. REV. 703 (1975); David A. Strauss, *Common Law, Common Ground, and Jefferson's Principle,* 112 YALE L.J. 1717 (2003); and CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT (1999).

[44] As Professor Mark Graber argues, constitutional theory would be enriched if it took constitutional politics into account. Mark A. Graber, *Constitutional Politics and Constitutional Theory: A Misunderstood and Neglected Relationship,* 27 L. & SOC. INQUIRY 309 (2002). *See also* Barry Friedman, *Taking Law Seriously,* 4 PERSPECTIVES ON POL. 261, 272 (2006) (arguing for the importance of interdisciplinary work between legal scholars and political scientists).

[45] Professor Whittington, for example, concludes that a "'regime' perspective on judicial review, in which the Supreme Court is understood as an actor operating within the logic of a broader partisan regime rather than in antagonism to it, is being developed by a range of scholars with a variety of particular interests." Keith E. Whittington, *Congress Before the Lochner Court,* 85 B.U. L. REV. 821, 827 (2005).

[46] There are, of course, other mechanisms that could be used to limit the power of the Supreme Court. Professor Geyh explains that the emergence of a custom or a convention that judicial independence should be protected has prevented Congress from using the political tools in its arsenal, however. CHARLES G. GEYH, WHEN COURTS AND CONGRESS COLLIDE 5-10 (forthcoming 2006). As a consequence of the emergence of this convention, Congress today relies largely on the nomination process to control courts rather than impeachment, the budget, or jurisdiction.

[47] David S. Law & Sanford Levinson, *Why Nuclear Disarmament May Be Easier to Achieve Than an End to Partisan Conflict Over Judicial Appointments,* 39 U. RICH. L. REV. 923 (2005).

courts politically accountable. Courts can be held politically accountable either ex ante by means of appointments or post facto by providing mechanisms for a democratic override of constitutional interpretations.[48] Parts III and IV discuss respectively how Western Europe and Canada learned from our experience with weak political accountability for judicial review to fashion different and stronger democratic constraints. These polities rather understandably rejected the notion that there is a sharp division between law and politics and that a court construing the Constitution would be a court of law. The American system of weak, ex ante political controls over the judiciary was adopted because the founders mistrusted democracy and pinned their hopes on republican virtue. The Supreme Court is the vestigial remnant of an older notion of politics where only the few participated because only elites had the necessary virtue to govern.[49] The framers, moreover, could not foresee the role that the Supreme Court would play in American politics. If the framers made no explicit provision for judicial review in the Constitution, then a fortiori they did not give sustained thought to the problem of the accountability of the least dangerous branch. The rest of the world chose a different path because of political learning.[50] Other polities considered and rejected adopting American style judicial review with its weak democratic constraints because they learned from the American experience that constitutional courts are political as well as legal institutions. The nations of Western Europe chose a more democratic political appointments process than the United States.[52] By adopting supermajority appointments procedures, the European model of judicial review reduces the power of factions to influence constitutional interpretation. Fearing the power of the American Supreme Court, Canada provides for the possibility of a legislative override of its Supreme Court.[53] Factions are unlikely to choose the uncertain path of seeking to change constitutional meaning by influencing appointments when they can seek a legislative override of constitutional interpretations.

This Article argues that different models of judicial review should be judged not according to normative criteria but rather from a much different vantage point: how

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[48] Other mechanisms to control courts include impeachment and control over jurisdiction. These are seldom used in mature democracies because they invade judicial independence. The threat of such constraints may make courts more politically accountable, however. John A. Ferejohn & Larry D. Kramer, *Independent Judges, Dependent Judiciary: Institutionalizing Judicial Restraint,* 77 N.Y.U. L. REV. 962 (2002).

[49] MICHAEL SCHUDSON, THE GOOD CITIZEN: A HISTORY OF AMERICAN CIVIC LIFE 12-45 (1998).

[50] Polities constantly learn from the experience of other nations. Political learning, for example, was an important factor in recent transitions to democracy. SAMUEL P. HUNTINGTON, THE THIRD WAVE: DEMOCRATIZATION IN THE LATE TWENTIETH CENTURY (1991).

[52] *See* Part III *infra*.

[53] *See* Part IV *infra*.

alternative forms of judicial review structure politics.[54] As Donald Kommers argues, comparative constitutional law "illuminate[s] the relationship between American courts and democracy."[55] Comparative constitutional law also opens the door to a different appreciation of our Constitution. In an important new book, Sanford Levinson argues persuasively that a critical tradition is lacking in American constitutional thought.[56] One can be committed to the goals of the Constitution contained in its Preamble while thinking that many of its provisions have not withstood the test of time. Comparative analysis obviously has a key role to play in any critical understanding of the Constitution.[57] The framers were men of exceptional talent but they quite obviously lacked the "knowledge that might be gained from later experience with democracy in America and elsewhere."[58] American exceptionalism when it comes to the formal rules governing appointments has not served the United States well.[59] By democratizing judicial review, other polities have made courts more politically accountable and thereby reduced the power of factions to change the meaning of the Constitution.

II. American Exceptionalism and Distrust

> The American Constitution has thus by and large remained a constitution properly so called, concerned with constitutive questions. What has distinguished it, and indeed the United States itself, has been a process of government, not a governing ideology. . . . 'As a charter of government a constitution must prescribe legitimate processes, not legitimate outcomes, if like ours (and unlike more ideological documents elsewhere) it is to serve many generations through changing times.'[60]

There is considerable disagreement whether judicial review enhances or undermines democracy.[61] The most famous attempt to argue that judicial review

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[54] Daniel A. Farber, *Judicial Review and Its Alternatives: an American Tale*, 38 WAKE FOREST L. REV. 415 (2003).

[55] Donald P. Kommers, *American Courts and Democracy: a Comparative Perspective, in* THE JUDICIAL BRANCH (Kermit L. Hall & Kevin T. McGuire eds., 2005).

[56] SANFORD LEVINSON, OUR UNDEMOCRATIC CONSTITUTION: WHERE THE CONSTITUTION GOES WRONG (AND HOW WE THE PEOPLE CAN CORRECT IT) (2006).

[57] George P. Fletcher, *Comparative Law as a Subversive Discipline*, 46 AM. J. COMP. L. 683 (1990).

[58] ROBERT A. DAHL, HOW DEMOCRATIC IS THE AMERICAN CONSTITUTION? 8 (2001).

[59] The United States, of course, differs from other democracies along a number of constitutional dimensions. AMERICAN EXCEPTIONALISM AND HUMAN RIGHTS (Michael Ignatieff ed., 2005).

[60] JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 101 (1980) (Quoting Linde, *Due Process of Lawmaking,* 55 NEB. L. REV. 197, 254 (1977)).

[61] Lisa Hilbink, *Beyond Manicheanism: Assessing the New Constitutionalism,* 65 MD. L. REV. 15, 15 (noting that "normative responses to the rise of [judicial review is split] . . . between liberal enthusiasm and democratic dismay."

promotes democracy is John Hart Ely's *Democracy and Distrust*.[62] Professor Ely sought to drive a stake in the heart of the countermajoritarian difficulty by arguing that the Supreme Court was not a deviant institution in a democracy. The tension between democracy and the Court that lay at the root of Bickel's problem dissolves when the Court acts as a referee that polices the mechanisms of democracy:

> Malfunction occurs when the process is undeserving of trust, when (1) the ins are choking off the channels of political change to ensure that they will stay in and the outs will stay out, or (2) though no one is actually denied a voice or vote, representatives beholden to an effective majority are systematically disadvantaging some minority.[63]

The Warren Court was not, as Bickel suggested, a problem that constitutional theory had to surmount but rather provides an exemplary model of how the Court ought to function.[64] Courts should, and the Warren Court did,[65] take an "antitrust" rather than a "regulatory" approach to politics by protecting democratic participation rather than imposing substantive outcomes.[66] The Supreme Court, in short, engenders trust when it effectuates democratic participation.

There is little doubt that Ely's theory resonates deeply with core assumptions about courts and democracy. Democracy is commonly defined in procedural terms as a set of rules for structuring political competition.[67] Polities throughout the world adopted judicial review when they democratized because courts serve as "an alternative forum in which to challenge governmental action" and thereby provide a "form of insurance to prospective electoral losers during the constitutional bargain."[68] Polities rely on courts to ameliorate conflict because it is universally recognized that the fairest means to deal with disagreement is to have a neutral third party resolve the matter.[69] John Roberts invoked this universal logic in the opening statement of his nomination hearings when he argued that "[j]udges are like umpires" because "[u]mpires don't make the rules, they apply

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[62] CHRISTOPHER L. EISGRUBER, CONSTITUTIONAL SELF-GOVERNMENT 5 (2001) ("[B]ooks about constitutional adjudication should aspire to the model of John Hart Ely's great work, *Democracy and Distrust.*"); Barry Friedman, *The Birth of an Academic Obsession: The History of the Countermajoritarian Difficulty, Part Five,* 112 YALE L.J. 153, 165 n.34 (2002) (Ely's book is "one of the most extended and famous examples of scholarship steeped in the countermajoritarian problem."); and Mark V. Tushnet, *Foreword: Symposium*, *Democracy and Distrust: Ten Years Later ,* 77 VA. L. REV. 631, 631 (1991) (Ely's work plays a key role in shaping the agenda of constitutional theory as a "foil against which opposing positions contended.")

[63] ELY, *supra* note __, at 103.

[64] *Id*. at (pinpoint Chapter 4).

[65] LUCAS A. POWE, JR., THE WARREN COURT AND AMERICAN POLITICS 489 (2000) (noting that Ely's process theory explains most of the Warren Court's major decisions).

[66] ELY, *supra* note __, at 103.

[67] IAN SHAPIRO, THE STATE OF DEMOCRATIC THEORY 50-77 (2003).

[68] TOM GINSBURG, JUDICIAL REVIEW IN NEW DEMOCRACIES: CONSTITUTIONAL COURTS IN ASIAN CASES 25 (2003).

[69] MARTIN SHAPIRO, COURTS: A COMPARATIVE AND POLITICAL ANALYSIS (1981).

them."[70] Samuel Alito also based his opening statement on this logic: "A judge can't have an agenda . . . and a judge certainly doesn't have a client. The judge's only obligation—and it's a solemn obligation—is to the rule of law."[71]

Although Ely's theory is normatively attractive, it fails to realistically appraise either the work of the Warren Court or its impact on American politics. The Warren Court was revolutionary because it articulated and protected substantive rights.[72] Although the founders built substantive commitments into the Constitution, the Supreme Court did not become serious about effectuating rights until the Constitutional Revolution of 1937.[73] The post-1937 jurisprudence of the Court had a profound influence on constitutional politics as factions or interest groups formed in response to the substantive rights articulated by the Court. Political activity increasingly became oriented towards the judicial arena. Interest groups sought to change the law by bringing test cases[74] and by changing the membership of the Court. As a consequence, Americans began to see themselves as the bearers of legally enforceable rights rather than as participants in a political process that would determine those rights.[75]

The political activity awakened by the Warren Court illustrates that Ely was wrong to argue that nations are constituted solely by a commitment to legitimate processes. Nations are "imagined communities" whose members do not know each other, yet share important bonds.[76] The American Revolution created a new model or template for building a nation by using a constitution, rather than language or ethnicity, to found a political community. Professor Tushnet makes a critical contribution to our understanding of how the American nation was forged by arguing that there are two parts to the Constitution: one part regulates the government; the other speaks to who we are as a people.[77] The substantive provisions played an important role in the political battles

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[70] Opening Statement of Judge John G. Roberts before the Senate Judiciary Committee, September 12, 2005 (transcript available at http://www.nytimes.com/2005/09/12/politics/politicsspecial1/12text-roberts.html?pagewanted=all).

[71] Charles Babington & Amy Goldstein, *Alito Stresses 'Rule of Law' in Opening Statement,* WASHINGTON POST, January 10, 2006, at A01.

[72] Laurence H. Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories,* 59 YALE L.J. 1063 (1980).

[73] There is some dispute as to the timing of the rights revolution in the United States. The conventional view is that the work of the Court was transformed after 1937 as it became increasingly concerned with articulating substantive rights. ROBERT G. MCCLOSKEY, THE AMERICAN SUPREME COURT (Sanford Levinson rev., 1994) (1960). Charles Epp, on the other hand, dates the right revolution to the early twentieth century. CHARLES R. EPP, THE RIGHTS REVOLUTION (1998).

[74] EPP, *supra* note __, at 44-70.

[75] SCHUDSON, *supra* note __, at 241-93.

[76] BENEDICT ANDERSON, IMAGINED COMMUNITIES: REFLECTIONS ON THE ORIGIN AND SPREAD OF NATIONALISM (1990).

[77] MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS 12 (1999).

that shaped the nation. From *Dred Scott v. Sanford*,[78] to *Lochner v. New York*,[79] to *Brown v. Board of Education*,[80] to *Roe v. Wade*,[81] the Supreme Court has never been the final word when speaking to the fundamental values that constitute the nation. The argument that the "Supreme Court's interpretations of the Constitution" ought to be "treated as having status equivalent to the Constitution itself"[82] has fortunately never had any purchase with either politicians or the public.

The American Supreme Court is exceptional among the world's supreme or constitutional courts because it has weak rules of political accountability. Changing the constitution's meaning by replacing its members is not an attractive political strategy in nations that follow either the European[83] or Canadian models of judicial review.[84] A core argument of this Article is that although supreme or constitutional courts throughout the world generate political controversy, it is unlikely that factions will form to transform the constitution by influencing appointments in other polities because they have stronger and more democratic rules of political accountability. By democratizing judicial review, polities can avoid the faction strewn shoals of American judicial appointments. The politicization of the appointments process in the United States, moreover, has eroded the legitimacy of the Supreme Court. Courts can ameliorate political conflict only if they are perceived as neutral arbiters. If the justices of the Court are identified with a political faction, however, the Supreme Court undermines rather than facilitates the trust needed for democracy to work. In short, the appointments wars have negative, long-term consequences for American democracy.

A. Legal mobilization and constitutional politics

Scholars disagree whether the appointments wars constitute something new in constitutional politics. One view is that ideology has mattered since the founding of the republic.[85] The opposing view is that the Reagan administration transformed judicial

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[78] 60 U.S. 393 (1857).

[79] 198 U.S. 45 (1905).

[80] 349 U.S. 294 (1955).

[81] 410 U.S. 113 (1973).

[82] Larry Alexander & Frederick Schauer, *Defending Judicial Supremacy: A Reply,* 17 CONST. COMMENT. 455, __ (2002).

[83] *See* Part III *infra.*

[84] *See* Part IV *infra.*

[85] LEE EPSTEIN & JEFFREY A. SEGAL, ADVICE AND CONSENT: THE POLITICS OF JUDICIAL APPOINTMENTS (2005) and Jack Balkin & Sanford Levinson, *Understanding the Constitutional Revolution*, 87 VA. L. REV. 1045 (2001). It is clear that politics has always played some role in appointments since there were more failed Supreme Court appointments in the nineteenth than in the twentieth century. DAVID ALISTAIR YALOF, PURSUIT OF JUSTICES: PRESIDENTIAL POLITICS AND THE SELECTION OF SUPREME COURT NOMINEES 9-10 (1999) and Keith E. Whittington, *Presidents, Senates, and Failed Supreme Court Nominations,* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=890361*,* 3-4, 38 (forthcoming 2006).

appointments by imposing an ideological litmus test for nominations.[86] There is little doubt that ideology and interest group mobilization play an unprecedented role in judicial appointments that increasingly look like elections. The elite centered appointment struggles of the 19th and early 20th century have now become full fledged democratic brawls as the public has a place at the table.[87] Professor Davis, for example, concludes "The transformation of the Supreme Court appointment process into a mechanism similar to that of an electoral campaign has occurred because of the introduction of new, powerful players—the news media, interest groups, and public opinion."[88]

What is not well understood, however, are the historical and institutional processes that led citizens to mobilize to seek to transform the meaning of the Constitution by changing the membership of the Supreme Court. The existing literature focuses on the political battles to shape the Court while largely ignoring the role the Court plays in mobilizing citizens. Yet a review of the history of appointments struggles in the United States demonstrates the role law plays in shaping the formation of interest groups that seek to change the law and the role that legal mobilization plays in transforming the law.[89] Legal mobilization, in short, is both a consequence and a cause of constitutional change.

Today's democratic appointments battles are being fought on an institutional terrain that was not designed for public participation. Although there was considerable disagreement at the Constitutional convention over how Supreme Court justices were to be appointed, the compromise that was reached made the President the primary player in the appointments process.[90] Article II, section 2 of the Constitution provides that the President "shall nominate, and by and with the advice and consent of the Senate, shall appoint . . . judges of the Supreme Court." The president was made the key player in nominating justices because it was thought that he would be best able to select qualified individuals.[91] The process was designed to be free of popular politics as neither the President nor the Senate were directly elected. The framers did not and could not foresee that the Revolution would transform a hierarchical and deferential society, where elites

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[86] Sheldon Goldman, *Judicial Confirmation Wars: Ideology and the Battle for the Federal Courts,* 39 U. RICH. L. REV. 871, 889 (2005) ("These developments in judicial selection—the avowed and open use of an ideological vetting process that would assure insofar as possible the selection of philosophically compatible individuals to the federal bench—has set the stage for judicial confirmation wars.") and RICHARD DAVIS, ELECTING JUSTICE: FIXING THE SUPREME COURT NOMINATION PROCESS (2005).

[87] DAVIS, *supra* note __,

[88] *Id*. at 7.

[89] Social movements can also seek to change the meaning of the Constitution by transforming public opinion. Jack M. Balkin, *How Social Movements Change (or Fail to Change) the Constitution: the Case for the New Departure,* __ SUFFOLK U. L. REV. __ (forthcoming 2006).

[90] MICHAEL J. GERHARDT, THE FEDERAL APPOINTMENTS PROCESS: A CONSTITUTIONAL AND HISTORICAL ANALYSIS 28 (2000).

[91] GERHARDT, *supra*, note __, at 28 and THE FEDERALIST NO. 76 (Alexander Hamilton).

governed with little public participation, into an egalitarian society.[92] Appointments were designed to be an elite-centered process where virtue would trump interest.[93]

The Appointments Clause was also designed for a very different constitutional universe than the one we inhabit today. The modern view that the Supreme Court is an important policymaker was not shared by the founders. The founders assumed that law was fixed and immutable and that change would occur only through the political processes.[94] The assumptions that gave birth to Article II, section 2 of the Constitution are illustrated in a case that looms large in the constitutional imagination: *Marbury v. Madison*.[95] *Marbury* was decided in the maelstrom of a political battle. Having lost control of the presidency and the legislature in the 1800 elections, the Federalists sought to retain power by packing the judiciary with their partisans.[96] Marbury was a disappointed Federalist nominee and his suit threatened to ignite a battle between the Court and the President that Chief Justice John Marshall wanted to avoid. Marshall successfully navigated the political shoals of the dispute, in part, by drawing a "line, which nearly all citizens of his time believed ought to be drawn, between the legal and the political—between those matters on which all Americans agreed and which therefore were fixed and immutable and those matters which were subject to fluctuation and change through democratic politics."[97] When Justice Marshall opined that Marbury's right to the judicial commission was akin to a property right, Americans understood that these were rights that were to be preserved by courts against democratic processes. *Marbury* was understood by contemporaries to be an important decision that "generate[d] [surprisingly] little controversy" because it rested on the "largely unarticulated" operative constitutional assumptions of the day.[98]

Although the division between law and politics drawn by Marshall was largely unchallenged before the Civil War, many Supreme Court decisions did arouse political controversy. The Marshall Court was a nationalist institution in an era when state loyalties were strong. Its nationalist decisions led to "heated public controversy."[99] The opposition "ranged from outright defiance of judicial rulings to protests and memorials against Court action directed to Congress and other states."[100] This opposition, however, did not lead to a sustained challenge to the power of the Court. The states were unable to

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[92] MICHAEL SCHUDSON, THE GOOD CITIZEN: A HISTORY OF AMERICAN CIVIC LIFE 11-89 (1998) and GORDON S. WOOD, THE RADICALISM OF THE AMERICAN REVOLUTION 5-7 (1992).

[93] THE FEDERALIST NO. 78 (Alexander Hamilton).

[94] WILLIAM E. NELSON, MARBURY V. MADISON: THE ORIGINS AND LEGACY OF JUDICIAL REVIEW 3-7 (2000).

[95] 5 U.S. 137 (1803).

[96] Jack Knight & Lee Epstein, *On the Struggle for Judicial Supremacy*, 30 LAW & SOC'Y REV. 87 (1996); MCCLOSKEY, *supra* note __, at 23-30; and NELSON, *supra* note __, at 54-71.

[97] NELSON, *supra* note __, at 8.

[98] *Id.* at 73.

[99] DWIGHT WILEY JESSUP, REACTION AND ACCOMMODATION: THE UNITED STATES SUPREME COURT AND POLITICAL CONFLICT 1809-1835, at 27 (1987).

[100] *Id.* at 429.

ally and present a united front against the Court since opposition coalesced around individual decisions rather than the Court as an institution. Popular control over the Court was largely a non-issue before the Civil War as the Court was considerably more limited in its powers and citizens were more prone to ignore its edicts.[101]

The institutional seeds that would eventually facilitate the development of ideological popular warfare in judicial appointments were planted in the wake of the Civil War.[102] The Court had an important new weapon in its arsenal as the Fourteenth Amendment provided important restrictions that could be enforced against the states.[103] The Due Process Clause furnished the Court with an institutional lever of power around which social forces would henceforth coalesce. In addition, federal courts were provided with broader jurisdiction to "redirect civil litigation involving national commercial interests out of state courts and into the federal judiciary."[104] In short, federal courts now had sufficient power to elicit sustained popular opposition.

The institutional transformations that occurred after the Civil War cannot be understood in a political and social vacuum. Business interests were politically ascendant and sought to use the courts to facilitate the development of a national economy. In the nineteenth and early twentieth century, constitutional politics revolved around the issue of government regulation of capitalism. Economic growth transformed American society after the Civil War.[105] Businesses changed from being primarily family run operations before 1870 to larger bureaucratic organizations that were able to fend of regulation by means of strategic litigation.[106] The managers of these businesses "formed professional associations and networks of communications that allowed them to learn from each other."[107] The railroads, in particular, played a key role in shaping the contours of the Fourteenth Amendment. As the "first modern, interstate industry that intimately affected the economic interests of virtually all of American society," there was considerable popular pressure to subject the railroads to regulation and they responded with a "systematic litigation campaign challenging the constitutional validity of government regulation in the courts."[108]

Attempts by business interests to shield themselves from regulation was met with popular opposition as "populists, progressives, and labor leaders subjected both state and federal courts to vigorous and persistent criticism and proposed numerous plans to

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[101] Barry Friedman, *The Myths of Marbury, in* ARGUING MARBURY V. MADISON 65, 68-9 (Mark Tushnet ed., 2005).

[102] GRIFFIN, *supra* note __, at 97.

[103] MCCLOSKEY, *supra* note __, at 67-89.

[104] Howard Gillman, *How Political Parties Can Use the Courts to Advance Their Agendas: Federal Courts in the United States, 1875-1891,* 96 AM. POL. SCI. REV. 511, 517 (2002).

[105] ROBERT H. WIEBE, THE SEARCH FOR ORDER: 1877-1920.

[106] EPP, *supra* note __, at 45.

[107] *Id.* at 46.

[108] RICHARD C. CORTNER, THE IRON HORSE AND THE CONSTITUTION: THE RAILROADS AND THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT xi (1993).

abridge judicial power."[109] Popular forces mounted a two pronged attack on judicial power. One prong was directed at weakening judicial power by scholars and politicians who questioned the propriety of judicial review.[110] The other prong involved two attempts to derail Supreme Court nominations. The first was by the National Grange which was a national organization that played an important role in influencing states to enact legislation regulating railroads.[111] The Grange sought to further the goals of its members by becoming involved in an ultimately unsuccessful attempt to defeat the appointment of Stanley Matthews, who as a Senator had been an important spokesman for the railroads.[112] The Grange mounted a vigorous campaign against Matthews who was ultimately confirmed 24 to 23 in 1881. The closeness of the vote is remarkable given that Senators were not directly elected. The enactment of the Seventeenth Amendment in 1913 facilitated the second attempt by populist forces to derail a Supreme Court nomination.[113] President Hoover's nomination of Judge John Parker in 1930 aroused opposition by organized labor as well as by the NAACP.[114] Parker's nomination was defeated by a vote of 41 to 39. The campaigns that revolved around the nominations of Stanley Matthews and John Parker are a clear harbinger of current appointment battles.

The jurisprudence of the *Lochner* era, like that of the *Marbury* era, rested on largely unspoken assumptions as to the proper dividing line between law and politics. The Court sought to curtail legislative attempts to deal with the social ills created by capitalism by holding that it rested on constitutionally suspect factional politics. Professor Gillman writes "The judiciary's persistent attachment to traditional limits on legislative power represented the final defense of a principle of constitutional legitimacy that the framers sought to permanently enshrine in fundamental law."[115] The framers sought to erect a neutral state that could not constitutionally enact legislation favoring factions. The "master principle" of the Constitution, as articulated in the Federalist No. 10, was that "[G]ood republican government required institutional structures that were popular yet still divorced from the corrupting influence of 'factions,' defined by Madison . . . as a number of citizens, majority or minority, united by some common passion or interest (usually arising out of 'the various and unequal distribution of property') that was

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[109] WILLIAM G. ROSS, A MUTED FURY: POPULISTS, PROGRESSIVES, AND LABOR UNIONS CONFRONT THE COURTS, 1890-1937, at 1 (1994).

[110] *Id.* at 49-50 and Michael Curtis, *Judicial Review and Populism,* 38 WAKE FOREST L. REV. 313, 331-36 (2003).

[111] Scott H. Ainsworth & John A. Maltese, *National Grange Influence on the Supreme Court Confirmation of Stanley Matthews,* 20 SOC. SCI. HIST. __ (1996).

[112] *Id.* at 45.

[113] The transformation of the Senate from a representative of the States to a popular institution actually preceded the enactment of the Seventeenth Amendment. William H. Riker, *The Senate and American Federalism,* 49 AM. POL. SCI. REV. 452 (1955).

[114] ROSS, *supra* note __, at 291-3 and Richard L. Watson, *The Defeat of Judge Parker: A Study in Pressure Groups and Politics,* 50 MISS. VALLEY HIST. REV. 213, 216-19 (1963).

[115] HOWARD GILLMAN, THE CONSTITUTION BESIEGED: THE RISE AND DEMISE OF LOCHNER ERA POLICE POWERS JURISPRUDENCE 15 (1993).

adverse to the 'permanent and aggregate interests of the community.'"[116] In short, the Court sought to protect a vision of democratic politics where legislatures could not enact legislation that would protect or favor interest groups.

The popular opposition that arose to *Lochner* and its progeny exposes how constitutional fault lines are constructed. The strategic use of the constitution by conservative interest groups came at a price: the politicization of judicial review. The original understanding that judicial review was an apolitical exercise collapsed when the Court clashed with important political currents:

> In deciding . . . to protect property rights and individual economic liberty at the expense of those who were using legislative power to promote their vision of a just and good society, judges were seen by progressive reformers to be engaging in a fundamentally different activity than which John Marshall had engaged in when his Court, early in the nineteenth century, had commenced the judiciary's protection of property.[117]

The Court's attempt to effectuate an interest free democratic politics became untenable once it was perceived that the Court was allied with business interests that sought to entrench their policy preferences from the channels of ordinary political change.[118] The *Lochner* era illustrates that attempts to use the Constitution by factions to protect their interests from politics can arouse a popular counter-mobilization that shifts the battle from the legislative to the constitutional arena.

The judicial effort to protect property rights broadly construed against popular political forces collapsed in what has become known as the Constitutional Revolution of 1937.[119] The government sought to use its regulatory and spending powers to alleviate the ills caused by the Depression.[120] From 1935 to 1936, however, the Supreme Court held fast to the old dividing line between law and politics when it derailed many New Deal initiatives. Franklin Roosevelt understood that he would have to do battle with the Supreme Court to fashion a vigorous federal response to the Depression.[121] He considered but rejected a constitutional amendment as too difficult politically and too uncertain as any amendment would be subject to judicial interpretation.[122] Instead, Roosevelt proposed a plan to increase the membership of the Court.[123] Although Roosevelt failed in his bid to entrench his partisans on the Court, the Court changed course.[124] The Supreme Court announced that henceforth it would provide only cursory review of economic rights while conducting a more searching review of individual

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[116] *Id.* at 30.

[117] NELSON, *supra* note __, at 91

[118] GILLMAN, *supra* note __. at 148-193.

[119] WILLIAM E. LEUCHTENBERG, THE SUPREME COURT REBORN: THE CONSTITUTIONAL REVOLUTION IN THE AGE OF ROOSEVELT (1995).

[120] ALAN BRINKLEY, LIBERALISM AND ITS DISCONTENTS 17-62 (1998).

[121] LEUCHTENBERG, *supra* note __, at 82-131 (1995).

[122] *Id.*

[123] *Id.* at 132-162.

[124] *Id.* at 213-236.

liberties.[125] By deciding on a court packing plan, Roosevelt fashioned an important precedent in constitutional politics. The rigors of Article V meant that henceforth influencing appointments would be a viable strategy for those seeking constitutional change.

The scholarship that revolves around the import of the Constitutional Revolution of 1937 focuses on the highly visible doctrinal changes that occurred in its wake while ignoring the more important but subterranean transformations that occurred in the linkages between the people and the Court. The rights revolution involved legal *and* social transformations. Economic growth played an important role in fueling the rights revolution as it provided the wherewithal for a number of players, not just primarily business actors as had been true in the second half of the nineteenth century, to participate in and fund interest group activity aimed at constitutional litigation.[126] The judicial shift to protecting rights, moreover, would not have been possible without the involvement of citizens who were willing to mobilize to fashion and effectuate rights.[127] A new model of citizenship arose as citizens increasingly became seen as the bearers of constitutionally protected rights.[128] The civil rights movement, in particular, "provided a model and inspiration for a wide variety of new social movements and political organizations" and helped fix a "rights-centered citizenship at the center of American civic aspiration."[129] The broad guarantees contained in the Constitution were effectuated not simply from above by the Supreme Court but also from below by the thickening of interest group activity that supported a broad array of constitutional litigation.[130] The doctrinal constitutional rights revolution, in short, both facilitated and was supported by legal mobilization.

The Constitutional Revolution of 1937 also looms large in scholarly attempts to understand efforts by conservatives to transform the meaning of the Constitution. In *Understanding the Constitutional Revolution*,[131] Professors Jack Balkin and Sanford Levinson argue that the conservative turn of the Supreme Court can best be explained by a theory of "partisan entrenchment."[132] The theory posits that constitutional politics is no different today than in F.D.R.'s day because the Court ultimately reflects popular opinion

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

[126] James T. Patterson, *The Rise of Rights and Rights Consciousness in American Politics, in* CONTESTING DEMOCRACY: SUBSTANCE AND STRUCTURE IN AMERICAN POLITICAL HISTORY, 1775-2000, at 201, 201-202 (Byron E. Shafer & Anthony J. Badgers eds., 2001).

[127] EPP, *supra* note __ and Miguel Schor, *The Rule of Law, in* ENCYCLOPEDIA OF LAW AND SOCIETY: AMERICAN AND GLOBAL PERSPECTIVES (David Clark ed., forthcoming 2006).

[128] SCHUDSON, *supra* note __, at 241-293.

[129] *Id.* at 255-256.

[130] EPP, *supra* note __, at 5, 196.

[131] Jack Balkin & Sanford Levinson, *Understanding the Constitutional Revolution*, 87 VA. L. REV. 1045 (2001).

[132] *Id.* at 1066.

through the process of judicial appointments.[133] Constitutional change occurs through judicial interpretation as Presidents seek to change the meaning of the Constitution by placing their partisans on the Supreme Court. The theory of partisan entrenchment very usefully highlights the role that battles over appointments play in transforming the Constitution. This Article argues, however, that current conservative attempts to change the membership of the Court are not simply constitutional politics as usual for three reasons. First, the bureaucratic capacity to identify the ideology of appointees has improved markedly since F.D.R. was president. Second, the conservative turn in the Court is not simply a reflection of majoritarian views but rather reflect the views of influential factions within the Republican coalition that have intense preferences over judicial appointments. Third, current appointments battles have negative implications for the long-term health of American democracy.

The problem with theories that seek to build on the lessons of F.D.R.'s court packing plan to understand conservative attempts to transform the Court is that the analogy is flawed. Ronald Reagan, much like F.D.R., came into office critical of a number of Supreme Court decisions and determined to transform the Constitution by changing the membership of the Court. Ronald Reagan, however, had in place a bureaucratic apparatus which previous presidents lacked that enabled his administration to thoroughly vet the ideology of his nominees.[134] The Reagan Justice Department through the Office of Legal Policy articulated a view of the Constitution in a series of reports that was strikingly critical of existing doctrine.[135] The Office of Legal Policy also emphasized the importance of judicial ideology in seeking to transform the Constitution.[136] The Reagan administration established ideological criteria for judicial nominations and then searched for nominees who complied with those criteria. Professor David Alistair Yalof concludes that the examination by the administration of the ideological view of potential Supreme Court nominees was unprecedented.[137]

Partisan entrenchment by the Reagan and subsequent conservative administrations was not simply a result of presidential politics. The modern conservative movement arose in direct response to judicial decisions that directly challenged many core

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[133] The view that the Court ultimately reflects that of the governing coalition because of appointments was also stressed in a famous essay by Robert Dahl. Robert A. Dahl, *Decision-Making in a Democracy: the Supreme Court as National Policy-Maker, in* JUDICIAL REVIEW AND THE SUPREME COURT 105 (Leonard W. Levy ed., 1967).

[134] Goldman, *supra* note __, at 879-80 and YALOF, *supra* note __, at 7.

[135] Dawn E. Johnson, *Ronald Reagan and the Rehnquist Court on Congressional Power: Presidential Influences on Constitutional Change,* 78 IND. L.J. 363, 390 (2003) (A "theme throughout [the reports] was a concern that 'activist,' unelected judges were creating rights not properly found in the constitutional text or structure or original intent of the framers, such as the right to privacy and the rights of criminal suspects.")

[136] *Id.* at 397 (A report entitled "The Constitution in the Year 2000: Choices Ahead in Constitutional Interpretation" noted "'There are few factors that are more critical to determining the course of the Nation, and yet more often overlooked, than the values and philosophies of the men and women who populate the third co-equal branch of the national government—the federal judiciary.'")

[137] YALOF, *supra* note __, at 144.

conservative beliefs.[138] It is no accident that "[b]attles over abortion, birth control, the Equal Rights Amendment, and other gender-based issues (and, more recently, battles over homosexuality) have mobilized the fundamentalist right more successfully and energetically than any other issues."[139] As Professor Feldman notes, we are a nation divided over issues that "go to the very heart of who we are as a nation."[140] Perhaps no modern constitutional case played a more important role in dividing the nation along lines of supposed good and evil than *Roe v. Wade*. *Roe* "infuriated a lightly sleeping giant,"[141] by energizing a conservative movement that sees the opinion as the moral equivalent of *Dred Scott.* Since the policies that social conservatives wish to change are embedded in the Constitution primarily by means of judicial interpretation, the solution is to change the make-up of the federal courts. The interest group activity that played a crucial role in the appointments of John Roberts and Samuel Alito illustrates how factions can form to change the path of the Court. Constitutional change occurs not only as a result of pressure from above as presidents seek to transform the meaning of the Constitution but also as a result of pressure from below as interest groups coalesce to change the path of the Court. In short, the substantive decisions of the Court facilitated the rise of a conservative counter-mobilization that seeks to transform the meaning of the Constitution by appointing conservative partisans on the Supreme Court.

The appointments wars have long-term, negative consequences for American democracy. Public support for the Court may be undergoing erosion.[142] Courts can play a role in ameliorating political conflict only if they are perceived to be independent of ideological and social forces. E.P. Thompson in his classic *Whigs and Hunters* notes "If the law is evidently partial and unjust, then it will mask nothing, legitimize nothing. . . . The essential precondition for the effectiveness of law . . . is that it shall display an independence from gross manipulation and shall seem to be just."[143] Democracies

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[138] NOAH FELDMAN, DIVIDED BY GOD (2005) and MORONE, *supra* note __.

[139] BRINKLEY, *supra* note __, at 291.

[140] *Id.* at 7.

[141] N.E.H. HULL & PETER CHARLES HOFFER, ROE V. WADE: THE ABORTION RIGHTS CONTROVERSY IN AMERICAN HISTORY 187 (2001).

[142] A recent survey shows that more than half of Americans are "angry and disappointed with the nation's judiciary" and that a "majority of the survey respondents agreed with statements that 'judicial activism' has reached a crisis stage, and that judges who ignore voters' values should be impeached." Martha Neil, *Half of U.S. Sees Judicial Activism Crisis*, __ A.B.A. J. __ (Sept. 30, 2005). Another important survey shows that the Supreme Court's "public image has eroded significantly." The Court has lost support among Democrats who are unhappy over *Bush v. Gore* and among Republicans "who want the court to take a tougher stand against abortion rights." The Pew Research Center for the People and the Press, *Supreme Court's Image Declines as Nomination Battle Looms: Court Critics Now on Both Left and Right*, June 15, 2005, http://people-press.org/reports/display.php3?ReportID=247. *See generally* Stephen B. Burbank, *Judicial Independence, Judicial Accountability, and Interbranch Relations,* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=922091 (2006).

[143] E.P. THOMPSON, WHIGS AND HUNTERS: THE ORIGINS OF THE BLACK ACT 263 (1975).

require the alternation in power by opposing factions. Constitutions play an important role in facilitating regular turnover in power as the losing side knows that there are limits to what the party in power can do. If, however, one faction can entrench its partisans in the judicial system, then politics becomes polarized as the Constitution no longer moderates but exacerbates conflict.[144] American exceptionalism when it comes to the formal rules governing appointments has fueled distrust.

Although a vigorous debate is currently underway among scholars over reforming judicial appointments,[145] the debate is unlikely to bear fruit given the roadblocks to reform.[146] Other polities have powerful constitutional courts yet have managed to avoid the appointments battles that plague the United States. The nations of continental Europe, for example, largely require a supermajority for appointment to national high courts.[147] Canada allows for temporary legislative overrides of Supreme Court decisions.[148] The comparative experience shows the importance of democratizing judicial review by creating institutional mechanisms that make it impossible or unlikely that factions will seek to transform the constitution by influencing appointments. American constitutional theory, on the other hand, has turned not to institutional mechanisms in seeking to curb the Court but to popular constitutionalism.

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[144] Political conflict in Latin America, for example, has been exacerbated by the ease with which constitutions were manipulated by social forces. Miguel Schor, *Constitutionalism Through the Looking Glass of Latin America*, 41 TEX. INT'L L. J. 1 (2006).

[145] The scholarship on reforming judicial appointments overwhelmingly focuses on the problem of life-time tenure rather than the advisability of super-majoritarian appointment mechanisms. *See, e.g.,* REFORMING THE COURT: TERM LIMITS FOR SUPREME COURT JUSTICES (Roger C. Cramton & Paul D. Carrington eds., 2006). The problem, however, is not how to make a Supreme Court more responsive to democratic pressures, which ending life tenure would certainly do, but rather in fashioning a court that is both responsive to the will of the vast majority of Americans while sufficiently independent to retain legitimacy. Super-majority appointment provisions attack this problem more directly than do term limits for Supreme Court Justices.

[146] David S. Law & Sanford Levinson, *Why Nuclear Disarmament May Be Easier to Achieve Than an End to Partisan Conflict Over Judicial Appointments,* 39 U. RICH. L. REV. 923 (2005).

[147] *See* Part III *infra.*

[148] *See* Part IV *infra*.

III. Ex Ante Popular Controls over the Constitution

> For all the disagreement about what we mean by 'republic,' no one has ever doubted that self-government is its essence and a constitution the purest distillate. What kind of republic removes its constitution from the process of self-governing? Certainly not the one our Founders gave us. Is it one we prefer? The choice, after all, is ours. The Supreme Court has made its grab for power. The question is: will we let them get away with it?[149]

Power grabs understandably elicit scholarly attention. The revolutionary transformations wrought by the Warren Court provided considerable and unprecedented grist for the constitutional theory mill. Scholars sought to reconcile the jurisprudence of the Warren Court with the belief that the Supreme Court must be a legal, rather than a political, institution if it were to retain legitimacy. Both Bickel's *The Least Dangerous Branch* and Ely's *Democracy and Distrust*, for example, sought to spin out normative theories that justified the work of the Warren Court as a legal institution. Constitutional theory posited that courts had the capacity to act in a principled fashion that other political actors lacked.[150] Constitutional theory did not take constitutional politics into account in seeking to understand or legitimate the work of the Warren Court.

Constitutional theory faced a different set of challenges with the Rehnquist Court. Legal academics largely did not approve of the Rehnquist Court[151] which was obviously more conservative and, somewhat less obviously, more activist than the Warren Court.[152] More importantly, a transformation occurred in the criticism levied at the Supreme Court. The bedrock assumption that the right normative theory could cabin the Court's discretion had been shattered.[153] Conservative mistrust of liberal judicial activism that

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[149] Larry D. Kramer, *The Supreme Court 2000 Term, Foreword: We the Court,* 115 HARV. L. REV. 5, 169 (2001).

[150] Keith E. Whittington, *Herbert Wechsler's Complaint and the Revival of Grand Constitutional Theory,* 34 U. RICH. L. REV. 509, 512-517 (2000).

[151] The polemical tone of some of this criticism is illustrated by the title of Cass Sunstein's recent book, RADICALS IN ROBES: WHY EXTREME RIGHT-WING COURTS ARE WRONG FOR AMERICA (2005).

[152] The Warren Court tangled more often with state than with federal actors. LUCAS A. POWE, JR., THE WARREN COURT AND AMERICAN POLITICS (2000). The Rehnquist Court, on the other hand, has been more active than the Warren Court in invalidating federal statutes as it sought to trim the sails of Congress and resurrect the power of states. THOMAS M. KECK, THE MOST ACTIVIST SUPREME COURT IN HISTORY: THE ROAD TO MODERN JUDICIAL CONSERVATISM (2004).

[153] An article by perhaps the most famous federal judge currently sitting on the bench in one of the leading American law reviews that the Supreme Court is a political institution would have been unthinkable four decades ago when the Warren Court was in its heyday. Judge Richard Posner's foreword to the Court's 2004 term marks an important shift in the thinking of lawyers and legal academics as it argues that the Court is a political institution. Richard A. Posner, *The Supreme Court 2004 Term, Foreword: A Political Court,* 119 HARV. L. REV. 31 (2005). Posner's claim is a matter of dispute

grew in response to the Warren Court was now joined by liberal mistrust of conservative judicial activism in response to the Rehnquist Court.[154] As a result, normative theories that place the Supreme Court at the center of the constitutional pantheon must now contend with more radical and populist critiques that aim at dethroning the Court as the supreme interpreter of the Constitution. These theories rest on the assumption that if law does not limit judicial discretion, then perhaps politics can. Constitutional theory which once overwhelmingly stressed how judges ought to interpret the law has important new offshoots that look to the role that we the people might play in constraining judicial discretion.[155] Constitutional theory, in short, no longer ignores the role of constitutional politics.

Larry Kramer is a forceful exponent of the need to curtail the power of the Supreme Court. In *The People Themselves: Popular Constitutionalism and Judicial Review,*[156] Kramer argues that the founding generation had a very different understanding of the Constitution than the one we hold today. The original understanding was that the people made the Constitution and, contrary to modern practice, also maintained and interpreted it. Fundamental law was popular law because it rested on consent and immemorial custom. It could be changed only by revolution or by the slow accretion of social change. The "idea of turning [any part of] this responsibility over to judges was simply unthinkable."[157] Modern legal commentators, on the other hand, argue that

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among lawyers and legal academics even though it is a matter of bedrock faith for political scientists.

[154] Although liberals have criticized a number of Rehnquist Court decisions, *Bush v. Gore*, 531 U.S. 98 (2000), obviously cemented liberal mistrust of the Rehnquist Court. *See, e.g.,* Jack Balkin & Sanford Levinson, *Understanding the Constitutional Revolution*, 87 VA. L. REV. 1045, 1049-50 (2001) (arguing that the decision amounted to a "constitutional coup" in which "[f]ive members of the United States Supreme Court, confident in their power, and brazen in their authority, engaged in flagrant judicial misconduct that undermined the foundations of constitutional government").

[155] This nascent shift in constitutional theory is mirrored by an analogous transformation in views by political scientists about the Supreme Court. The once prevailing orthodoxy eschewed law as a mechanism for limiting discretion and argued that ideology determines how judges voted. JEFFREY A. SEGAL & HAROLD J. SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL (1993). The attitudinal model rests on an assumption that once united constitutional theory which is that one can explain the Supreme Court without taking its environment into account. More recent political science accounts of the Supreme Court, much like the newer strands of constitutional theory, seek to contextualize the Court by looking at the role of other actors and at history. LEE EPSTEIN & JACK KNIGHT, THE CHOICES JUSTICES MAKE (1998) (arguing that the justices act strategically by taking the preferences of other actors into account when rendering decisions) and Rogers Smith, *Political Jurisprudence, the 'New Institutionalism,' and the Future of Public Law,* 82 AM. POL. SCI. REV. 89 (1988) (arguing that the values that shape judicial preferences are historically constructed).

[156] LARRY K. KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW (2004).

[157] *Id.* at 7.

Framers sought to "create a self-correcting system of checks and balances whose fundamental operations could all take place from within the government itself, with minimal involvement or interference from the people."[158] The modern view divorces politics from law by entrusting the maintenance of the Constitution to the Supreme Court rather than to the people. Kramer believes that the modern view has debilitated the citizenry and exacerbated political conflict. He concludes that the problems currently afflicting American democracy would be alleviated if the people were brought back into the mainstream of constitutional maintenance and interpretation, thereby recovering the lost Arcadian world of the founders.

An important and negative consequence of the displacement of the people by the Court is the increased politicization of the nomination process. Appointments increasingly matter as the Court has become the last and the supreme word on the meaning of the Constitution. Other polities, Kramer argues, have solved the problem of democratic debilitation by adopting a different form of judicial review:

> The nations of modern Europe have found more sensible ways to handle this problem of control. . . . Appointments to the bench . . . typically require a supermajority . . . guaranteeing that constitutional courts have a mainstream ideology, while judges serve terms that are limited and staggered to ensure a regular turnover. In addition, the constitutions themselves are more easily amended than ours. The combined effect of these innovations is to relieve the pressure a doctrine of supremacy creates by reducing the likelihood of serious breaches between the constitutional court and the other branches of government, and by making political correctives easier to implement when breaches occur.[159]

While Kramer is right that the European model of judicial review makes important improvements on the American model, his analysis of what is flawed with American constitutionalism is wrong. The Supreme Court's assertion of supremacy did not debilitate the people but mobilized them to seek to place their partisans on the Court. Social conservatives have strong views on what the Constitution means and do not supinely accept constitutional decisions they believe are wrong. The problem is that a mobilized citizenry can erode judicial independence. Courts can ameliorate political conflict only if they are perceived as neutral arbiters. A judiciary that is seen as accountable to a political faction, on the other hand, lacks legitimacy.[160] American exceptionalism in judicial appointments undermines constitutionalism by shrinking the distance between the people and the institutions of governance.[161]

European constitutionalism works because appointment rules structure constitutional politics differently not because European nations have virtuous citizens that

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[158] *Id.*

[159] LARRY K. KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW 250 (2004).

[160] Owen M. Fiss, *The Right Degree of Independence, in* TRANSITION TO DEMOCRACY IN LATIN AMERICA: THE ROLE OF THE JUDICIARY 55 (Irwin P. Stotzky ed., 1993).

[161] FAREED ZAKARIA, THE FUTURE OF FREEDOM: ILLIBERAL DEMOCRACY AT HOME AND ABROAD (2003).

behave like the ideal of the founding generation. Factions cannot seek to change constitutions by changing the personnel of national high courts because a supermajority is typically required to appoint constitutional judges. European constitutionalism has different ex ante popular controls of the constitution than does the United States because European constitutionalism rests on very different assumptions. The appointment rules for the American Supreme Court were crafted in the late eighteenth century when the power that the Court would one day wield was unimaginable. When the nations of continental Europe created constitutional courts in the wake of World War II, on the other hand, there was no doubt, as richly evidenced by the history of the United States Supreme Court, that a court with the authority to interpret a constitution was a powerful political actor.

The European model of judicial review

Europe could not simply graft American style judicial review in constructing constitutional judicial review after World War II[162] for two reasons. First, the intellectual environment of late twentieth century Europe was profoundly different than that of late eighteenth century America. The framers of the American constitution assumed that there was a clear delineation between law and politics and that the new Supreme Court would, therefore, be a court of law.[163] After more than a century of American experience with judicial review, it was clear to Europeans that the American Supreme Court was not simply a legal institution but a political one as well.[164] Second, the nations of continental

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[162] Although there were European outliers that adopted judicial review prior to the Second World War, such as Austria, constitutional judicial review did not become the norm until after the war. MAURO CAPELLETTI, THE JUDICIAL PROCESS IN COMPARATIVE PERSPECTIVE (1989). European style judicial review, moreover, has become a very influential model throughout the world. TOM GINSBURG, JUDICIAL REVIEW IN NEW DEMOCRACIES: CONSTITUTIONAL COURTS IN ASIAN CASES 7-9 (__).

[163] Alexander Hamilton defended judicial review on these grounds. THE FEDERALIST NO. 78. *See generally* WILLIAM E. NELSON, MARBURY V. MADISON: THE ORIGINS AND LEGACY OF JUDICIAL REVIEW (2000).

[164] ALEX STONE, GOVERNING WITH JUDGES: CONSTITUTIONAL POLITICS IN EUROPE (2000). The realistic "reception" of judicial review in twentieth century Europe differs markedly from nineteenth century, continental attitudes towards judicial interpretation. The nineteenth century view was that only legislators could make law and that judges should and could simply interpret it. JOHN HENRY MERRYMAN, THE CIVIL LAW TRADITION: AN INTRODUCTION TO THE LEGAL SYSTEMS OF WESTERN EUROPE AND LATIN AMERICA 39-47 (1985). The current conservative critique of constitutional interpretation in the United States looks oddly like what was once in vogue in nineteenth century France when it came to interpreting the civil code. Antonin Scalia, *Common Law Courts in a Civil-Law System: the Role of United States Federal Courts in Interpreting the Constitution and Laws, in* A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 3 (1997) (arguing that judges in interpreting the law should behave like virtuous civil law judges who do not make law but only interpret it). The classic view of the role of the civil law judge described by Merryman, however, has never adequately described the behavior of civilian judges, who, like their common law counterparts, make law while

Europe had a tradition of parliamentary sovereignty that was difficult to reconcile with judicial review.[165] Legislatures, not courts, were supreme in interpreting the constitution. As a consequence, the strong form of American judicial review, with its correspondingly weak provisions for political accountability, was unacceptable.[166] These two factors led Europeans to devise a different form of judicial review that acknowledges its political nature by providing stronger democratic checks.

Although constitutional judicial review would not be adopted in Europe until after World War II, an important debate occurred in the first half of the twentieth century. A number of French public law scholars argued that American style judicial review should be adopted.[167] This intellectual movement criticized the "traditional [understanding of the] separation of powers" and its "prohibition against judicial review."[168] These scholars believed that adopting judicial review was the key to ensuring the supremacy of the constitution over ordinary legislation. The attempt to graft judicial review was challenged, however, by scholars who criticized the American Supreme Court for blocking social legislation by a "restrictive reading of the due process clause."[169] *Lochner* was a powerful anti-model[170] for forces opposed to the adoption of American

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interpreting it. MARTIN SHAPIRO, COURTS: A COMPARATIVE AND POLITICAL ANALYSIS 126-56 (1981) and Mitchel de S.-O.-l'E. Lasser, *Judicial (Self-) Portraits: Judicial Discourse in the French Legal System*, 104 YALE L.J. 1325 (1995).

[165] Mauro Cappelletti, *Repudiating Montesquieu? The Expansion and Legitimacy of "Constitutional Justice,"* 35 CATH. U. L. REV. 1, 26 (1985); Louis Favoreu, *Constitutional Review in Europe, in* CONSTITUTIONALISM AND RIGHTS: THE INFLUENCE OF THE UNITED STATES CONSTITUTION ABROAD 38, 45 (Louis Henkin & Albert J. Rosenthal eds., 1989); and Pasquale Pasquino, *Constitutional Adjudication and Democracy. Comparative Perspectives: USA, France, Italy,* 11 RATIO JURIS 38, 45 (1998). Professor Michael Corrado builds his recent casebook on comparative judicial review around differing notions of parliamentary sovereignty. MICHAEL LOUIS CORRADO, COMPARATIVE CONSTITUTIONAL REVIEW (2005).

[166] Mark Tushnet coined the expression strong form review to describe American and German judicial review. Mark Tushnet, *Marbury v. Madison Around the World,* 71 TENN. L. REV. 251 (2004). This Article uses the term somewhat differently than Professor Tushnet. Although there is no doubt that Germany has a powerful constitutional court, this Article will reserve the term strong form review for the United States and contrast American exceptionalism with the weaker forms of review that prevail in Europe, including Germany, and in Canada. Strong forms of judicial review are characterized by weak rules of political accountability while weaker forms of judicial review are characterized by stronger rules of political accountability.

[167] JOHN BELL, FRENCH CONSTITUTIONAL LAW 23-27 (1992); Michael H. Davis, *A Government of Judges: an Historical Review*, 35 AM. J. COMP. L. 559 (1987); and ALEC STONE, THE BIRTH OF JUDICIAL POLITICS IN FRANCE: THE CONSTITUTIONAL COUNCIL IN COMPARATIVE PERSPECTIVE 31-45 (1992).

[168] BELL, *supra* note __, at 25.

[169] STONE, *supra* note __, at 39.

[170] Heinz Klug, *Model and Anti-Model: The United States Constitution and the "Rise of World Constitutionalism,"* 2000 WIS. L. REV. 597.

style judicial review. The scholars who challenged the adoption of judicial review succeeded in "destroying whatever effective political support [that had] existed within parliament."[171]

While the debate over adopting American style judicial review was vigorously being waged in France during the first half of the twentieth century, the intellectual groundwork for a different form of judicial review was being crafted in Austria by Hans Kelsen.[172] He understood that judicial review in Europe would have to take a different form than in the United States so that it could please two groups that were at loggerheads: "politicians suspicious of the judiciary and judicial power, and a pan-European movement of prominent legal scholars who favored installing American judicial review on the Continent."[173] Kelsen proposed that judicial review be exercised by a specialized body, a constitutional court, with carefully circumscribed powers. Kelsen "thought that a constitutional court ha[d] to be a special kind of court because constitutional law was a special kind of law."[174] He argued that a court with the power to invalidate legislation because it contravened the constitution exercised political as well as lawmaking authority.[175] To limit this potentially dangerous delegation of power, Kelsen distinguished between negative and positive lawmaking. The latter was the province of the legislator, the former of judges. Kelsen believed the distinction between negative and positive lawmaking could be maintained if constitutions did not contain human rights due to their open-ended nature. Kelsen proposed that the members of these specialized constitutional courts be selected by politicians. He also argued that constitutional courts should review legislation before it was promulgated "thus preserving the sovereign character of statute[s] within the legal system."[177]

Kelsen's ideas proved very influential in the construction of judicial review in Europe after World War II. The desire to deal with the legacies of human rights violations led to the creation of specialized constitutional courts.[178] The European model of judicial review differs from American style judicial review along three dimensions.[179]

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[171] STONE, *supra* note __, at 40. *See also* BELL, *supra* note __, at 26-27 ("Time and again the opponents of constitutional review would point to the experience of the United States in the [the early twentieth century] as an illustration of what could happen in France.").

[172] Hans Kelsen, *La garantie juridictionnelle de la Constitution,* REVUE DU DROIT PUBLIC 197 (1928).

[173] Alec Stone Sweet, *Why Europe Rejected American Judicial Review and Why it May Not Matter,* 101 MICH. L. REV. 2744, 2766 (2003).

[174] Mark Tushnet, *Marbury v. Madison Around the World,* 71 TENN. L. REV. 251, 258 (2004).

[175] *Id.* at 2767.

[177] Sweet, *supra* note __, at 2768.

[178] John Ferejohn & Pasquale Pasquino, *Constitutional Adjudication: Lessons from Europe,* 82 TEX. L. REV. 1671, 1674-75 (2004).

[179] Kelsen's ideas were obviously not adopted in toto. By and large, the nations of Europe after World War II rejected his idea that constitutions should not contain a bill of rights. A bill of rights coupled with a specialized body charged with protecting those rights are, after all, very appealing tools with which to combat the legacy of

First, the European model provides one court, a constitutional court, with a monopoly over constitutional adjudication.[180] Judicial review is centralized in Europe whereas it is diffuse in the United States.[181] Given Europe's long tradition of parliamentary supremacy, a specialized court that was empowered to deal with constitutional issues was needed as a counterweight.[182] The ordinary courts in Europe lacked the independence and prestige to be able to effectively check parliament.[183] Second, judicial review in Europe is abstract whereas it is concrete in the United States.[184] Review is abstract in Europe because statutes may be challenged before they are promulgated. Review is concrete in the United States because courts may hear only cases or controversies.[185] As Professor Stone Sweet writes, "European constitutional courts were designed as relatively pure oracles of constitutional law."[186] Third, the appointment procedures differ and appointments have term limits.[187] The United States has a majoritarian appointment

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authoritarianism and human rights violations. John Ferejohn & Pasquale Pasquino, *Constitutional Adjudication: Lessons from Europe,* 82 TEX. L. REV. 1671, 1674-75 (2004).

[180] Although concentrated review is the norm in continental Europe, there are exceptions. The nations of Scandinavia, for example, adopted diffuse judicial review but that power is seldom exercised. Jaako Husa, *Guarding the Constitutionality of Laws in the Nordic Countries: A Comparative Perspective,* 48 AM. J. COMP. L. 345, 373-81 (2000).

[181] ALEX STONE, GOVERNING WITH JUDGES: CONSTITUTIONAL POLITICS IN EUROPE 31-37 (2000) and MAURO CAPPELLETTI, THE JUDICIAL PROCESS IN COMPARATIVE PERSPECTIVE 132-149 (1989).

[182] Germany, for example, adopted a constitutional court with concentrated review because of the "deeply ingrained Continental belief that judicial review is a political act, following the assumption that 'constitutional law . . . is genuine political law, in contrast, for example, to civil and criminal law." DONALD P. KOMMERS, THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY 3 (1997).

[183] Although there are parliamentary systems, such as Canada, that have diffuse review, there is an affinity between parliamentary government and constitutional courts. Alec Stone Sweet, *Why Europe Rejected American Judicial Review and Why it May Not Matter,* 101 MICH. L. REV. 2744, 2769 (2003) ("The European model of judicial review proved popular because—unlike American judicial review—it could be easily attached to the parliamentary-based architecture of the state.") and Louis Favoreu, *Constitutional Review in Europe, in* CONSTITUTIONALISM AND RIGHTS: THE INFLUENCE OF THE UNITED STATES CONSTITUTION ABROAD 38, 56 (Louis Henkin & Albert J. Rosenthal eds. 1990).

[184] STONE, *supra* note __, at 41-46.

[185] Mark Tushnet, *Marbury v. Madison Around the World,* 71 TENN. L. REV. 251, 254-55 (2004).

[186] Alec Stone Sweet, *Why Europe Rejected American Judicial Review and Why it May Not Matter,* 101 MICH. L. REV. 2744, 2771 (2003).

[187] Lee Epstein et al., *Comparing Judicial Selection Systems,* 10 WM. & MARY BILL RTS. J. 7, 12 (2001) (noting that democracies with constitutional courts rejected the American model in selecting and retaining judges because they sought to "maximize

process whereas the nations of Europe typically have a supermajoritarian process.[188] An important consequence that flows from requiring a supermajority for appointment is that judges are more broadly representative of a polity's culture and ideals.[189]

There is considerable disagreement whether these differences matter. One view focuses on the substantive divergences between European and American constitutionalism.[190] In a number of substantive areas such as freedom of speech,[191] the protection of human dignity,[192] the protective function of the state,[193] and the role of international factors in domestic constitutionalism,[194] European constitutionalism clearly

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accountability") and John Ferejohn & Pasquale Pasquino, *Constitutional Adjudication: Lessons from Europe,* 82 TEX. L. REV. 1671, 1681 (2004).

[188] France is an important exception. The French Constitutional Council ("FCC") consists of nine members. Its members are appointed by the President of the Republic, the President of the Senate, or the President of the National Assembly. Each of these three elected officials appoints one member every three years for a nonrenewable term of nine years. JOHN BELL, FRENCH CONSTITUTIONAL LAW __ (1992).

[189] Donald P. Kommers, *American Courts and Democracy: a Comparative Perspective, in* THE JUDICIAL BRANCH 200, 214 (Kermit L. Hall & Kevin T. McGuire eds., 2005).

[190] George Nolte, *Introduction—European and U.S. Constitutionalism: Comparing Essential Elements, in* EUROPEAN AND U.S. CONSTITUTIONALISM 9 (G. Nolte ed., 2005).

[191] The United States, for example, protects hate speech whereas Europe does not. Frederick Schauer, *Freedom of Expression Adjudication in Europe and the United States: A Case Study in Comparative Constitutional Architecture, in* EUROPEAN AND U.S. CONSTITUTIONALISM 47 (G. Nolte ed., 2005).

[192] The term human dignity is of fairly recent constitutional vintage and can be found in a number of post-war European constitutions but not in the American constitution. The phrase was adopted to deal in a more direct way with the atrocities of the Nazi regime than could be done under the general rubric of due process of law or the Eighth Amendment's prohibition against cruel and unusual punishment. Giovanni Bognetti, *The Concept of Human Dignity in European and U.S. Constitutionalism, in* EUROPEAN AND U.S. CONSTITUTIONALISM 75 (G. Nolte ed., 2005).

[193] The United States has resisted implying a positive duty on the part of the state. *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189, 195 (1989) (the due process clause is not a "guarantee of certain minimal levels of safety and security.") The differing European attitude can be seen most markedly in the famous German abortion decision reasoning that the right to life required the state to use the criminal law protect the foetus. *Abortion I*, translated in DONALD P. KOMMERS, THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY 337-__ (1997). *See generally* Frank I. Michelman, *The Protective Function of the State in the United States and Europe: The Constitutional Question, in* EUROPEAN AND U.S. CONSTITUTIONALISM 131 (G. Nolte ed., 2005).

[194] The nations of Europe are open to the influence of constitutional decisions in other polities whereas the United States is undergoing a heated debate led by Justice Breyer and Justice Scalia on this topic. A transcript of a discussion between the two

differs from American constitutionalism. A contrary view argues that "despite obvious differences between American and European systems of review, there is an increasing convergence in how review actually operates."[195] Professor Stone Sweet concludes that the United States Supreme Court is becoming specialized in constitutional law like its constitutional court counterparts in Europe whereas European abstract review is becoming more concrete.[196]

The difficulty in comparing European and American constitutionalism is that the obvious differences, such as specialized courts exercising abstract review, matter less than the differing appointments mechanisms. Professor Michel Rosenfeld notes that the abstract nature of judicial review makes judicial review look more openly political than does the concrete review exercised in the United States yet "American constitutional adjudication has been attacked much more vehemently for being unduly political than its European counterpart."[197] Europe transformed judicial review in the process of adopting it by democratizing an inherently non-democratic institution. Constitutional review has proven less problematic in Europe than in the United States in large part because supermajority provisions ensure that there is less ideological polarization on European constitutional courts than on the United States Supreme Court. European courts can and do issue decisions that lead to political backlash. What cannot readily occur, however, is the rise of a sustained social movement whose primary objective is to transform the constitution by changing the membership of a nation's high court. Such a goal would be difficult given supermajority appointment provisions and would also make little sense given that European constitutions are easier to amend than the American constitution.[198] Strengthening ex ante controls over judicial review, however, is not the only mechanism by which the people can be empowered to exercise control over their Constitution. Canada provides an example of how post facto controls may diminish the power of factions by democratizing judicial review.

Justices can be found in *A conversation between U.S. Supreme Court justices. The relevance of foreign legal materials in U.S. constitutional cases: Justice Antonin Scalia and Justice Stephen Breyer,* 3 INT'L J. CONST. L. 519 (2005). This disagreement produced sharply divided opinions in *Lawrence v. Texas*, 539 US 558 (2003) and *Roper v. Simmons*, __ U.S. __ (2005). *See generally* Jed Rubenfeld, *The Two World Orders, in* EUROPEAN AND U.S. CONSTITUTIONALISM 233 (G. Nolte ed., 2005).

[195] Alec Stone Sweet, *Why Europe Rejected American Judicial Review and Why it May Not Matter,* 101 MICH. L. REV. 2744 (2003).

[196] *Id.*

[197] Michel Rosenfeld, *Constitutional Adjudication in Europe and the United States: Paradoxes and Contrasts, in* EUROPEAN AND U.S. CONSTITUTIONALISM 165, 166 (G. Nolte ed., 2005). *See also* Peter E. Quint, *The Most Extraordinary Powerful Court of Law the World Has Ever Known?—Judicial Review in the United States and Germany,* 65 MD. L. REV. 152 (2006).

[198] LIJPHART, *supra* note __, at 218-20 (1999).

IV. Post Facto Popular Controls over the Constitution

> Some think that the Supreme Court's elaboration of constitutional law has given us a rich vocabulary of practical political philosophy. It has not. It may have given the Supreme Court and some constitutional lawyers such a vocabulary. . . . The Declaration of Independence and the Preamble to the Constitution give all of us that opportunity. Perhaps it is time for us to reclaim it from the courts.[199]

A constitution is, as Karl Llewellyn once remarked, a "peculiar institution" because it involves a way of "living and doing" of "well-nigh the whole population."[200] The existence of shared attitudes "toward the verbal symbol Constitution and toward any person supposed to be attacking it"[201] is crucial if constitutions are to limit power. The court of public opinion, not a court of law, is the primary mechanism for enforcing constitutions.[202] Courts cannot limit power if citizens are unwilling to mobilize when constitutional guarantees are violated.[203] The question then is the role that courts play in constructing and maintaining the attitudes needed to sustain constitutional democracy.

Popular constitutionalism is an intellectual project that posits a deep tension between the attitudes and beliefs needed to sustain constitutional democracy and judicial review.[204] Kramer, for example, believes that the attitudes once shared by the virtuous citizens of the Republic have been eroded by judicial supremacy.[205] Mark Tushnet shares with Kramer the view that judicial review undermines the attitudes needed to sustain democracy but Tushnet's criticism runs deeper than Kramer. In *Taking the Constitution Away from the Courts*,[206] Tushnet aims at doing away with judicial review, not just judicial supremacy, in construing the Constitution. Judicial review, he argues, "amounts to noise around zero" because it "offers essentially random changes, sometimes good and sometimes bad, to what the political system produces."[207]

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[199] MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS 194 (1999).

[200] Karl N. Llewellyn, *The Constitution as an Institution*, 34 COLUM. L. REV. 2, 17 (1934).

[201] *Id.* at 18.

[202] President Bush's extraordinary assertion of power in the wake of the events of September 11 will ultimately be resolved by the people as they decide what sort of government they wish. *See generally* Keith Whittington, *Yet Another Constitutional Crisis*, 43 *Wm. & Mary Law Rev.* 2093, 2109 (2001).

[203] The historical experience of Latin America, for example, demonstrates that constitutions that lack popular support facilitate dictatorship rather than democracy. Miguel Schor, *Constitutionalism Through the Looking Glass of Latin America*, 41 TEX. INT'L L. J. 1 (2006).

[204] Ran Hirschl, *Looking Sideways, Looking Backwards, Looking Forewards: Judicial Review v. Democracy in Comparative Perspective*, 34 U. RICH. L. REV. 415, 421 (2000).

[205] KRAMER, *supra* note __.

[206] TUSHNET, *supra* note __.

[207] *Id.* at 153.

Tushnet's attack on judicial review is based on the distinction he makes between the thin and the thick constitution. The thin constitution consists of the principles embedded in the Declaration of Independence and the Preamble to the Constitution that constitute the nation. The thick constitution, on the other hand, consists of the detailed provisions that organize the government. The provisions of the thick constitution are important but they neither "generate" passion nor adherence to the Constitution.[208] The people can be "committed to the thin Constitution in ways they could never be committed to the thick Constitution."[209] The problem with judicial review is that the public learns to leave important issues to the courts thereby eroding public discussion and adherence to the thin constitution. He concludes his attack on judicial review by suggesting that perhaps we need an amendment precluding courts from construing the constitution.[210] By doing away with judicial review, Tushnet seeks to make space for the people to discuss the "Constitution's meaning . . . in the ordinary venues for political discussion."[211]

In seeking to take the constitution away from the courts, Tushnet fails to appreciate why democracies choose to provide judicial protection of rights. Rights that are embedded in politics, but not the law, as Tushnet urges, can be effectuated only through electoral channels. The problem with relying solely on elections to effectuate rights is that there are a number of roadblocks to collective action. Polities throughout the world adopted judicially enforceable constitutional guarantees because they allow individuals to effectuate their rights at a lower cost than having to seek political vindication of such rights. Legalizing rights, moreover, does not debilitate democracy as Tushnet argues. The law is a democratic form of policymaking because it relies on citizens filing suits.[212] Courts cannot effectuate rights without a stream of litigation. The real problem in constitutional engineering, therefore, is to find a balance between politics and law so that courts do not gain mastery over the constitution at the expense of the people. A more effective means for taking the constitution away from the courts—one that respects the political economy of rights—is provided by Canada's post facto popular control of constitutionalism.

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[208] *Id.* at 10.

[209] *Id.* 12.

[210] *Id.* at 175. Professor Tushnet's proposed "End Judicial Review Amendment" provides: "Except as authorized by Congress, no court of the United States or any individual state shall have the power to review the constitutionality of statues enacted by Congress or by state legislatures." Laurence H. Tribe, Jeremy Waldron, and Mark Tushnet conduct a spirited debate on the proposed amendment in *On Judicial Review*, DISSENT MAGAZINE (2005), http://www.dissentmagazine.org/article/?article=219.

[211] TUSHNET, *supra* note __, at 14.

[212] EPP, *supra* note __; Miguel Schor, *The Rule of Law, in* ENCYCLOPEDIA OF LAW AND SOCIETY: AMERICAN AND GLOBAL PERSPECTIVES (David Clark ed., forthcoming 2006); and Frances Kahn Zemans, *Legal Mobilization: The Neglected Role of the Law in the Political System,* 77 AM. POL. SCI. REV. 692 (1983).

The Canadian model of judicial review

The question popular constitutionalism wrestles with is how the dictates of a constitution can best be made effective. There were historically two answers to that question: politics or law.[213] The former is the Westminster model of parliamentary supremacy; the latter the American system of judicial review. The Westminster model, which was once the dominant model among the world's more stable democracies, no longer exists in its pure form.[214] The nations of continental European adopted judicial review in the wake of the Second World War. They rejected the American strong form of judicial review and democratized the practice by adopting supermajoritian appointment procedures.[215] The last set of stable democracies to adopt judicial review were the nations of the British commonwealth, but they too rejected the pure American model since they give courts the first, but not the last word, in exercising judicial review.[216] Democracy may not have conquered the world but judicial review, in some form or other, has conquered democracy. Popular constitutionalism is swimming against a worldwide historical current.

The Canadian model of judicial review demonstrates that judicial review need not be joined at the hip with judicial supremacy even if the distinction between the two has been blurred by American courts.[217] The conclusion reached by the United States Supreme Court that courts must have the last word in construing the Constitution lest constitutional supremacy be undermined has been rejected by Canada. Section 33 of the Canadian Constitution provides:

> Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature . . . that the Act or a provision thereof shall operate *notwithstanding* a provision included in section 2 or sections 7 to 15 of this Charter

Section 33, or the notwithstanding clause, seeks to bridge the divide between British practice of politicizing the enforcement of rights and the American practice of judicializing the enforcement of rights. It has been reviled and praised by Canadian

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[213] Bruce Ackerman, *The New Separation of Powers,* 113 HARV. L. REV. 633 (2000).

[214] Mark Tushnet, *New Forms of Judicial Review and the Persistence of Rights- and Democracy-Based Worries*, 38 WAKE FOREST L. REV. 813, 815 (2003).

[215] *See* Part III *supra*.

[216] Stephen Gardbaum, *The New Commonwealth Model of Constitutionalism*, 49 AM. J. COMP. L. 707 (2001). Australia is perhaps the last holdout but it has adopted by means of judicial interpretation a weak form of judicial review. JASON L. PIERCE, INSIDE THE MASON REVOLUTION: THE HIGH COURT OF AUSTRALIA TRANSFORMED 157-189 (2006).

[217] *Aaron v. Cooper*, 357 U.S. 566 (1958).

[219] Rainer Knopff & Andrew Banfield, "*It's the Charter Stupid!" Electoral Politics and the Supreme Court*, http://www.cpsa-acsp.ca/papers-2005/Banfield.pdf (June 2, 2005).

politicians[219] as well as scholars who dispute how well it comports with Canadian democracy.[220] Section 33 has also become an important topic in comparative constitutional theory as scholars disagree whether it marks a new form of judicial review.[221]

The origins of Section 33 can be found in section 2 of the Canadian Bill of Rights ("CBOR") of 1960.[222] CBOR, however, was a statutory bill of rights and had little impact because the courts "viewed their power through the traditional lens of parliamentary supremacy."[223] Unhappiness with CBOR's lack of effectiveness provided the impetus for the Charter of Rights and Freedoms.[224] Pierre Trudeau initiated the process that would eventually culminate in the Canadian Charter of Rights and Freedoms when he was elected Prime Minister in 1968. In the final negotiations that led to the adoption of the Charter, there was considerable opposition on the part of the provinces to a constitutionalized and entrenched bill of rights.[225] Professor Weiler notes "The source of the provincial leaders' concern was the same as the source of the Charter's popular attraction: observation of Canada's next-door neighbor's two centuries of experience with constitutionalized rights."[226] Section 33 was adopted as the result of a last minute compromise that made possible the adoption of the Canadian Charter of Rights and Freedoms.[227] The Canadian Charter of Rights and Freedom sought to adopt the more

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[220] *Compare* Peter W. Hogg & Allison A. Bushell, *The Charter Dialogue Between Courts and Legislatures (Or Perhaps the Charter of Rights Isn't Such a Bad Thing After All),* 35 OSGOODE HALL L. J. 75 (1997) *with* CHRISTOPHER P. MANFREDI, JUDICIAL POWER AND THE CHARTER: CANADA AND THE PARADOX OF LIBERAL CONSTITUTIONALISM (2d ed. 2001).

[221] *Compare* Mark Tushnet, *New Forms of Judicial Review and the Persistence of Rights- and Democracy-Based Worries*, 38 WAKE FOREST L. REV. 813, 815 (2003) *with* Stephen Gardbaum, *The New Commonwealth Model of Constitutionalism*, 49 AM. J. COMP. L. 707 (2001).

[222] Gardbaum, *supra* note __, at 719-20. Section 2 was designed to reconcile parliamentary sovereignty with a statutory bill of rights. The problem was that a statute enacted after CBOR was promulgated might be construed to impliedly abrogate the rights contained in CBOR. To prevent this from occurring, Section 2 provided "every law of Canada shall, unless it is expressly declared by an Act of Parliament of Canada that it shall operate notwithstanding the Canadian Bill of Rights, be so construed and applied as not to abrogate, abridge or infringe . . . any of the rights and freedoms herein recognized and declared." CBOR, c. 44, Section 2.

[223] Gardbaum, *supra* note __, at 720.

[224] Leeson, *supra* note __, at 7.

[225] *Id.* at 11-12. *See also* MANFREDI, *supra* note __, at XIII-XVI, 181-84 (2d ed. 2001).

[226] Paul C. Weiler, *Rights and Judges in a Democracy: a New Canadian Version,* 18 U. MICH. J.L. REFORM 51, 53 (1984).

[227] Howard Leeson, *Section 33, the Notwithstanding Clause: A Paper Tiger?,* INSTITUTE FOR RESEARCH ON PUBLIC POLICY, CHOICES, Vol. 6, no. 4, at 3-4, http://www.irpp.org/choices/archive/vol6no4.pdf (June 2000) (noting that the decision to insert § 33 into the Charter "had more to do with the raw politics of bargaining and

attractive features of American constitutionalism and reject its more repellant ones by constitutionalizing rights while allowing a legislative override.[228]

Although the notwithstanding clause was crucial to the adoption of the Charter of Rights and Freedoms, and has important theoretical implications, it has not fared well in Canada's constitutional politics. The few times it has been used have proven controversial. Quebec used the notwithstanding clause primarily to protect language rights.[229] This led to a strong negative reaction[230] as language rights for the French minority is a contentious political and constitutional issue.[231] The political "demonization" of Section 33 has spread to other issues.[232] The two major political parties have wrangled over whether to use the notwithstanding clause to deal with the Canadian Supreme Court's recent decision on same-sex marriage.[233] The politicization of same sex marriage in Canada represents the mirror of how that issue has been politicized in the United States. In the United States, it has been conservatives who have successfully used same sex marriage as a wedge issue to mobilize voters. In Canada, it has been the Liberal Party that has successfully portrayed the Conservative Party's willingness to use the notwithstanding clause to deal with the same sex jurisprudence of the Canadian Supreme Court as "hostility to the Charter itself and thus to fundamental Canadian values."[234] Any attempt by the federal or a provincial government to use the notwithstanding language in proposed legislation allows the supporters of the primacy of the judiciary in construing the Charter to mobilize. As a consequence, governments have been "exceedingly reluctant to use [Section] 33."[235]

Section 33 has had not only a checkered political history but has also been a matter of dispute among scholars who debate whether it contributes to Canada's

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chance phone calls late at night than with reasoned debate about what might constitute a rational compromise between democracy and constitutional law"). There is some dispute as to the origins of the notwithstanding clause, however, because some "participants described the override not as part of a second-best solution but as preferable to a fully entrenched bill of rights with no possibility for legislative response." Sujit Choudry, *The Lochner Era and Comparative Constitutionalism,* 2 INT'L J. CONST. L. 1, 45 (2004).

[228] Choudry, *supra* note __ at 43-48 (emphasizing the importance of *Lochner v. New York* as an anti-model in the drafting of section 33).

[229] MANFREDI, *supra* note __, at 181-188.

[230] When Quebec used the override to insulate legislation mandating the use of French in commercial signs in 1988, Canada's Prime Minister, Brian Mulroney, reacted by calling section 33 "'that major fatal flaw of 1981'" which "'renders the entire constitution suspect.'" He concluded by stating that a constitution that does not protect the "'individual rights of individual Canadians is not worth the paper it is written on.'" MANFREDI, *supra* note __, at 186.

[231] For a good discussion of the role that the politics of language rights played in the adoption of the Charter of Rights and Freedoms, *see* Weiler, *supra* note __, at 56-60.

[232] Knopff & Banfield, *supra* note __.

[233] *Reference re Same Sex Marriage,* (2004) 3 S.C.R. 698. Knopff & Banfield, *supra* note __, at 5-15.

[234] Knopff & Banfield, *supra* note __, at 9.

[235] 2 PETER W. HOGG, CONSTITUTIONAL LAW OF CANADA 36-9 (4th ed. 2004).

democracy. Scholars who believe that Section 33 contributes to a democratic "dialogue" between legislatures and courts stress that it resolves the countermajoritarian difficulty.[236] Courts are afforded the power of judicial review to ensure that all organs of government are subject to constitutional dictates. The problem, of course, is that constitutional restrictions on power are open-ended and afford courts considerable discretion.[237] Professor Weiler notes that the "'fancy claims' lawyers make about the superiority of judges" in construing the constitution must be balanced against the reality that legislatures are better equipped to make policy decisions.[238] Section 33 deals with this problem by providing both courts and legislatures the authority to determine constitutional meaning. Scholars who disagree that section 33 contributes to a democratic dialogue point, rather unsurprisingly, to its relative lack of use.[239] Professor Manfredi argues that judicial review is necessary to make checks and balances work, yet courts are not subject to any effective checks since Section 33 has seldom been used. Section 33, in short, may provide a formal solution to the countermajoritarian difficulty while not resolving the debilitation problem that may occur when courts gain supremacy over constitutional construction.[240]

Comparative scholars debate whether Section 33 represents an important constitutional innovation. Professor Gardbaum argues that Canada is part of a trend among Commonwealth nations to find a middle way between parliamentary and judicial supremacy in constitutional interpretation.[241] By democratizing judicial review, the notwithstanding clause prevents courts from unduly interfering with legislatures. It was designed to prevent the possibility of the impasse between Congress and the Supreme Court that led to Franklin Roosevelt's court packing plan.[242] It also serves as a breakwater for social mobilization. When factions are angered by judicial decisions, they are more likely to pursue an override than to seek to influence the appointments process.[243] Professor Tushnet, on the other hand, argues that as a practical matter Canadian courts are supreme in construing the Charter as Section 33 is seldom used.[244] The desuetude of Section 33 for Tushnet is proof that the public has accepted judicial supremacy as legislatures find it politically unpalatable to override judicial decisions they disagree with. For Tushnet, there is no middle ground between parliamentary and judicial supremacy.

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[236] Peter W. Hogg & Allison A. Bushell, *The Charter Dialogue Between Courts and Legislatures (Or Perhaps the Charter of Rights Isn't Such a Bad Thing After All),* 35 OSGOODE HALL L. J. 75 (1997) and Weiler, *supra* note __.

[237] Hogg & Bushell, *supra* note __, at 77.

[238] Weiler, *supra* note __, at 73.

[239] MANFREDI, *supra* note __.

[240] Jeffrey Goldsworthy, *Judicial Review, Legislative Override, and Democracy,* 38 WAKE FOREST L. REV. 451, 470 (2003) ("[J]udicial enforcement of constitutional rights" may corrode "'the habits and temperaments' that are necessary for democracy to thrive.")

[241] Gardbaum, *supra* note __.

[242] Choudry, *supra* note __, at 47.

[243] *Id.* at 48.

[244] Tushnet, *supra* note __.

This Article argues that the importance of Section 33 lies along a different dimension which is how it structures the relationship between society and courts. Canada's Supreme Court is more susceptible than the United States Supreme Court to the problem of faction. There are three principal mechanisms that polities use in appointing Justices: monocratic (Canada), majoritarian (United States), and supermajoritarian (the European model).[245] Canada follows the British model in providing the chief executive virtually unfettered authority to appoint Justices.[246] The British system worked well when paired with parliamentary supremacy but is problematic when courts have the final word on what the constitution means. Canada, however, has not yet experienced the appointment wars that are now part of the American constitutional political landscape. The Charter is quite new and the Liberal Party has dominated the government for much of its existence which has minimized political struggle over appointments.[247] More importantly, as the American experience suggests, citizen mobilization over appointments is fashioned in a long-term, historical process. With increased experience under the Charter, Canadians may seek to exert greater control over the Court as they begin to "appreciate the important role of personalities and judicial philosophies in the interpretation and application of Charter norms."[248]

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[245] John Ferejohn & Pasquale Pasquino, *supra* note __, at 1681.

[246] F. L. Morton, *Judicial Appointments in Post-Charter Canada: a System in Transition, in* APPOINTING JUDGES IN AN AGE OF POWER: CRITICAL PERSPECTIVES FROM AROUND THE WORLD 56, 57 (Kate Malleson & Peter H. Russell eds., 2006); Peter McCormick, *Essay: Selecting the Supremes: The Appointment of Judges to the Supreme Court of Canada,* 7 J. APP. PRAC. & PROC. 1, 14-17 (2005); and Jacob S. Ziegal, *Merit Selection and Democratization of Appointments to the Supreme Court of Canada,* 5 CHOICES: INST. FOR RES. ON PUB. POL'Y 1 (1999).

[247] Ziegal, *supra* note __, at 10 and Morton, *supra* note __, at 60-62.

[248] Ziegal, *supra* note __, at 14. The seeds of an American style appointments war may have been planted during Canada's 2006 parliamentary elections when Stephen Harper, the conservative Reform candidate, defeated Paul Martin, the Liberal candidate. Stephen Harper's lead in the polls took a hit when he said that "some judges appointed by Liberals are activists working to promote their own social agendas." Gloria Galloway, *Harper warns of activist judges: Tory leader says some appointed to bench by Liberals promote social agendas,* GLOBE AND MAIL, Jan. 19, 2006, at __. Paul Martin accused Mr. Harper of "planning to stack the Supreme Court with politicized judges who would allow a social-conservative agenda drawn from the 'extreme right' in the United States." *Harper eager to politicize top court, Martin warns,* GLOBE AND MAIL, Jan. 20, 2006, at __. As a consequence of this debate, Harper's lead in the polls diminished somewhat. Steven Chase et al., *Harper's lead takes a hit,* GLOBE AND MAIL, Jan. 20, 2006, at __.

Canada's nomination process may be undergoing an important change as a public hearing was held for the first time on February 27, 2006. Gloria Galloway & Richard Blackwell, *Top-court nominee faces fire Monday,* GLOBE AND MAIL, Feb. 21, 2006, at __. The nominee, Judge Marshall Rothstein, stated, unsurprisingly, that he was no activist while sidestepping "questions about the validity of the notwithstanding clause in the Constitution and how the court should arbitrate moral issues." Campbell Clark, *No activist, Supreme Court nominee says,* GLOBE AND MAIL, Feb. 28, 2006, at __.

The importance of Section 33 was illustrated by the debate between the two leading candidates to become Canada's Prime Minister in January 2006. The liberal candidate, Paul Martin, sought to gain electoral ground on the conservative front-runner, Stephen Harper, by "pledging to repeal Ottawa's power to override the Charter of Rights."[249] Harper opposes same-sex marriage but pledged not to use the notwithstanding clause to outlaw same sex-marriage. Martin's promise to end the federal government's power to use the override was made to sharpen the parties' difference on the issue of same-sex marriage. There was considerable criticism of Martin's proposal, however, which suggests that the retention of the notwithstanding clause has political support.[250] The reason that there is more support for retaining the notwithstanding clause than there is for its use lies in the function it plays. Professor Choudry notes: "To its defenders, the override serves as an outlet, channeling potentially dangerous and destructive responses to judicial review into legislative forums where brute power is tempered by the demands of public justification and the procedures for parliamentary democracy."[251] In particular, if the citizens are unhappy with a particular constitutional provision, they are more likely to seek a legislative override than to pack the courts with their supporters.[252] Section 33 allows courts to issue opinions that roil the political waters while making it less likely that the factions will seek to dominate the appointments process. The notwithstanding clause, in short, functions not unlike the "beware of dog" sign that some homeowners put up even though they do not own a dog.

V. Conclusions: Democratizing Judicial Review

> [T]he candid citizen must confess that if the policy of the Government upon vital questions affecting the whole people is to be irrevocably fixed by decisions of the Supreme Court, the instant they are made in ordinary litigation between parties in personal actions the people will have ceased to be their own rulers, having to that extent practically resigned their Government into the hands of that eminent tribunal. Nor is there in this view any assault upon the court or the judges. It is a duty from which they may not shrink to decide cases properly brought before them, and it is no fault of theirs if others seek to turn their decisions to political purposes.[253]

Lincoln certainly had it right when he argued that the people will have ceased to be their own rulers if courts were to gain constitutional supremacy. The world's democracies and constitutional theory have been on oddly convergent paths as both seek

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[249] Brian Laghi et al, *Martin Hits Hard at Harper: Liberal Leader uses second English debate to say he'd ban federal use of notwithstanding clause,* GLOBE AND MAIL, Jan. 10, 2006, at __.

[250] Joan Bryden, *Liberal MPs, experts not with Charter changes,* GLOBE AND MAIL, January 10, 2006, at __.

[251] Choudry, *supra* note __, at 48.

[252] Daniel LeBlanc, *Martin's Charter promise easier said than done,* GLOBE AND MAIL, January 11, 2006, at __.

[253] Abraham Lincoln, First Inaugural Address, March 4, 1861, *available at* http://www.yale.edu/lawweb/avalon/presiden/inaug/lincoln1.htm.

to balance the power of courts and citizens over constitutional meaning by democratizing judicial review. The twentieth century witnessed a worldwide expansion of judicial review[254] as nations democratized[255] but polities rejected American style strong form review with its correspondingly weak form of political accountability. No polity could readily ignore the power exercised by the American Supreme Court in designing judicial review in the twentieth century. Although there are a number of mechanisms that may be used to cabin courts, modern democracies have overwhelmingly relied on ex ante and post facto mechanisms of popular control over the meaning of the constitution.

Constitutional theory rather oddly ignored the role that citizens play in shaping constitutional meaning until the advent of popular constitutionalism. American debates over the propriety of judicial review were long trapped in a weird nineteenth century time warp that courts exercise only judgment[256] whereas legislatures exercise will. The countermajoritarian difficulty at bottom posits that courts should police themselves by adopting the correct interpretive theory lest they trample on democracy. The problem with Bickel and his interlocutors is that they ignore the role that the people play in maintaining the Constitution as a living institution. The counter-constitutional difficulty, on the other hand, acknowledges that the people, not the courts, are the ultimate arbiter of what the Constitution means.

Courts can, and do, however, further the interests of factions rather than those of we the people.[257] This Article argues that the tension between law and politics, which constitutional theory sought to resolve by grappling with the countermajoritarian difficulty, looks very different when viewed from the vantage point of constitutional politics. The problem is not that courts might impermissibly interfere with legislatures but that judicial review might facilitate a form of constitutional politics that threatens to undermine the constitution. Given the rigors of Article V, the easiest way to amend the Constitution is to place one's partisans on the Supreme Court. A number of decisions by the Court have played an important role in mobilizing religious conservatives who now seek to amend the Constitution by transforming the membership of the Court. The appointments battles that led to the nominations of Justices Roberts and Alito, and to the withdrawal of Harriet Miers, illustrate the strategy and the power of this conservative movement. By playing an important role in nomination battles, factions shape the meaning of the Constitution. The polarization in the appointments process, in short, is the Achilles heel of the Constitution.

Popular constitutionalism departs from much existing constitutional theory by bringing we the people back into our understanding of how constitutional meaning is shaped. Professor Kramer fears that the arrogation of judicial supremacy by the Supreme Court will undermine the republican virtues needed to sustain democracy. Professor Tushnet is concerned that judicial review "amounts to noise around zero." The United

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[254] THE GLOBAL EXPANSION OF JUDICIAL POWER (C. Neal Tate & Torbjörn Vallinder eds., 1995).

[255] SAMUEL P. HUNTINGTON, THE THIRD WAVE: DEMOCRATIZATION IN THE LATE TWENTIETH CENTURY (1991).

[256] GRANT GILMORE, THE AGES OF AMERICAN LAW 41-67 (1974).

[257] RAN HIRSCHL, TOWARDS JURISTOCRACY: THE ORIGINS AND CONSEQUENCES OF THE NEW CONSTITUTIONALISM (2004).

States would be better off without it, he argues, so that Americans could discuss the principles that constitute their collective national identity in the venues of ordinary politics. Kramer and Tushnet are right to underscore the danger of citizens losing attachment to the Constitution.

The problem with popular constitutionalism, however, is that the people have never supinely accepted the power of a political body, even one as august as the Supreme Court of the United States, to define the identity of a nation. American history is replete with social movements that fought the Court over the meaning of the Constitution.[258] Social movements can seek constitutional change either by changing public opinion or by changing the membership of the Supreme Court.[259] The former plays a key role in maintaining the constitution as a living institution[260] whereas the latter erodes democracy. Constitutional democracy works when it channels social forces seeking change into a two level game. A bare majority is needed to change ordinary law whereas a supermajority is required to change the Constitution. Appointments battles blur the line between ordinary and constitutional politics. Maintaining that distinction, however, is critical for the long-term viability of democracy.[261]

Appointment battles not only erode the rigidity of the Constitution but also undermine the ability of courts to ameliorate political conflict. Courts lessen conflict because it is universally understood that a neutral third party is the fairest means for resolving disputes.[263] For courts to be able to reduce social tensions, they must be perceived as fair and independent.[264] There is a tension, however, between the popular

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[258] *See* Part II *infra*. Indeed the comparative evidence is quite strong that one of the consequences of providing courts with the power of judicial review is that social movements will orient their activity towards winning legal as well as political victories. F.L. MORTON & RAINER KNOPFF, THE CHARTER REVOLUTION AND THE COURT PARTY (2000).

[259] Balkin, *supra* note __.

[260] Reva B. Siegal, *The Jurisgenerative Role of Social Movements in United States Constitutional Law*, available at http://islandia.law.yale.edu/sela/SELA%202004/SiegelPaperEnglishSELA2004.pdf (2004) and Jules Lobel, *Losers, Fools, & Prophets: Justice as Struggle,* 80 CORNELL L. REV. 1331 (1995).

[261] The collapse of the distinction between constitutional and ordinary politics led to dictatorship and oligarchy throughout much of Latin America's history. Miguel Schor, *Constitutionalism Through the Looking Glass of Latin America,* 41 TEX. INT'L L.J. 1 (2006). Politicians quite naturally fear the alternation in power that is necessary for democracy when elected officials have the power to transform a nation's constitution readily. If constitutions can change with the electoral cycle, the result is political polarization.

[263] MARTIN SHAPIRO, COURTS: A COMPARATIVE AND POLITICAL ANALYSIS (1981).

[264] E.P. THOMPSON, WHIGS AND HUNTERS: THE ORIGIN OF THE BLACK ACT 263 (1975).

social underpinnings of democracy and its formal institutions.[265] The framers' hopes for an elite centered appointments process were frustrated by long-term developments whereby citizens increasingly demanded a place at the appointments table. If courts are seen as the pawns of interest group struggles, however, the social trust they need to ameliorate political conflict is eroded. Democracy, in short, can erode institutions.

The American adherence to weak political controls over constitutional review is deeply ingrained but the die that was cast in Philadelphia was more the result of historical accident than any prolonged inquiry. Constitution makers are not free to remake the world anew but are constrained by the operative assumptions of the intellectual milieu within which they operate.[267] The intellectual assumption on which American judicial review is built is a sharp distinction between law and politics. This distinction provided the intellectual foundations of *Marbury v. Madison*[268] and continues to provide the grist for the continuing fascination that constitutional scholars have for Bickel's countermajoritarian mill. If what the courts do is law and what legislatures do is politics, then maintaining the distinction between these two spheres is critical if judicial review is to be legitimate in a democracy.

The institutional counterpoint to the distinction between law and politics that the framers uncritically assumed are the weak forms of democratic control that the Supreme Court is subject to. It is not surprising that elites whose lives spanned a transformation from a monarchical and hierarchical society to a republican and egalitarian one[269] would fear the very changes they helped usher in.[270] They understood that democracy would bring about important social transformations and sought to hem these changes in by fashioning a court free of democratic constraints that would stand guard over what majorities could do.[271] Lifetime tenure coupled with virtuous judges drawn from a narrow circle would hopefully prevent future democratic majorities from working their will.

It should not be surprising that other polities strengthened the mechanisms of political accountability when they "borrowed" judicial review from the United States.

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[265] FAREED ZAKARIA, THE FUTURE OF FREEDOM: ILLIBERAL DEMOCRACY AT HOME AND ABROAD (2003).

[267] Mark Tushnet, *The Possibilities of Comparative Constitutional Law,* 108 YALE L.J. 1225, 185-1304 (1999) (noting that constitution makers typically proceed by using the tools and materials at hand rather than as engineers who seek to use the best possible design).

[268] 5 U.S. 137 (1803).

[269] GORDON S. WOOD, THE RADICALISM OF THE AMERICAN REVOLUTION 5 (1992).

[270] LESTER D. LANGLEY, THE AMERICAS IN THE AGE OF REVOLUTION 1750-1850 (1996).

[271] ROBERT A. DAHL, HOW DEMOCRATIC IS THE AMERICAN CONSTITUTION? (2001).

The framers could not foresee the role that judicial review would play in American politics. The continued American adherence to weak political controls over judicial review owes more to path dependency than to an ideological commitment to judicial supremacy in constitutional interpretation. The democratic changes made to judicial review in the process of legal transplantation in Europe and in Canada are significant. These changes can best be explained by the notion of political learning. Elites study and learn from the legal and political experience of other nations.[272] The rest of the world adopted stronger political controls over their respective supreme courts because elites in those polities understandably feared fashioning a constitutional court that would exercise the power of the American Supreme Court. No nation adopting judicial review in the late twentieth century could ignore the political dimensions of constitutional law. As a consequence of this political learning, the nations of continental Europe constructed a different appointments process that makes it very difficult for minorities to place their partisans on a nation's highest court. Canada made it unlikely that factions would arise to seek to control its highest court by allowing for the possibility of a legislative override. The European and Canadian forms of judicial review, in short, sought to preserve a stronger role for Parliament by creating stronger democratic constraints on judicial review.

The problem in designing judicial review lies in how best to design the institutional mechanisms that enable citizens to exercise control over the meaning of the constitution. As the following table illustrates, American exceptionalism forces citizens to utilize ex ante mechanisms of control whereas other polities structure judicial review to facilitate post facto control mechanisms:

POLITICAL ACCOUNTABILITY[273]

	Ex Ante (Appointments)	**Post Facto** (Legislative override, amendments)
Weak	Monocratic (Canada) Majoritarian (United States)	United States (supermajority required both in Congress and among the states)
Strong	Supermajoritarian (Europe)	Europe (typically supermajority required in Parliament) Canada (majority for temporary override)

[272] HUNTINGTON, *supra* note __ .

[273] Donald S. Lutz, *Toward a Theory of Constitutional Amendment, in* RESPONDING TO IMPERFECTION: THE THEORY AND PRACTICE OF CONSTITUTIONAL AMENDMENT 237 (Sanford Levinson ed., 1995).

Citizens in the United States have little choice but to engage in appointments battles given the difficulty of amending the Constitution. Citizens in a polity with the European model of judicial review, on the other hand, will be more likely to seek constitutional change through amendment than through the uncertain path of changing the membership of a constitutional court. Canada falls in between the American and European models of judicial review as citizens can influence both appointments and seek a legislative override. Social movements are more likely to seek an override than to seek to change the membership of the Canadian Supreme Court, however, given that appointments battles produce an uncertain pay-off. Post facto mechanisms are superior to ex ante mechanisms of popular control as they neither interfere with judicial independence nor undermine constitutional rigidity.

Bickel and his interlocutors would have done well to have considered comparatively how judicial review shapes the politics of constitutional change. The countermajoritarian difficulty has dominated constitutional theory in this country for over half a century. The problem has had less purchase abroad because constitutional courts are subject to greater political oversight than they are in the United States. The experience of the United States teaches us that courts can become a dangerous branch if they lack efficacious mechanisms of democratic control. The experience of Europe and Canada teaches us that by ensuring that democratic majorities have some power over either the make-up of constitutional courts or over their decisions, courts do a better job of ameliorating political conflict. In short, the countermajoritarian difficulty dissolves when judicial review is democratized so that courts cannot be counterconstitutional actors.