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## Mapping Comparative Judicial Review

Miguel Schor

*Suffolk University Law School*

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# MAPPING COMPARATIVE JUDICIAL REVIEW

MIGUEL SCHOR\*

In that Empire, the craft of Cartography attained such Perfection that the Map of a Single province covered the space of an entire City, and the Map of the Empire itself an entire Province. In the course of Time, these Extensive maps were found somehow wanting, and so the College of Cartographers evolved a Map of the Empire that was of the same Scale as the Empire and that coincided with it point for point. Less attentive to the Study of Cartography, succeeding Generations came to judge a map of such Magnitude cumbersome, and, not without Irreverence, they abandoned it to the Rigours of sun and Rain. In the western Deserts, tattered Fragments of the Map are still to be found, Sheltering an occasional Beast or beggar; in the whole Nation, no other relic is left of the Discipline of Geography.<sup>1</sup>

## I. INTRODUCTION

Comparative scholars have long been drawn to the possibility of mapping the world's legal systems.<sup>2</sup> Maps, after all, are used to conceptualize the world. Similarly, scholars believe that order can be brought to the profusion of laws that populate the world by classifying and organizing them into families. Taxonomies, it is thought, facilitate the task of transferring laws between nations.<sup>3</sup> The problem with taxonomic

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\* Associate Professor of Law, Suffolk University Law School. I would like to thank Mary Sarah Bilder, Beau Breslin, Daniel Brinks, Brannon Denning, Adam Dodek, Tom Ginsburg, David Law, Patrick Shin, Mathias W. Reimann, Jacqueline E. Ross, Gordon Silverstein, Aviam Soifer, James Tully, Mark Tushnet, Neil Walker, and Peer Zumbansen for their thoughtful comments and suggestions. I would also like to thank the participants at the Law and Society Conference, Humboldt University, Berlin, Germany, July 25–28, 2007; the AALS Conference on International Law, Vancouver, Canada, June 17–20, 2007; the Constitutionalism Seminar, Institute for Constitutional Studies, George Washington University Law School, Washington, D.C., June 11–17, 2007; the New England Political Science Association Meeting, Newton, MA, April 28, 2007; the Second Osgoode Constitutional Law Roundtable, Osgoode Hall Law School, York University, Toronto, Canada, February 24, 2007; and the Second Annual Michigan-Illinois Comparative Law Workshop, Champaign-Urbana, IL, February 9–10, 2007, for their comments and suggestions.

1. J.A. Suárez Miranda, *Travels of Praiseworthy Men* (1658), reprinted in JORGE LUIS BORGES, *A UNIVERSAL HISTORY OF INFAMY* 141 (Norman Thomas di Giovanni trans., 1975).

2. WILLIAM TWING, *GLOBALIZATION AND LEGAL THEORY* 136–73 (2000).

3. Ugo Mattei, *Three Patterns of Law: Taxonomy and Change in the World's Legal Systems*, 45 *AM. J. COMP. L.* 5, 6–9 (1997).

approaches to comparative law, however, is that they obscure the tension between representing reality and orienting the user that maps ineluctably present.<sup>4</sup> Those tensions, moreover, are a rich source of scholarly inquiry. If a map that perfectly depicted reality were possible, it might make a good story but would be of little use in organizing the world of comparative judicial review.

Rather than seek to depict and classify the profusion of constitutional courts that populate the world,<sup>5</sup> this Article argues that a different type of map is needed that focuses on orienting the user.<sup>6</sup> This Article provides a map of how scholars conceptualize comparative judicial review by exploring the questions they ask and assessing the answers they provide. Maps tell us not only something about the world they purport to conceptualize but also something about the scholarly imagination. The problems that drive comparative inquiry are, after all, conceptual rather than geographical.

Methodological concerns have long been the stock in trade of comparative law. Perhaps no field of legal inquiry faces deeper unresolved methodological problems.<sup>7</sup> A distinct genre of scholarship has arisen that bewails the methodological issues that afflict the field.<sup>8</sup> The sheer volume of scholarship written on methodology attests to a deep underlying unease as to what it is that scholars do when they do comparative law.<sup>9</sup> The

4. Boaventura de Sousa Santos, *Law: A Map of Misreading. Toward a Postmodern Conception of Law*, 14 J.L. & SOC'Y 279, 282–86 (1987).

5. Dr. Ann Mavčič, Constitutional/Judicial Review Around the World, <http://www.concourts.net/comparison.php> (last visited Mar. 5, 2008) (providing one attempt to map and classify the world's constitutional courts).

6. ANNE-MARIE SLAUGHTER, *A NEW WORLD ORDER* 15–27 (2004) (arguing similarly that we need new conceptual maps to deal with the issues raised by globalization).

7. Martin Shapiro's observations are acute:

I think it is fair to say that comparative law had been a somewhat disappointing field. For the most part it has consisted of showing that a certain procedural or substantive law of one country is similar to or different from that of another. Having made the showing, no one knows quite what to do next.

MARTIN SHAPIRO, *COURTS: A COMPARATIVE AND POLITICAL ANALYSIS* vii (1981).

8. Annelise Riles, *Wigmore's Treasure Box: Comparative Law in the Era of Information*, 40 HARV. INT'L L.J. 221, 224 (1999) (noting that a "collective crisis of methodological confidence is something of a defining genre of comparative legal scholarship, as each commentator outdoes the next with dire critiques of the field and timid solutions for its reconfiguration").

9. Comparative public law scholars also write about methodology, albeit less extensively than do their private comparative law brethren. See, e.g., John Bell, *Comparing Public Law*, in *COMPARATIVE LAW IN THE 21ST CENTURY* 235 (Andrew Harding & Esin Orucu eds., 2002); *DEFINING THE FIELD OF COMPARATIVE CONSTITUTIONAL LAW* (Vicki C. Jackson & Mark Tushnet eds., 2002); Günter Frankenberg, *Comparing Constitutions: Ideas, Ideals, and Ideology—Toward a Layered Narrative*, 4 INT'L J. CONST. L. 439 (2006); Ran Hirschl, *The Question of Case Selection in Comparative Constitutional Law*, 53 AM. J. COMP. L. 125 (2005); *THE MIGRATION OF*

conclusion, therefore, uses the scholarly map developed in this Article to offer a brief assessment of how scholars should do comparative constitutional law.

The foundational question scholars ask is about institutional emergence. Constitutional judicial review emerged in the United States and exploded in importance after World War II. Polities throughout the world sought to tame democracy by fashioning courts with the power to enforce entrenched bills of rights.<sup>10</sup> Part II explores the tension between historical and political accounts of this global transformation. This Article argues that theories which seek to explain the worldwide expansion of judicial review by reducing this phenomenon to the political calculus of elites fail to appreciate the complexity of the historical processes that led to the flowering of judicial review. There is little doubt that elites play an important role in the emergence of institutions.<sup>11</sup> The late twentieth century, however, witnessed an explosion in citizen demands for democracy and for the entrenchment of rights throughout the globe.<sup>12</sup> The construction of judicial review, in short, rests on both the short-term calculations of political actors and on long-term social changes.

One consequence of this global transformation is that some democratic diversity has been lost. Parliamentary supremacy is now a critically endangered constitutional species as many of the last holdouts succumbed to judicial review.<sup>13</sup> Part III examines the consequences of this loss of institutional diversity. The really big question scholars ask is whether the

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CONSTITUTIONAL IDEAS 1 (Sujit Choudry ed., 2006); Cheryl Saunders, *The Use and Misuse of Comparative Constitutional Law*, 13 *IND. J. GLOBAL LEGAL STUD.* 37 (2006); MARTIN SHAPIRO & ALEC STONE SWEET, *ON LAW, POLITICS, & JUDICIALIZATION* 1 (2002); Mark Tushnet, *Comparative Constitutional Law*, in *THE OXFORD HANDBOOK OF COMPARATIVE LAW* 1225 (Mathias Reimann & Reinhard Zimmerman eds., 2006); and Mark Tushnet, *The Possibilities of Comparative Constitutional Law*, 108 *YALE L.J.* 1225 (1999).

10. *THE GLOBAL EXPANSION OF JUDICIAL POWER* (C. Neal Tate & Torbjörn Vallinder eds., 1995), and Tom Ginsburg, *The Global Spread of Constitutional Review*, in *OXFORD HANDBOOK OF LAW AND POLITICS* (Keith Whittington ed., forthcoming 2008).

11. MERILEE S. GRINDLE, *AUDACIOUS REFORMS: INSTITUTIONAL INVENTION AND DEMOCRACY IN LATIN AMERICA 201–18* (2000) (arguing that elites played a key role in the decision to decentralize power in Venezuela, Bolivia, and Argentina in the 1980s).

12. MARGARET E. KECK & KATHRYN SIKKINK, *ACTIVISTS BEYOND BORDERS: ADVOCACY NETWORKS IN INTERNATIONAL POLITICS* 84 (1998) (noting the important role human rights organizations play in shaming governments to improve their human rights records), and LYNN HUNT, *INVENTING HUMAN RIGHTS: A HISTORY* 34 (2007) (arguing that human rights rest on long-term changes whereby “ordinary people” gained “new understandings” that enabled them to empathize with other human beings).

13. Mark Tushnet, *New Forms of Judicial Review and the Persistence of Rights and Democracy-Based Worries*, 38 *WAKE FOREST L. REV.* 813, 815 (2003) (noting the demise of the “Westminster model of parliamentary supremacy”).

global expansion of judicial review has positive or negative implications for democracy.

Scholarly reaction is sharply split between “liberal enthusiasm” and “democratic dismay.”<sup>14</sup> If scholarly camps could be reduced to bumper stickers, optimistic accounts<sup>15</sup> would read: “Don’t let politicians mess with the Constitution.” Pessimistic accounts, on the other hand, stress the loss in democratic self-governance entailed by the adoption of judicial review.<sup>16</sup> The bumper sticker for the pessimists would read: “Don’t let judges mess with the people’s Constitution.”

This Article argues that both camps fail to adequately grapple with how courts facilitate or erode the values needed for democracy to survive for the long haul. Both camps also draw judicial review with too broad a brush and ignore important variations in the political accountability of courts.<sup>17</sup> Some constitutional courts are more accountable than others and nearly all constitutional courts are more accountable than the United States Supreme Court. The variation in judicial review illustrates that institutions are transformed when they spread across national boundaries.<sup>18</sup> When judicial review expanded throughout the world, the U.S. model of weak rules of political accountability was largely rejected in favor of stronger mechanisms of political accountability for constitutional courts.<sup>19</sup>

14. Lisa Hilbink, *Beyond Manicheism: Assessing the New Constitutionalism*, 65 MD. L. REV. 15, 15 (2006).

15. See, e.g., Bruce Ackerman, *The Rise of World Constitutionalism*, 83 VA. L. REV. 771, 772 (1997); MAURO CAPPELLETTI, *THE JUDICIAL PROCESS IN COMPARATIVE PERSPECTIVE* 191 (1989); RONALD DWORKIN, *A BILL OF RIGHTS FOR BRITAIN: WHY BRITISH LIBERTY NEEDS PROTECTING* (1990); Louis Favoreu, *Constitutional Review in Europe*, in *CONSTITUTIONALISM AND RIGHTS: THE INFLUENCE OF THE UNITED STATES CONSTITUTION ABROAD* 38, 58–59 (Louis Henkin & Albert J. Rosenthal eds., 1989); HERMAN SCHWARTZ, *THE STRUGGLE FOR CONSTITUTIONAL JUSTICE IN POST-COMMUNIST EUROPE* 248 (2000). Michael Corrado’s recent casebook on comparative judicial review also looks positively on the demise of parliamentary supremacy. MICHAEL LOUIS CORRADO, *COMPARATIVE CONSTITUTIONAL REVIEW: CASES AND MATERIALS* ix (2005) (“If the book has a theme, it is the moving nature of the subject matter.”).

16. ROBERT BORK, *COERCING VIRTUE: THE WORLDWIDE RULE OF JUDGES* 15 (2003); MARY ANN GLENDON, *RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE* 6 (1991); RAN HIRSCHL, *TOWARDS JURISTOCRACY: THE ORIGINS AND CONSEQUENCES OF THE NEW CONSTITUTIONALISM* 214 (2004); LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* 232–35 (2004); MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* (2003); Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 YALE L. J. 1346 (2006).

17. Cf. PRESIDENTIALISM AND DEMOCRACY IN LATIN AMERICA 3–4 (Scott Mainwaring & Matthew Soberg Shugart eds., 1997) (criticizing scholars who fail to take institutional variation into account when analyzing presidentialism in Latin America).

18. BENEDICT ANDERSON, *IMAGINED COMMUNITIES: REFLECTIONS ON THE ORIGIN AND SPREAD OF NATIONALISM* 155–56 (1996) (arguing that political templates change when one nation copies them from another).

19. Miguel Schor, *Squaring the Circle: Democratizing Judicial Review and the Counter-*

Institutions are not bodily transplanted as some scholars urge,<sup>20</sup> but undergo important transformations when they spread across borders since accommodations must be reached with local power holders.<sup>21</sup>

While judicial review has not been transplanted anywhere, it has proliferated throughout the globe. The world's polities exhibit a riot of institutional diversity that is the direct consequence of the political domestication of judicial review. Part IV examines the two very different tacks scholars take in seeking to explain the rich diversity of judicial review. Academic lumpers look at the complexity of the social world and see important commonalities in judicial review throughout the world. Splitters, on the other hand, explore why judicial review has taken divergent paths in different polities. Both lumpers and splitters, however, are engaged in a common enterprise that seeks to lay bare the foundations of constitutionalism.

## II. THE GLOBAL TRANSFORMATION

“[W]hy do so many people, in so many parts of the world entrust so much of their governance to judges?”<sup>22</sup>

Judicial review began paradoxically in a country that failed to write this power into its constitution.<sup>23</sup> The origin of judicial review in the United States is not well understood because it has become the stuff of myth.<sup>24</sup> *Marbury v. Madison* is remembered today as establishing judicial

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*Constitutional Difficulty*, 16 MINN. J. INT'L L. 61, 70–72 (2007).

20. ALAN WATSON, *LEGAL TRANSPLANTS: AN APPROACH TO COMPARATIVE LAW* 22 (1974).

21. YVES DEZALAY & BRYANT G. GARTH, *THE INTERNATIONALIZATION OF PALACE WARS: LAWYERS, ECONOMISTS, AND THE CONTEST TO TRANSFORM LATIN AMERICAN STATES* 5 (2002) (“[W]e wish to renew attention to what the existing critics and the proponents [of law and development] tend to neglect: the place of law in specific national contexts to which the law is exported or imported.”); Miguel Schor, *Constitutionalism Through the Looking Glass of Latin America*, 41 TEX. INT'L L.J. 1, 27–30 (2006) (arguing that the desire of elites to deal with the problem of underdevelopment in Latin America transformed constitutions so that they facilitated dictatorship rather than republican government).

22. Martin Shapiro, *The Success of Judicial Review*, in *CONSTITUTIONAL DIALOGUES IN COMPARATIVE PERSPECTIVE* 193, 218 (Sally Kenney et al. eds., 1999).

23. Although any post-1787 constitution maker would have to decide whether to incorporate judicial review explicitly into the written constitution, this design decision has not proven dispositive. Judicial review is clearly something in the post-1787 constitutional air and it has proven difficult to prevent courts from assuming this power. The failure to adopt a written constitution did not stop the Israeli Supreme Court from concluding that it had the power of judicial review. CA 6821/93 United Mizrahi Bank Ltd. v. Migdal Village [1995] IsrSC 49(4) 221. The failure to adopt a bill of rights did not prevent the Australian High Court from finding that there were rights based limits on Parliament's power. *Australian Capital Television v. Commonwealth of Australia* (1992) 177 C.L.R. 106.

24. Barry Friedman, *The Myths of Marbury*, in *ARGUING MARBURY V. MADISON* 65 (Mark Tushnet ed., 2005).

review and as the fountainhead of judicial protection of individual rights.<sup>25</sup> Neither belief is well founded. *Marbury* did not found judicial review because the practice was well established before the case was decided,<sup>26</sup> and because the framers understood that the Court would exercise this power.<sup>27</sup> *Marbury* did not become a famous case, moreover, until the latter part of the nineteenth century when the Supreme Court first began to flex its power of judicial review.<sup>28</sup> When the Court came under attack during the *Lochner* era, “[p]roponents of judicial review . . . seized upon the *Marbury* decision and its author, Chief Justice John Marshall, to legitimize their claims for expansive conception of the doctrine.”<sup>29</sup> The case grew in importance during the twentieth century as the Court increasingly cited it in controversial decisions to buttress its legitimacy. Nor is *Marbury* the source of judicial protection of rights. The Bill of Rights was, after all, a constitutional afterthought designed to win support for the Constitution.<sup>30</sup> Constitutional rights were not protected by the federal government against state encroachment until the Fourteenth Amendment was enacted in 1868.<sup>31</sup> The Supreme Court did not seriously take up the invitation to enforce individual rights until after World War II.<sup>32</sup>

Judicial review was designed to knit the nation together by counterbalancing the pressures exerted by federalism. The framers understood that the national government needed a mechanism that would

25. Alexander Bickel played an important role in perpetuating this myth by claiming that Marshall single handedly fashioned judicial review out of the “constitutional vapors” in *Marbury*. ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 1–4 (1962).

26. Mary Sarah Bilder, *The Corporate Origins of Judicial Review*, 116 *YALE L.J.* 502, 504 (2006) (arguing that judicial review “arose from a longstanding English corporate practice under which a corporation’s ordinances were reviewed for repugnancy to the laws of England”); William M. Treanor, *Judicial Review Before Marbury*, 58 *STAN. L. REV.* 455, 457 (2005) (arguing that judicial review was well established before *Marbury* was decided).

27. Jack N. Rakove, *The Origins of Judicial Review: A Plea for New Contexts*, 49 *STAN. L. REV.* 1031, 1047 (1997).

28. Davison M. Douglas, *The Rhetorical Uses of Marbury v. Madison: the Emergence of a “Great Case,”* 38 *WAKE FOREST L. REV.* 375 (2003).

29. *Id.* at 377.

30. AKHIL REED AMAR, *AMERICA’S CONSTITUTION: A BIOGRAPHY* 315–32 (2005); STANLEY ELKINS & ERIC MCKITRICK, *THE AGE OF FEDERALISM: THE EARLY AMERICAN REPUBLIC, 1788–1800* 58–64 (1993).

31. State courts, on the other hand, could and did play a role in enforcing the federal bill of rights against state government. Jason Mazzone, *The Bill of Rights in the Early State Courts*, *MINN. L. REV.* (forthcoming 2008).

32. MARY L. DUDZIAK, *COLD WAR CIVIL RIGHTS: RACE AND THE IMAGE OF AMERICAN DEMOCRACY* 182 (2000); CHARLES R. EPP, *THE RIGHTS REVOLUTION: LAWYERS, ACTIVISTS, AND SUPREME COURTS IN COMPARATIVE PERSPECTIVE* 45–69 (1998); ROBERT G. MCCLOSKEY & SANFORD LEVINSON, *THE AMERICAN SUPREME COURT* (4th ed. 2004).

bind the states to the Constitution. The Supreme Court and the Supremacy Clause were intended to prevent centrifugal forces from tearing the new nation apart: “[u]ndisputedly, judicial review, conceived as a mechanism for federalism, was palpably and unequivocally a fundamental element of the original intention of the Constitution with the Supremacy Clause as its trumpet.”<sup>33</sup> The Supreme Court was the “central government’s first line of defense against the excesses of individual states.”<sup>34</sup> The American experience suggests an affinity between judicial review and federalism. It is no accident that courts gain power when authority is divided. The more important lesson, though, is that “clusters of institutions [tend] to appear together throughout history” and the “relative success of one institution may be intimately tied to the presence and success of another, partner institution.”<sup>35</sup>

The United States was not the only new nation in the Americas to experiment with written constitutions and judicial review. Most accounts of the rise of judicial review ignore the experience of Latin America because it is difficult to construct a triumphalist narrative for *Marbury* abroad given the difficulties the region experienced in instituting democracy.<sup>36</sup> Once Spain’s colonies gained independence, they unsurprisingly looked north for constitutional models. The prestige that the United States enjoyed made an American-style constitution with judicial review a compelling model for constitution writers to emulate throughout the region.<sup>37</sup> As a consequence, the U.S. model of diffuse review, which does not rely on specialized courts to exercise judicial review, proved more successful in Latin America than elsewhere.<sup>38</sup>

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33. Rakove, *supra* note 27, at 1047.

34. AMAR, *supra* note 30, at 211.

35. CINDY SKACH, BORROWING CONSTITUTIONAL DESIGNS: CONSTITUTIONAL LAW IN WEIMAR GERMANY AND THE FRENCH FIFTH REPUBLIC 128 (2005).

36. The historical experience of Latin America has unfortunately been marginalized from scholarly treatment of constitutionalism, nationalism, democratization, and social science theory building. Schor, *Constitutionalism*, *supra* note 21; ANDERSON, *supra* note 18; DEMOCRACY IN DEVELOPING COUNTRIES: LATIN AMERICA (Larry Diamond et al. eds., 1999); THE OTHER MIRROR: GRAND THEORY THROUGH THE LENS OF LATIN AMERICA (Miguel Centeno & Fernando López-Alves eds., 2001).

37. Robert J. Kolesar, *North American Constitutionalism and Spanish America: A Special Lock Ordered by Catalogue which Arrived with the Wrong Instruction and No Keys?*, in AMERICAN CONSTITUTIONALISM ABROAD: SELECTED ESSAYS IN COMPARATIVE CONSTITUTIONAL HISTORY 41 (George A. Billios ed., 1990); Keith S. Rosenn, *The Success of Constitutionalism in the United States and its Failure in Latin America: an Explanation*, 22 INTER-AMERICAN L. REV. 4, 24 (1990); Schor, *Constitutionalism*, *supra* note 21.

38. ALLAN R. BREWER-CARÍAS, JUDICIAL REVIEW IN COMPARATIVE LAW 156–67 (1989); Patricio Navia & Julio Ríos, *The Constitutional Adjudication Mosaic of Latin America*, 38 COMP. POL. STUD. 189–90 (2005).



Although judicial review failed to preserve constitutions from centrifugal forces in the region,<sup>39</sup> it did play a role in stabilizing regimes whose democratic credentials were questionable.<sup>40</sup> The Latin American experience illustrates that even borrowed institutions, such as written constitutions and judicial review, may function when planted in alien soil, albeit in a fashion that was not envisioned by their designers. The governments of the region were highly centralized,<sup>41</sup> however, which meant that courts were marginalized from power. The power of courts to ameliorate political conflict diminishes when authority is concentrated.

The spread of judicial review before World War II outside of Latin America also supports the thesis that federalism is positively correlated with the success of judicial review. Politics where judicial review was effective before World War II—Austria,<sup>42</sup> Canada,<sup>43</sup> Switzerland,<sup>44</sup> and the United States<sup>45</sup>—were federal republics. Federalism was an important condition for judicial review to flourish, because the member states of a federal government had an interest in ensuring that there is an entity with the power to police the bargain they made. In short, federalism drove the early expansion of judicial review, not concerns over effectuating rights.<sup>46</sup>

The Second World War was a watershed in the expansion of judicial review for two reasons. First, the nations of continental Europe adopted judicial review after having long resisted granting courts this power because it was thought to be incompatible with parliamentary supremacy.<sup>47</sup> Although there were written constitutions and bills of rights

39. The nineteenth century was highly tumultuous in Latin America as dictators or “caudillos” rather than constitutions provided the true source of power. DAVID BUSHNELL & NEILL MACAULEY, *THE EMERGENCE OF LATIN AMERICA IN THE NINETEENTH CENTURY* (1994).

40. Pilar Domingo, *Judicial Independence: The Politics of the Supreme Court in Mexico*, 32 J. LATIN AM. STUD. 705 (2000); Jonathan M. Miller, *The Authority of a Foreign Talisman: A Study of U.S. Constitutional Practice as Authority in Nineteenth Century Argentina and the Argentine Elite’s Leap of Faith*, 46 AM. U. L. REV. 1484 (1997); Matthew C. Mirow, *Marbury in Mexico: Judicial Review’s Precocious Southern Migration*, 35 HASTINGS CONST. L.Q. (forthcoming 2008).

41. BRIAN LOVEMAN, *THE CONSTITUTION OF TYRANNY: REGIMES OF EXCEPTION IN SPANISH AMERICA* (1993) and CLAUDIO VÉLIZ, *THE CENTRALIST TRADITION OF LATIN AMERICA* (1980).

42. Stanley L. Paulson, *Constitutional Review in the United States and Austria: Notes on the Beginnings*, 16 RATIO JURIS 223 (2003); Hans Kelsen, *Judicial Review of Legislation: A Comparative Study of the Austrian and American Constitution*, 4 J. POL. 183 (1942).

43. Jennifer Smith, *The Origins of Judicial Review in Canada*, 16 CAN. J. POL. SCI. 1 (1983).

44. Mauro Cappelletti & John Clarke Adams, *Judicial Review of Legislation: European Antecedents and Adaptations*, 79 HARV. L. REV. 1207–08 (1966) and Michael Crommelin, *Intergovernmental Relations: Dispute Resolution in Federal Systems*, 53 INT’L SOC. SCI. J. 139 (2001).

45. Rakove, *supra* note 27.

46. SHAPIRO & STONE SWEET, *supra* note 9, at 149–83; Ginsburg, *supra* note 10.

47. Mauro Cappelletti, *Repudiating Montesquieu? The Expansion and Legitimacy of “Constitutional Justice,”* 35 CATH. U. L. REV. 191 (1985) and TOM GINSBURG, *JUDICIAL REVIEW IN NEW DEMOCRACIES: CONSTITUTIONAL COURTS IN ASIAN CASES 1–2* (2006).

in Europe before World War II, they were not judicially enforceable.<sup>48</sup> Parliament represented the will of the people, and could not, therefore, be checked by the judiciary. The “constitutional revolution” that occurred after the war came from the belief that constitutions “need judicial machinery to be made effective.”<sup>49</sup> Since popularly elected institutions failed to prevent the rise of tyranny, it was hoped that an entrenched constitution safeguarded by a constitutional court would better safeguard democracy.

Second, rights, rather than federalism or separation of power concerns, became the driving force behind the expansion of judicial review.<sup>50</sup> The most important post-war constitution is Germany’s Basic Law, and it has proven highly influential with scholars<sup>51</sup> and constitution designers.<sup>52</sup> The architecture of Germany’s Constitution exhibits a dramatic break with the U.S. constitution in terms of the role that rights play. Rights no longer tag along behind the organic powers of government but are placed prominently at the beginning of Germany’s Basic Law. Article 1 provides: “[h]uman dignity shall be inviolable. To respect and protect it shall be the duty of all state authority.”<sup>53</sup> Although the term “dignity” lacks a clear, undisputed meaning, modern jurists see it as the cornerstone of all other rights.<sup>54</sup> The key elements of German constitutionalism are

the binding force of basic rights, the protection of the free democratic order, the renunciation of any constitutional amendment

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48. Favoreu, *supra* note 15.

49. Cappelletti, *supra* note 47, at 6.

50. Donald L. Horowitz, *Constitutional Courts: a Primer for Decision Makers*, 17 J. DEMOCRACY 127 (2006) (noting that judicial review has grown in importance “largely to enforce guarantees of human rights”). The importance of rights in the construction of the post-war order is evidenced by the successful struggle to incorporate rights into the United Nations charter. PAUL GORDON LAUREN, *THE EVOLUTION OF HUMAN RIGHTS: VISIONS SEEN* 168–93 (2d ed. 2003). For a more skeptical view of the role of rights in driving the expansion of judicial review, see Shapiro, *supra* note 22. There are outliers, however, where the expansion of judicial power after World War II was not driven by a concern for rights. The adoption of judicial review in France, for example, was originally driven by separation of power concerns in France’s new semi-presidential form of government. JOHN S. BELL & L. NEVILLE BROWN, *FRENCH ADMINISTRATIVE LAW* 9 (1998). The French Constitutional Court soon asserted, however, that it had the power to effectuate rights that could be implied in the French Constitution of 1958. DC decision no. 71-41 DC, July 16, 1971 (Fr.); ALEX STONE, *THE BIRTH OF JUDICIAL POLITICS IN FRANCE* 23 (1992).

51. Bruce Ackerman, *The New Separation of Powers*, 113 HARV. L. REV. 634, 636 (2000) (arguing that the German frame of government should be a model for the world).

52. The German model of judicial review, which relies on a specialized or a constitutional court, has proven very influential in new democracies. GINSBURG, *supra* note 47, at 7–9.

53. Grundgesetz für die Bundesrepublik Deutschland [GG] (federal constitution) art. 1(1) (F.R.G.).

54. Giovanni Boggetti, *The Concept of Human Dignity in European and U.S. Constitutionalism*, in *EUROPEAN AND U.S. CONSTITUTIONALISM* 75 (G. Nolte ed., 2005).

that would erode the essential principles of the political system . . . or the concept of human dignity laid down in Article 1, and the special role of the Federal Constitutional Court as guardian of the constitutional order.<sup>55</sup>

The German Constitutional Court, in short, was given the job of protecting rights to cement the transition to democracy. The influence of the German constitutional experience helped move rights to the center of the judicial agenda after World War II.

The last two decades of the twentieth century witnessed dramatic examples of liberalization, primarily in Eastern Europe and Latin America.<sup>56</sup> It also witnessed the expansion of judicial review from the United States and Western Europe to democracies that had long resisted constitutionalized rights<sup>57</sup> and to corners of the globe with troubled human rights records.<sup>58</sup> Reformers throughout the world hoped that constitutionalized rights would prove effective in implementing democratic transitions and dealing with authoritarian legacies.<sup>59</sup> Academics brushed up and modernized the notion of the rule of law to incorporate constitutional judicial review and argued that exporting the

55. Donald P. Kommers, *German Constitutionalism: A Prolegomenon*, 40 EMORY L.J. 837, 839 (1991).

56. SAMUEL P. HUNTINGTON, *THE THIRD WAVE: DEMOCRATIZATION IN THE LATE TWENTIETH CENTURY* (1991) and GUILLERMO O'DONNELL & PHILIPPE C. SCHMITTER, *TRANSITIONS FROM AUTHORITARIAN RULE: TENTATIVE CONCLUSIONS ABOUT UNCERTAIN DEMOCRACIES* (1986).

57. Three of the last bastions of parliamentary supremacy—Canada, New Zealand, and the United Kingdom—adopted bills of rights near the end of the twentieth century but sought to do so in a manner that preserves a role for the legislature in construing rights. Stephen Gardbaum, *The New Commonwealth Model of Constitutionalism*, 49 AM. J. COMP. L. 709 (2001). Parliamentary supremacy in Australia, on the other hand, was undermined via judicial interpretation. JASON L. PIERCE, *INSIDE THE MASON COURT REVOLUTION: THE HIGH COURT OF AUSTRALIA TRANSFORMED 157–89* (2006).

58. Nathan J. Brown, *Judicial Review and the Arab World*, 9 J. DEMOCRACY 85 (1998); Javier A. Couso, *The Politics of Judicial Review in Chile in the Era of Democratic Transition, 1990–2002*, 10 DEMOCRATIZATION 70, 71 (2003); Jodi S. Finkel, *Judicial Reform as an 'Insurance Policy' in Mexico in the 1990s: A Supreme Court Willing and Able to Enter the Political Fray*, 47 LATIN AM. POL. & SOC'Y. 87 (2005); GINSBURG, *supra* note 47; Matias Iaryczower et al., *Judicial Independence in Unstable Environments, Argentina 1935–1998*, 46 AM. J. POL. SCI. 699 (2002); Clark B. Lombardi & Nathan J. Brown, *Do Constitutions Requiring Adherence to Sharia Threaten Human Rights? How Egypt's Constitutional Court Reconciles Islamic Law with the Liberal Rule of Law*, 21 AM. U. INT'L L. REV. 379 (2006); Rett Ludwikowski, *Constitutionalization of Human Rights in Latin America and the Countries of the Former Soviet Union*, 33 GA. J. INT'L & COMP. L. 6 (2004); TAMIR MOUSTAFA, *THE STRUGGLE FOR CONSTITUTIONAL POWER: LAW, POLITICS, AND ECONOMIC DEVELOPMENT IN EGYPT* 19 (2007); H. Kwasi Prempeh, *Marbury in Africa: Judicial Review and the Challenge of Constitutionalism in Contemporary Africa*, 80 TUL. L. REV. 1240, 1241 (2006); Ángel R. Oquendo, *The Solitude of Latin America: The Struggle for Rights South of the Border* (draft article); S.P. Sathe, *Judicial Activism: The Indian Experience*, 6 WASH. U. J.L. & POL'Y 39 (2001); SCHWARTZ, *supra* note 15.

59. RUTI G. TEITEL, *TRANSITIONAL JUSTICE* 198–210 (2000).

rule of law would cure the developing world's manifest ills.<sup>60</sup> The expansion of judicial review after World War II, in short, suggests a strong affinity between judicial review and human rights.

Scholars disagree, however, on why the “world seems to have been seized by a craze for constitutionalization and judicial review.”<sup>61</sup> One view discounts the importance of rights and stresses the role of elites who fear losing political power and favor, therefore, empowering courts as a second best choice in an uncertain political environment.<sup>62</sup> The elite-centered account comes in two flavors, one darkly realist, the other more democratically hopeful. Ran Hirschl's *Toward Juristocracy: The Origins and Consequences of the New Constitutionalism* is darkly realist.<sup>63</sup> He argues that elites are threatened by demands from below by groups long marginalized from power. Elites favor empowering courts because they fear democracy and believe that courts will protect their interests. The “craze” for judicial review is the “result of a strategic tripartite pact between hegemonic, yet increasingly threatened, political elites seeking to insulate their policy preferences from the vicissitudes of democratic politics; economic elites who share a commitment to free markets . . .; and supreme courts seeking to enhance their symbolic power.”<sup>64</sup>

Tom Ginsburg's *Judicial Review in New Democracies: Constitutional Courts in Asian Cases* provides a democratically sunnier view of the role that elites play in empowering courts.<sup>65</sup> He agrees with Hirschl that elites favor judicial review when they fear losing power. Ginsburg's account is more democratically optimistic than Hirschl's because Ginsburg sees judicial review as a key building block in the construction of democracy.<sup>66</sup> In particular, polities are more likely to adopt judicial review when power is diffuse:

I argue that the answer to the question of why self-interested politicians would design a system of judicial review depends on the prospective power positions of constitutional designers in post-constitutional government . . . [b]y serving as an alternative forum in which to challenge governmental action, judicial review provides

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60. Miguel Schor, *The Rule of Law*, in 3 *ENCYCLOPEDIA OF LAW AND SOCIETY: AMERICAN AND GLOBAL PERSPECTIVES* 1329–33 (David S. Clark ed., 2007).

61. HIRSCHL, *supra* note 16.

62. GINSBURG, *supra* note 47; HIRSCHL, *supra* note 16.

63. HIRSCHL, *supra* note 16.

64. *Id.*

65. GINSBURG, *supra* note 47.

66. *Id.*

a form of insurance to prospective electoral losers during the constitutional bargain.<sup>67</sup>

Ginsburg calls this the insurance model of judicial review: the more diffuse political power is, the more likely a polity is to adopt judicial review.

Other scholars stress the role of ordinary citizens rather than elites in explaining the expansion of judicial review.<sup>68</sup> The citizen-oriented account also comes in two flavors: one stresses domestic factors, the other international factors. Charles Epp in *The Rights Revolution: Lawyers, Activists, and Supreme Courts in Comparative Perspective* observes that a number of polities began to articulate and protect individual rights in the sixties.<sup>69</sup> He argues that courts expanded their protection of rights because of pressure from below by citizens who engaged in “deliberate, strategic organizing.”<sup>70</sup> The rights revolution, moreover, is democratic as courts cannot make law without a stream of cases being brought for adjudication. Epp concludes “[t]he basic lesson of this study is that rights are not gifts: they are won through concerted collective action arising from both a vibrant civil society and public subsidy.”<sup>71</sup>

Heinz Klug in *Constituting Democracy: Law, Globalism, and South Africa's Political Representation* agrees with Epp that ordinary citizens play a key role in empowering courts but, unlike Epp, Klug stresses international factors.<sup>72</sup> White elites in South Africa favored judicial empowerment since they knew that they would lose political power in a democratic transition. Surprisingly, black South Africans, who were poised to gain political power, also supported the constitutionalization of rights. International human rights norms played a key role in mobilizing opposition to apartheid domestically and abroad, which explains the broad support given the new constitution and constitutional court. Although the decision to adopt a justiciable constitution would limit the power of political majorities in the newly constituted South Africa, it also contained a number of “mechanisms designed to address the legacy of apartheid. Among the mechanisms were constitutional protection for state policies of affirmative action; provisions for the restitution of land as well as specific

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67. *Id.* at 24–25.

68. EPP, *supra* note 32; HEINZ KLUG, *CONSTITUTING DEMOCRACY: LAW, GLOBALISM, AND SOUTH AFRICA'S POLITICAL REPRESENTATION* 12 (2000).

69. EPP, *supra* note 32.

70. *Id.* at 2.

71. *Id.* at 197.

72. KLUG, *supra* note 68.

protections for land reform; and also the introduction of socio-economic rights as justiciable rights.”<sup>73</sup> The creation of the South African Constitutional Court played an important role in the democratic transition as well. There was a shared faith that the judiciary would be an important player in “mediating the construction of a post-apartheid political order.”<sup>74</sup> Klug concludes that the “turn to judicial review involves a move towards the civilization of potentially unnegotiable conflicts.”<sup>75</sup>

The debate over the current “craze” in favor of judicial review reflects a wider debate over democratization. One view stresses the role of elites in crafting democracy.<sup>76</sup> The other view stresses long-term factors such as the rise of social classes that can demand democracy from below.<sup>77</sup> The elite-centered account argues that democracy emerges when elites first learn the “rules, practices, and the culture of competitive politics” before suffrage is widened.<sup>78</sup> Oligarchy today, democracy tomorrow works because “[t]olerance and mutual security are more likely to develop among a small elite sharing similar perspectives than among a large and heterogeneous collection of leaders representing social strata with widely varying goals, interests, and outlooks.”<sup>79</sup> Accounts that stress the importance of social structures, on the other hand, emphasize that democracy is the result of long-term factors. Economic development plays a key role as “industrialization transformed society in a fashion that empowered subordinate classes and made it difficult to politically exclude them.”<sup>80</sup> The key to democracy is a balance of social forces that facilitates the negotiation needed for democracy to work.

Perhaps the best attempt to synthesize the opposing views of how democracy is formed is Charles Tilly’s argument that democracy resembles a lake. Both are formed “in a variety of ways” and retain “traces of [their] singular history in the details of [their] current operation.”<sup>81</sup> The

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73. *Id.* at 124.

74. *Id.* at 179.

75. *Id.* at 180.

76. ROBERT A. DAHL, *POLYARCHY: PARTICIPATION AND OPPOSITION* 36 (1971); Larry Diamond et al., *Politics, Society, and Democracy in Latin America*, in *DEMOCRACY IN DEVELOPING COUNTRIES*, *supra* note 36, at 1; O’DONNELL & SCHMITTER, *supra* note 56.

77. SEYMOUR MARTIN LIPSET, *POLITICAL MAN: THE SOCIAL BASES OF POLITICS* 21 (1981); BARRINGTON MOORE, *SOCIAL ORIGINS OF DEMOCRACY AND DICTATORSHIP: LORD AND PEASANT IN THE MAKING OF THE MODERN WORLD* 3 (1966); ADAM PRZEWORSKI ET AL., *DEMOCRACY AND DEVELOPMENT: POLITICAL INSTITUTIONS AND WELL-BEING IN THE WORLD, 1950–1990* 13 (2000); DIETRICH RUESCHEMEYER ET AL., *CAPITALISM, DEVELOPMENT, AND DEMOCRACY* 12 (1992).

78. DAHL, *supra* note 76.

79. *Id.* at 37.

80. RUESCHEMEYER ET AL., *supra* note 77, at vii.

81. Charles Tilly, *Democracy is a Lake*, in *THE SOCIAL CONSTRUCTION OF DEMOCRACY, 1870–*

point is that democracy requires both the crafting of institutions and the construction of the attitudes needed to sustain democracy. The former are short-term processes whereas the latter are long-term. Elite-centered accounts posit that judicial review is the result of short-term factors such as bargaining. Citizen-oriented accounts, on the other hand, posit that judicial review rests on long-term, societal transformations. This Article argues that a combination of long-term and short-term factors is needed to produce healthy lakes, happy democracies, and successful judicial review. However judicial review emerges, it cannot be successful for the long-term without some form of separation of powers or alternation in power between different parties *and* citizen support for rights.

Although lakes, democracies, and judicial review are created in a number of ways, once formed they exhibit a number of important regularities that scholars can explore. Judicial review has become one of the institutional regularities that democracies exhibit. Democracies throughout the world have opted to judicialize constitutions. The really big question, therefore, is whether empowering courts to construe constitutions has a democratic pay-off.

### III. THE BIG QUESTION

[T]his much I think I do know—that a society so riven that the spirit of moderation is gone, no court *can* save; that a society where that spirit flourishes, no court *need* save; that in a society which evades its responsibility by thrusting upon the courts the nurture of that spirit, that spirit in the end will perish.<sup>82</sup>

With the demise of parliamentary supremacy, judicial review has (almost) conquered democracy. The really big question is what are the consequences of this global transformation. There are two competing views on the role of courts in a democracy that rest on different foundational myths. One view traces its intellectual lineage to the Warren Court, and particularly to *Brown v. Board of Education*, in painting a heroic picture of courts.<sup>83</sup> Judicial optimists look at the experience of

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1990 365 (George Reid Andrews & Herrick Chapman eds., 1995).

82. Learned Hand, *The Contribution of an Independent Judiciary to Civilization*, in *THE SPIRIT OF LIBERTY: PAPERS AND ADDRESSES OF LEARNED HAND* 155, 164 (Irving Dillard ed., 1942).

83. Ken I. Kersch, *The New Legal Transnationalism, The Globalized Judiciary, and the Rule of Law*, 4 WASH. U. GLOBAL STUD. L. REV. 345, 351–53 (2005); Lorraine E. Weinrib, *The Postwar Paradigm and American Exceptionalism*, in *THE MIGRATION OF CONSTITUTIONAL IDEAS* 84, 98–105 (Soujit Choudry ed., 2006).

newer, transitional democracies to argue that judicial review has an important democratic payoff. The competing view harkens back to the *Lochner* era when the Court sought to derail progressive reforms and takes a more jaundiced view of courts.<sup>84</sup> Judicial pessimists argue that constitutional courts weaken democracy by looking primarily at the record of older, consolidated democracies. Neither judicial optimists nor judicial pessimists, however, do a particularly good job of elucidating the complex relationship between judicial review and the construction or erosion of the societal attitudes that sustain democracy for the long haul.

Scholars who believe that courts play a heroic role in effectuating democracy draw their insights from democratic transitions. Mauro Cappelletti, for example, examined the democratic transitions that occurred after World War II to argue that courts play an important role in effectuating “constitutional justice.”<sup>85</sup> The nations of continental Europe drew on their “domestic experience of tyranny and oppression unchecked by law” to conclude that constitutions “need judicial machinery to be made effective.”<sup>86</sup> It is difficult to believe, however, that the lack of effective judicial machinery played an important role in Europe’s fall into totalitarianism.<sup>87</sup>

Judicial optimists are on stronger ground when they argue that courts can play a role in facilitating democratic transitions. Bruce Ackerman, for example, argues that the success of the German Constitutional Court flows from the sociological fact that the Basic Law has become a “central symbol of the nation’s break with its Nazi past.”<sup>88</sup> The transitions to democracy that occurred primarily in the last two decades of the twentieth century provide further grist for the judicial optimists’ mill. The difficulty that these new democracies are experiencing in consolidating democracy, however, has led to a more nuanced view of the role that constitutional courts play in constructing democracy. Herman Schwartz, for example, reprises Cappelletti’s themes in *The Struggle for Constitutional Justice in Post-Communist Europe* and concludes modestly that while constitutional courts cannot implement liberty, they can “help to maintain, nurture, and perhaps even to strengthen it.”<sup>89</sup>

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84. Sujit Choudry, *The Lochner Era and Comparative Constitutionalism*, 2 INT’L J. CONST. L. 56 (2004).

85. Cappelletti, *supra* note 47.

86. *Id.* at 6.

87. The institutional defects that plagued the form of semi-presidential government adopted by the Weimar Republic are much more likely the culprit of Hitler’s rise to power. SKACH, *supra* note 35.

88. Ackerman, *supra* note 15, at 778.

89. SCHWARTZ, *supra* note 15.



Judicial pessimists, on the other hand, draw their lessons from well-established, consolidated democracies.<sup>90</sup> The pessimists make three arguments: (1) institutional competence; (2) democratically suspect outcomes; and (3) democratic debilitation.

First, Jeremy Waldron argues vigorously that legislatures can do as good a job as courts in effectuating rights by examining parliamentary debates on liberalizing abortion, legalizing adult homosexual conduct, and abolishing capital punishment in the United Kingdom, Canada, Australia, and New Zealand.<sup>91</sup> He observes that the “quality of those debates . . . make nonsense of the claim that legislators are incapable of addressing such issues responsibly.”<sup>92</sup> Judges, on the other hand, are hampered in protecting rights because they must filter the moral and policy issues involved through the language found in bills of rights and precedent.

Second, Ran Hirschl observes that polities may have vigorous judicial protection of rights yet suffer from income inequality as “its influence on promoting progressive notions of distributive justice has been exaggerated.”<sup>93</sup> Issues of income and education are thought to “lie beyond the reach of constitutional rights as currently interpreted by national high courts.”<sup>94</sup> The United States, for example, has vigorous judicial review and “vast social and economic disparity” when compared to other advanced industrial nations. Norway and Sweden, on the other hand, enjoy an egalitarian “democracy while being less than enthusiastic (to put it mildly) about the American notions of rights and judicial review.”<sup>95</sup>

Third, Larry Kramer and Mark Tushnet worry that vigorous judicial review in the United States has undermined the societal attitudes needed to sustain democracy.<sup>96</sup> Kramer concludes that the United States has fallen from grace by contrasting the virtuous world of the founders where citizens were “responsible for interpreting fundamental law” with the current situation where citizens are marginalized in construing and

90. Waldron looks at the performance of legislatures in the Commonwealth democracies. Waldron, *supra* note 16. Hirschl examines primarily polities that adopted judicial review for “no apparent reason” (i.e., not as part of a democratic transition). HIRSCHL, *supra* note 16. Kramer and Tushnet are concerned primarily with the United States. KRAMER, *supra* note 16; TUSHNET, *supra* note 16.

91. Waldron, *supra* note 16, at 1345.

92. *Id.* at 1345–46. Other scholars have argued, for example, that Congress has done a better job than the Supreme Court in effectuating rights. Stephen Griffin, *Judicial Supremacy and Equal Protection in a Democracy of Rights*, 4 U. PA. J. CONST. L. 281 (2001); Rebecca E. Zietlow, *To Secure These Rights: Congress, Courts and the 1964 Civil Rights Act*, 57 RUTGERS L. REV. 945 (2005).

93. HIRSCHL, *supra* note 16, at 218.

94. *Id.*

95. *Id.* at 220.

96. KRAMER, *supra* note 16; TUSHNET, *supra* note 16.

effectuating the Constitution because the Supreme Court has usurped that power.<sup>97</sup> Tushnet wants to do away with judicial review because it hampers the development of a robust constitutional culture where citizens can discuss the values that constitute the nation in the ordinary venues of politics.

The core of the judicial pessimists' argument is that courts are not needed to effectuate rights and lack democratic legitimacy.<sup>98</sup> There are no signs, however, that the tide in favor of judicial review is rolling back.<sup>99</sup> Democracy, for better or worse, is stuck with judicial review. The argument that courts are anti-democratic while legislatures represent the people, moreover, paints with too broad a brush. Courts are more democratic than the pessimists believe for two reasons. First, courts cannot make policy unless citizens mobilize to effectuate rights.<sup>100</sup> Courts without a substratum of citizen support are powerless. Second, the example of the United States Supreme Court plays too large a role in the judicial pessimists' imagination. Perhaps no court is as free of democratic constraints as is the Supreme Court. The framers failed to take into account the problem of political accountability when designing the Court because they mistakenly thought that courts do not make policy. After all, there was little to fear from the least dangerous branch as it exercised neither force nor will.<sup>101</sup> When other polities turned their attention to designing constitutional courts after World War II, they learned from the U.S. experience and fashioned stronger mechanisms of political accountability.<sup>102</sup> Those mechanisms include term limits and

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97. KRAMER, *supra* note 16, at 24.

98. This is quite different from Bickel's critique. He would have agreed with the pessimists that courts lack democratic legitimacy but believed that courts do a better job than legislatures in protecting rights. BICKEL, *supra* note 25.

99. More than 75% of the world's constitutional systems have some form of judicial review. Ginsburg, *supra* note 10. The worldwide adoption of judicial review, moreover, took off in the latter part of the twentieth century. Between 1989 and 1999, 56% of the states in the U.N. adopted major amendments to their constitutions. As a consequence, approximately 50% of the Member States "have incorporated bills of rights, fundamental rights, or some form of individual and/or collective rights into their constitutional orders." KLUG, *supra* note 68. *See also* Vidar Helgesen, *Shaping States Through Constitutions*, International Institute for Democracy and Electoral Assistance, Nov. 16, 2006, [http://www.idea.int/news/editorial\\_nov06.cfm](http://www.idea.int/news/editorial_nov06.cfm) ("More than half of the member states of the United Nations have undergone constitutional reforms since 1974.").

100. EPP, *supra* note 32; Frances Kahn Zemans, *Legal Mobilization: The Neglected Role of the Law in the Political System*, 77 AM. POL. SCI. REV. 691 (1983).

101. THE FEDERALIST NO. 78 (Alexander Hamilton) (Benjamin F. Wright ed., 2d ed. 1996). For a useful corrective, see L. H. LaRue, *Neither Force Nor Will*, in CONSTITUTIONAL STUPIDITIES, CONSTITUTIONAL TRAGEDIES 57 (William N. Eskridge, Jr., & Sanford Levinson eds., 1998).

102. Schor, *Squaring the Circle*, *supra* note 19.

supermajority appointment provisions<sup>103</sup> as well as devices that make it easier for democratic forces to overrule constitutional decisions.<sup>104</sup> When judicial review expanded in the latter part of the twentieth century, it was democratized by strengthening the mechanisms of popular control.<sup>105</sup>

Optimists and pessimists, moreover, fail to adequately deal with whether judicial review facilitates or erodes the values needed to sustain democracy for the long haul. Judge Learned Hand's skepticism as to the importance of judicial review is somewhat heretical for a judge, but he was certainly right that citizen beliefs and attitudes play an important role in the success or failure of institutions.<sup>106</sup> It is instructive to contrast the role that constitutions sometimes play in the construction of attitudes needed to sustain democracy with the role that judicial review plays. There is little doubt that constitutions may play an important role in forging the attitudes needed to fashion democracy.<sup>107</sup> Social movements can and do arise to protest the distance they perceive between political and social practices and constitutional guarantees. Such activity can, in turn, strengthen the social bases of democracy.<sup>108</sup> Constitutions, moreover,

103. APPOINTING JUDGES IN AN AGE OF POWER: CRITICAL PERSPECTIVES FROM AROUND THE WORLD 3 (Kate Malleson & Peter H. Russell eds., 2006).

104. Amendments are the chief mechanism used to overrule constitutional decisions. The U.S. Constitution is one of the most difficult to amend in the world. 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). The legislative override, which has been adopted in Canada, is another mechanism. Constitution Act, 1982, Canada Act (Eng.), pt. 1 § 33.

105. Schor, *Squaring the Circle*, *supra* note 19.

106. CULTURE MATTERS: HOW VALUES SHAPE HUMAN PROGRESS 81 (Lawrence E. Harrison & Samuel P. Huntington eds., 2000); ROBERT D. PUTNAM, MAKING DEMOCRACY WORK: CIVIC TRADITIONS IN MODERN ITALY 3 (1993).

107. The democratic transitions that occurred in Eastern Europe in 1989 provide a powerful example of the transformative power of human rights. The Soviet Union recognized the principles of the Universal Declaration of Human Rights as part of the Helsinki agreement which was signed in 1975. JOHN LEWIS GADDIS, THE COLD WAR: A NEW HISTORY 188 (2005). The agreement emboldened dissidents throughout Eastern Europe who used rights rooted in international law to critique and eventually topple the dictatorships in the region. *Id.* at 188–93. See generally LAUREN, *supra* note 50. Human rights unsettle not only authoritarian regimes but also deeply-rooted authoritarian legacies in democracies. Racial and gender inequality in the United States has been undermined by social movements whose claims are based on constitutional language. Jules Lobel, *Losers, Fools & Prophets: Justice as Struggle*, 80 CORNELL L. REV. 1331, 1338 (1995); Reva B. Siegel, *Constitutional Culture, Social Movement Conflict, and Constitutional Change: the Case of the De Facto ERA*, 94 CAL. L. REV. 1323 (2006).

108. Americans over the course of history have made the constitution an institution with deep social roots by engaging in “constitutional struggles.” In so doing, they forged a shared consciousness of rights. Hendrik Hartog, *The Constitution of Aspiration and ‘The Rights That Belong to Us All,’* 74 J. AM. HIST. 1013, 1014 (1987). Gordon Wood, for example, argues that the American revolution was a social movement that radically transformed American society:

The revolutionaries aimed at nothing less than a reconstitution of American society. They hoped to destroy the bonds holding together the older monarchical society—kinship,

provide an important safety valve since losers in the political arena can use the broad language of rights to claim that their position will be vindicated in the future. Constitutions, in short, can deepen the social bases of democracy.<sup>109</sup>

The impact of judicial review is different. The long-term consequence of judicial review is that citizens realize that there is a payoff to playing the game of constitutional politics.<sup>110</sup> Citizens seek to influence the output of courts by engaging in strategic litigation<sup>111</sup> and influencing the appointments of judges.<sup>112</sup> The problem with using courts to achieve strategic aims, as the historical experience of the United States amply demonstrates, is that this can be a divisive road for a polity to follow. The politics that have swirled around *Roe v. Wade* may prove to be the norm once polities adopt judicial review. By relying on courts to achieve constitutional ends, the interest group activity that clusters around constitutional politics may tend to amplify and deepen societal divisions.<sup>113</sup> Courts, absent the support of broad social movements, cannot transform public opinion.

#### IV. LUMPERS AND SPLITTERS

Can a people born equal ever understand others, can it ever understand itself?<sup>114</sup>

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patriarchy, and patronage—and to put in their place new social bonds of love, respect, and consent. They sought to construct a society and governments based on virtue and disinterested public leadership and to set in motion a moral movement that would eventually be felt around the globe.

GORDON S. WOOD, *THE RADICALISM OF THE AMERICAN REVOLUTION* 229 (1992).

109. Lobel, *supra* note 107 (noting that losers in the political arena turn to “constitutional and higher-law arguments to articulate their deeply felt demands” and lay the groundwork for future change).

110. F.L. MORTON & RAINER KNOPF, *THE CHARTER REVOLUTION & THE COURT PARTY* 129 (2000); Schor, *Squaring the Circle*, *supra* note 19.

111. EPP, *supra* note 32.

112. *APPOINTING JUDGES IN AN AGE OF POWER*, *supra* note 103.

113. Jack M. Balkin, *How Social Movements Change (or Fail to Change) the Constitution: The Case for the New Departure*, 39 *SUFFOLK U. L. REV.* 27 (2005) (noting the dangers of social movements that seek to change elite opinion without transforming public opinion as well); Schor, *Squaring the Circle*, *supra* note 19, at 67–72 (arguing that attempts to change the meaning of the Constitution by changing the membership of the Court introduce the problem of factions into constitutional politics).

114. LOUIS HARTZ, *THE LIBERAL TRADITION IN AMERICA* 309 (1955).

Comparative law is “broadly defined as the study of how and why legal systems differ or are the same.”<sup>115</sup> Depending on whether differences or similarities are emphasized, comparative law scholarship can be divided into two approaches. Lumpers look at the brave new world of judicial review and see commonalities rather than differences. Splitters, on the other hand, look at the same constitutional landscape and argue that the differences jut out more prominently than do the commonalities.

The two major comparative constitutional law casebooks illustrate how these two approaches differ. Norman Dorsen, Michel Rosenfeld, András Sajó, and Susanne Baer’s *Comparative Constitutionalism* begins by asking what is a constitution and provides, therefore, an example of lumping.<sup>116</sup> Vicki C. Jackson and Mark Tushnet’s *Comparative Constitutional Law*, on the other hand, provides an example of splitting, as it starts with the dramatically different answers to abortion provided by the United States Supreme Court, the Canadian Supreme Court, and the German Constitutional Court.<sup>117</sup>

In seeking to understand comparative judicial review, lumpers and splitters grapple with the following phenomenon: courts around the world increasingly cite each other’s opinions. Scholars use a number of problematic terms in seeking to describe this phenomenon. “Borrowing” has long been the term of art used to describe the use of foreign legal material.<sup>118</sup> The problem with the term borrowing is that it suggests that courts transform domestic law by adopting ideas embedded in foreign legal sources.<sup>119</sup> The reality is quite different as the impact of foreign ideas is mediated by local power structures.<sup>120</sup>

A number of scholars, most notably Sujit Choudry, champion the use of the term “migration” rather than borrowing.<sup>121</sup> Using migration to describe this phenomenon is clearly an improvement over borrowing as migration does not imply that the constitutional rule in question will be

115. Sujit Choudry, *Globalization in Search of Justification: Toward a Theory of Comparative Constitutional Interpretation*, 74 IND. L.J. 819, 829 (1999).

116. NORMAN DORSEN, MICHEL ROSENFELD, ANDRÁS SAJÓ, & SUSANNE BAER, *COMPARATIVE CONSTITUTIONALISM: CASES AND MATERIALS* 1–98 (2003).

117. VICKI C. JACKSON & MARK TUSHNET, *COMPARATIVE CONSTITUTIONAL LAW* 1–140 (2d ed. 2006). In addition to these two comprehensive casebooks, there is a new, shorter work focusing solely on judicial review that splits its analysis along national lines. CORRADO, *supra* note 15.

118. Symposium, *Constitutional Borrowing*, 1 INT’L J. CONST. L. 177 (2003).

119. The odd notion that there are no barriers to the spread of legal ideas across national boundaries has long been championed by Alan Watson. WATSON, *supra* note 20.

120. DEZALAY & GARTH, *supra* note 19 (arguing that Western legal prescriptions adopted in Latin America were transformed by local power structures).

121. Sujit Choudry, *Migration as a New Metaphor in Comparative Constitutional Law*, in *THE MIGRATION OF CONSTITUTIONAL IDEAS* 1 (Sujit Choudry ed., 2006).

well received as it crosses borders. The problem with the term migration is that immigrants respond to push and pull factors<sup>122</sup> whereas constitutional ideas quite obviously are not purposeful actors. Ideas, moreover, travel differently than do human actors because the former are more readily transformed as they “move” across borders. This Article, therefore, describes the intersection between globalization and constitutional decision making as the comparative turn by constitutional courts.

Lumpers and splitters argue over the implications and propriety of the comparative turn by courts.<sup>123</sup> Lumpers and splitters agree on little, but their disagreements illuminate the role that the United States plays in the comparative constitutional imagination. Louis Hartz famously questioned whether the United States, given its exceptional founding, could understand the experience of other liberal democracies.<sup>124</sup> It has been both a model and an anti-model to all the world’s constitutional democracies.<sup>125</sup> The idea of written rights protected by a court has largely swept the world’s democracies. The rules governing the political accountability of the United States Supreme Court, on the other hand, have proven a contested export. The role that the Court plays in its domestic constitutional hierarchy, therefore, is in many key respects dissimilar to the role played by other constitutional courts in their domestic constitutional orders.<sup>126</sup> The issue is whether the importance of the United States in the comparative constitutional imagination has clouded our understanding of judicial review. This Article argues that our understanding of judicial review would be improved if our maps were to deemphasize and contextualize the U.S. experience. Scholarly maps of judicial review have for too long viewed the world through the prism of the exceptional U.S. Supreme Court.

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122. See JOSÉ MOYA, *COUSINS AND STRANGERS: SPANISH IMMIGRANTS IN BUENOS AIRES, 1850–1930* (1998), for a seminal discussion and critique of theories of migration.

123. Scholars who write about comparative judicial review obviously write about other issues as well. This Article focuses on how scholars grapple with the spread of ideas because it illustrates the scholarly imagination at work in fashioning conceptual comparative maps. Cf. ANDERSON, *supra* note 18 (arguing that the spread of nationalism around the world demonstrates how nations are “imagined” or conceptualized).

124. HARTZ, *supra* note 114.

125. Heinz Klug, *Model and Anti-Model: The United States Constitution and the “Rise of World Constitutionalism,”* 2000 WIS. L. REV. 597.

126. See *infra* Part IV.B.

### A. *The Contested Comparative Turn by the United States Supreme Court*

The United States Supreme Court is sharply divided over the propriety of citing foreign constitutional sources. This fault line<sup>127</sup> is evident in a number of recent cases<sup>128</sup> and in an extraordinary debate between Justices Antonin Scalia and Stephen Breyer.<sup>129</sup> Justice Scalia clearly sympathized with academic splitters when he asked: “[h]ow can a case from another nation be relevant given the obvious differences?”<sup>130</sup> Justice Breyer responded by making an argument that echoes the logic employed by academic lumpers. He argued that foreign law is relevant because a judge in a democratic society “tries to apply a similar document with similar language.”<sup>131</sup> The two sides to the debate have radically different notions of the legitimacy of the comparative turn by the Court. Justice Scalia believes that it is democratically illegitimate to rely on foreign sources in interpreting the Constitution. He argues that the Court actually borrows foreign ideas when it cites legal material from abroad and, therefore, effectively amends the Constitution in light of other people’s values.<sup>132</sup> Justice Breyer, on the other hand, argues that the Court deepens its understanding of the American Constitution, rather than amending it in accordance with the wishes of foreigners, by considering foreign sources.<sup>133</sup>

The fault line that runs through the Court is reflected in the explosion of scholarship on the topic. Scholars who agree with Justice Scalia believe that citing foreign opinions constitutes borrowing and is illegitimate

127. The fault line may well prove an enduring one given that both Chief Justice John Roberts and Justice Samuel Alito professed their hostility to citing foreign law in their confirmation hearings. *Confirmation Hearing on the Nomination of John G. Roberts, Jr., To Be Chief Justice of the United States, Hearing Before the S. Comm. on the Judiciary*, 109th Cong. (2005); *Confirmation Hearing on the Nomination Samuel A. Alito, Jr., To Be Associate Justice of the United States, Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 471 (2006).

128. *Roper v. Simmons*, 543 U.S. 551, 560 (2005); *Lawrence v. Texas*, 539 U.S. 558, 575–77 (2003); and *Printz v. United States*, 521 U.S. 898, 920 (1997).

129. Debate at American University Washington College of Law (Jan. 13, 2005). A transcript can be found at *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, 521 (2005).

130. *Id.* at 528. The framers, moreover, argue Justice Scalia, “would have been appalled” if they had been told “we’re to be just like Europe.” *Id.*

131. *Id.* at 529.

132. *Lawrence*, 539 U.S. at 598 (2003) (Scalia, J., dissenting) (the Court “should not impose foreign moods, fads, or fashions on Americans”); *Printz*, 521 U.S. at 921 n.11 (“We think that such comparative analysis inappropriate to the task of interpreting a constitution, though it was of course quite relevant to the task of writing one.”).

133. *Relevance of Foreign Legal Materials*, *supra* note 129, at 523.

because it suffers from a democratic deficit.<sup>134</sup> Jed Rubenfeld, for example, argues that U.S. and European constitutionalism rest on differing baseline assumptions of constitutional legitimacy. Europeans place little emphasis on the popular provenance of constitutions and believe that constitutions are legitimate when they reflect an international consensus.<sup>135</sup> Ken Kersch criticizes borrowing because a constitution is the key to democratic self-governance and looking abroad undermines the power of citizens to govern themselves.<sup>136</sup> He argues that the emergence of a globalized constitutional law is a troubling phenomenon because it undermines democratic self-rule as losers in the electoral arena turn to a “newly autonomous globalized judiciary.”<sup>137</sup>

Scholars who agree with Justice Breyer, on the other hand, believe world constitutionalism and U.S. constitutionalism are sufficiently related that courts can and should cite opinions from abroad.<sup>138</sup> Jeremy Waldron, for example, argues that there is a common law of mankind consisting of those principles that represent “a sort of consensus among judges, jurists, and lawmakers around the world.”<sup>139</sup> He notes that in areas outside the law, it would be inconceivable to reject the wisdom of those beyond our borders.<sup>140</sup> It would be a mistake to reject this body of wisdom that “represents a dense network of checking and rechecking results, experimental duplication, credentialing, mutual elaboration, and building on one another’s work.”<sup>141</sup> Daniel Farber takes aim at the view that borrowing is alien to U.S. constitutionalism by arguing that the framers were international and comparativist in their outlook. He concludes that “foreign law had deeply permeated our legal system from the very

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134. Stephen J. Calabresi, “A Shining City on the Hill:” *American Exceptionalism and the Supreme Court’s Practice of Relying on Foreign Law*, 86 B.U. L. REV. 1335 (2006); Kersch, *supra* note 81; John O. McGinnis, *Foreign to Our Constitution*, 100 NW. U. L. REV. 303 (2006); Jed Rubenfeld, *The Two World Orders*, in EUROPEAN AND U.S. CONSTITUTIONALISM 233 (G. Nolte ed., 2005).

135. Rubenfeld, *supra* note 134, at 233–37.

136. Kersch, *supra* note 83.

137. *Id.* at 348.

138. Daniel A. Farber, *The Supreme Court, the Law of Nations, and Citations of Foreign Law: the Lessons of History* (Dec. 15, 2006). UC Berkeley Public Law Research Paper No. 954359, available at <http://ssrn.com/abstract=954359>; Vicki C. Jackson, *Constitutional Comparisons: Convergence, Resistance, Engagement*, 119 HARV. L. REV. 109 (2005); Jeremy Waldron, *Foreign Law and the Modern Ius Gentium*, 119 HARV. L. REV. 129, 132 (2005).

139. Waldron, *supra* note 138.

140. *Id.* at 144.

141. *Id.* at 145.



beginning, not only in private law but in constitutional discourse and adjudication.”<sup>142</sup>

This Article argues that the critics of the comparative turn by the United States Supreme Court (1) mistakenly conflate constitutional with judicial legitimacy, (2) fail to pay heed to the historical record of borrowing by the Court, and (3) misconstrue the relationship between the U.S. Constitution and other constitutions around the globe. (1) Constitutions, of course, require a democratic provenance to be legitimate. When polities around the globe rejected the British model for protecting rights in favor of the U.S. model, they decided that judges, not politicians, should have the primary task of protecting rights. To argue that courts suffer from a democratic deficit is to belabor the obvious. (2) There is no doubt, moreover, that the United States Supreme Court has long cited foreign legal material.<sup>143</sup> In *Marbury*, Chief Justice John Marshall contrasted the written U.S. Constitution with the unwritten British system to argue that courts in polities with written constitutions have the power of judicial review.<sup>144</sup> Justice Scalia’s view that only certain sources should count as law runs counter not only to the historical practice of the U.S. Supreme Court, but also more broadly to the practice of common law judges. Common law judges, unlike their civil law brethren, have never been constrained by theories that only certain arguments count as law.<sup>145</sup> (3) Lastly, the critics of the comparative turn overly emphasize the U.S. founding while largely ignoring the subsequent course of constitutionalism around the globe. The United States was exceptional in having entrenched, judicially enforceable rights in 1787. Over the course of the last two centuries the U.S. model of entrenched rights, protected by courts, has become the norm around the globe. The pace of citation of foreign authority by the United States Supreme Court has quickened over the past half century<sup>146</sup> because so many polities adopted judicial review after World War II. The real issue is what the comparative turn by courts around the world tells us about the course of constitutionalism.

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142. Farber, *supra* note 138.

143. Stephen G. Calabresi & Stephanie Dotson Zimdahl, *The Supreme Court and Foreign Sources of Law: Two Hundred Years of Practice and the Juvenile Death Penalty Decision*, 47 WM. & MARY L. REV. 743, 755 (2005).

144. 5 U.S. 137 (1803). This graceful argument was first made by Professor Jackson. Jackson, *supra* note 138.

145. Civil law judges, on the other hand, are taught that the sources of law are limited and arranged in an immutable hierarchy. JULIO CUETA RUA, FUENTES DEL DERECHO (1982). LA. CIV. CODE art. 1 (illustrates this bedrock, civilian principle by providing that the only authoritative sources of law are “legislation and custom.”).

146. Calabresi & Zimdahl, *supra* note 143.

### B. *The Comparative Turn Abroad*

The comparative turn looks very different when our perspective shifts from U.S. constitutionalism to world constitutionalism. Other constitutional courts routinely cite foreign legal material.<sup>147</sup> This strongly suggests that the issue is of little importance other than that it reveals an ideological fault line running through the U.S. Supreme Court and, to some extent, through the American public. Justice Scalia is at the vanguard of an ideological movement that seeks to ban comparative law from the constitutional lexicon. His critique oddly echoes a French statute adopted in the wake of its Revolution that precluded courts from exercising judicial review because they were forbidden to make policy.<sup>148</sup> The French deviation<sup>149</sup> proved to be an evolutionary dead end since all courts engage in some policymaking.<sup>150</sup> The U.S. deviation will likely prove untenable as well. The development of the Internet and the rise of English as a common tongue of constitutionalism are creating a situation analogous to the one that led to the reception of Roman law throughout the continent of Europe.<sup>151</sup> The spread of ideas across national boundaries is an inevitable consequence of the forces that drive globalization. South Africa's constitutional provision that its courts, "[w]hen interpreting the Bill of Rights . . . may consider foreign law"<sup>152</sup> simply codifies what is becoming a global judicial practice.

From a global perspective, the issue is not the propriety of the comparative turn but its implications. Scholars disagree whether the

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147. Sarah K. Harding, *Comparative Reasoning and Judicial Review*, 28 YALE J. INT'L L. 409, 414 (2003) (observing that the use of foreign law by the Canadian Supreme Court is so common "that it is difficult to find general statements regarding the use, relevance, or value of such authorities"); Donald P. Kommers, *American Courts and Democracy: a Comparative Perspective*, in THE JUDICIAL BRANCH 200 (Kermit L. Hall & Kevin T. McGuire eds., 2005) (noting that the German Constitutional Court, unlike the United States Supreme Court, lacks factions which believe that certain interpretive techniques are illegitimate); Oquendo, *supra* note 58 (citation of foreign and international legal authorities by Latin American constitutional courts is the norm); Saunders, *supra* note 9 (observing that the United States Supreme Court is exceptional among common law nations for its hostility to the citation of foreign legal authority).

148. Law of 16–24 August 1790 (Fr.) The principle embedded in this law had tremendous influence not only in France but also throughout the civil law world. John Henry Merryman, *The French Deviation*, 44 AM. J. COMP. L. 109 (1996).

149. Merryman, *supra* note 148.

150. This is a point famously made by Benjamin Cardozo when he argued that judges are, at bottom, legislators. BENJAMIN CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 112–18 (1921). *See also* David Beatty, *Law and Politics*, 44 AM. J. COMP. L. 131, 142 (1996) ("The law of the constitution, to invoke Dicey's famous title, turns out to be much more about justification than interpretation.")

151. PETER STEIN, ROMAN LAW IN EUROPEAN HISTORY 3 (1999).

152. S. AFR. CONST. § 39 (1996).

comparative turn will result in the emergence of a common, global constitutional law. Academic lumpers believe that the comparative turn will eventually lead to constitutional convergence whereas academic splitters believe that constitutional differences will prove enduring. Struggles over the influence of foreign ideas on the meaning of domestic constitutions can as readily lead to resistance as convergence.<sup>153</sup>

Lumpers explain convergence by relying on two different theories: one looks to the environment in which judicial review is embedded, the other to human agency. David Law looks to environmental factors to conclude that a generic constitutional law is emerging.<sup>154</sup> The consequence of affording courts the power of constitutional judicial review is that they must struggle to draw the proper line between law and politics.<sup>155</sup> Courts need to legitimize their actions when they challenge majoritarian actors and they look, unsurprisingly, to written constitutions. In grounding their decisions on constitutional texts, constitutional courts engage in “generic constitutional analysis” even if “every jurisdiction has its own magic words” to describe what it is that courts do.<sup>156</sup> Generic constitutional analysis consists of balancing the interests involved to determine whether the limits imposed by the law in question are justified and determining whether the legislation is rationally related to the ends it seeks to achieve. Law claims that all courts utilize balancing and rationality tests when engaging in constitutional judicial review.

Anne-Marie Slaughter looks to human agency to argue that constitutional law is converging.<sup>157</sup> Slaughter approvingly observes that judges around the world conduct a “dialogue through mutual citation, as well as through increasingly direct interactions, both face to face and electronic.”<sup>158</sup> As a consequence, judges increasingly see themselves as part of a “global community” engaged in a common enterprise rather than as part of a national community deciding local cases.<sup>159</sup> While scholars facilitated the diffusion of Roman law throughout the continent of Europe

153. Ireland, for example, has used its national constitution to resist attempts, grounded in international and European human rights instruments, to legalize abortion. Gary Jacobsohn, *Constitutional Identity*, 68 REV. POL. 361, 384–91 (2006).

154. David S. Law, *Generic Constitutional Law*, 89 MINN. L. REV. 652, 693 (2005).

155. The line is drawn differently by different polities. TIM KOOPMANS, *COURTS AND POLITICAL INSTITUTIONS: A COMPARATIVE VIEW* (2003).

156. Law, *supra* note 154.

157. SLAUGHTER, *supra* note 6; Anne-Marie Slaughter, *A Global Community of Courts*, 44 HARV. INT'L L.J. 191, 195 (2003).

158. Slaughter, *supra* note 157.

159. *Id.* at 192.

thereby creating the *ius commune*,<sup>160</sup> today judges also play a leading role in forging a global community. Judges believe that they can learn from the experience of other nations and view the decisions of other constitutional courts as “superstar amicus briefs.”<sup>161</sup> The South African death penalty decision, with its copious citations to decisions from other constitutional courts,<sup>162</sup> is seen as the harbinger of a new constitutional order. Slaughter concludes that what is emerging is not a generic constitutional analysis but globalized constitutional norms: “Increasing cross-fertilization of ideas and precedents among constitutional judges around the world is gradually giving rise to a visible international consensus on various issues—a consensus that, in turn, carries compelling weight.”<sup>163</sup>

Splitters, on the other hand, point to the deep division in the United States Supreme Court over the propriety of the comparative turn to argue that constitutional law is not converging.<sup>164</sup> The United States was the first polity to construct a human rights regime of entrenched rights protected by courts. The constitutional systems developed after World War II “differ from their [American] precursor” because they “share a sophisticated legal paradigm that facilitates . . . comparative engagement.”<sup>165</sup> Bills of rights abroad, which were adopted in the wake of World War II, are deemed legitimate because they are linked to an emerging consensus on international human rights norms. Constitutional courts abroad believe that they are engaged in a global enterprise that requires that they engage in dialogue with courts in other polities.<sup>166</sup> The United States, on the other hand, grounds the legitimacy of its Bill of Rights on domestic, not international, acceptance.<sup>167</sup> As a consequence, the U.S. Supreme Court

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160. R.C. VAN CAENEGEM, *JUDGES, LEGISLATORS, AND PROFESSORS: CHAPTERS IN EUROPEAN LEGAL HISTORY* 44 (1987); STEIN, *supra* note 151.

161. Slaughter, *supra* note 157, at 217.

162. *S v. Makwanyane and Another* 1995 (3) SA 391 (CC) (S. Afr.).

163. Slaughter, *supra* note 157, at 202.

164. Harding, *supra* note 147; Weinrib, *supra* note 83.

165. Weinrib, *supra* note 83, at 84.

166. The dialogue theory has been advanced and debated forcefully by Canadian constitutional theorists. See generally Symposium, *Charter Dialogue: Ten Years Later*, 45 *OSGOODE HALL L.J.* 1 (2007). The Canadian Supreme Court has rejected the argument that judicial review is illegitimate by noting that it is constitutionally required to engage in a dialogue with other actors. *Vriend v. Alberta*, [1998] 1 S.C.R. 493, par. 137 (Can.).

167. Rubinfeld, *supra* note 134. This may explain why the United States remains, constitutionally speaking, strikingly different from other Western democracies. It is less tolerant of foreign influences in interpreting the Constitution and positive economic and social constitutional guarantees, but it is more tolerant of hate speech and the death penalty. *AMERICAN EXCEPTIONALISM AND HUMAN RIGHTS* (Michael Ignatieff ed., 2005).

sees itself at the apex of a constitutional pecking order and brooks little help from constitutional courts abroad.

Splitters and lumpers, in short, disagree as to whether a common, global constitutional law is emerging. The United States may resist the development of a common law of the constitution because its Supreme Court believes that it is the sole, legitimate interpreter of the Constitution. The American Supreme Court is exceptional not only in its resistance to legal ideas that cannot be stamped with a made purely in America label, but also in its attitude towards balancing or proportionality. Balancing or proportionality is more widely accepted in constitutions adopted after World War II than in the United States.<sup>168</sup> Modern constitutions recognize that courts must balance democracy and rights. Section 1 of the Canadian Charter of Rights and Freedoms, for example, “guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.”<sup>169</sup> Proportionality provisions are important because they inform courts that legislatures have an important role to play in construing rights. The hostility exhibited by the United States Supreme Court towards foreign constitutional sources simply reflects, therefore, its broad antipathy towards any competition, including from domestic political actors, in construing the Constitution.<sup>170</sup>

## V. CONCLUSIONS

Live in London for a year and you will not get to know much about the English. But through comparison, and in the light of your surprise, you will suddenly come to understand some of the more

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168. Mattias Kumm, *What Do You Have in Virtue of Having a Constitutional Right? The Place and Limits of Proportionality Analysis*, in *LAW, RIGHTS, DISCOURSE: THEMES OF THE WORK OF ROBERT ALEXANDER* (S. Paulsen & G. Pavlakos eds.) (forthcoming 2008) (arguing that proportionality analysis is more firmly embedded in constitutions adopted after World War II); *see also* 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).

169. Constitution Act, 1982, c. 11, § 1, sched. B (Eng.).

170. The clearest example of this can be found in the Fourteenth Amendment, where the Court has resolutely warded off Congressional attempts to construe its dictates. *See, e.g., City of Boerne v. Flores*, 521 U.S. 507 (1997). *See generally* Jeremy Waldron, *Some Models of Dialogue Between Judges and Legislators*, 23 *SUP. CT. L. REV.* 7, 39–47 (2004) (arguing that the strong form of judicial review exercised by the United States Supreme Court precludes inter-branch dialogue).

profound and individual characteristics of France, which you did not previously understand because you knew them too well.<sup>171</sup>

Comparative inquiry is an important tool in teasing out the unspoken assumptions that inform our understanding of the law.<sup>172</sup> The purpose of comparative law is ultimately introspective. Although comparative public law draws from comparative private law an emphasis on introspective inquiry, comparative public law scholarship has been less concerned with methodology than has comparative private law scholarship, which is both healthy and odd. It is odd because the problem of method looms large in comparative public law scholarship since it necessarily deals with issues that transcend the law. Constitutions quite obviously do not exist in a political vacuum and context, therefore, is central to comparative constitutional inquiry. Kim Scheppele is right to argue that comparative constitutional analysis should be thick rather than thin.<sup>173</sup> The lack of interest in methodological niceties has been healthy because it is quite possible to push the boundaries of knowledge while ignoring the question of how best to make comparisons.<sup>174</sup>

Comparative private law has long been enamored of maps of the world's legal systems and of methodological arguments. Comparative constitutional law scholarship, on the other hand, is clearly moving on a different methodological path. It took shape in response to the expansion of judicial power that began after World War II and intensified with the wave of democratization that occurred in the last two decades of the twentieth century.<sup>175</sup> By focusing on what is happening rather than arguing over how best to make comparisons, comparative constitutional law has made real progress. Comparative constitutional law, moreover, has largely ignored the troubled relationship between geography and law that historically played such an important role in comparative private law.<sup>176</sup> Rather than drawing maps that divide the world's democracies into families of judicial review, scholars have asked three broad questions: (i)

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171. Mary Ann Glendon, *Rights in Twentieth-Century Constitutions*, 59 U. CHI. L. REV. 519, 520 (1992) (quoting FERNAND BRAUDEL, *HISTOIRE ET SCIENCES SOCIALES: LA LONGUE DURÉE* 725, 737 (1958)).

172. James Q. Whitman, *The Neo-Romantic Turn*, in *COMPARATIVE LEGAL STUDIES: TRADITIONS AND TRANSITIONS* 312 (Pierre Legrand & Roderick Munday eds., 2003).

173. Kim Lane Scheppele, *Constitutional Ethnography: An Introduction*, 38 LAW & SOC'Y REV. 389 (2004).

174. Mathias Reimann, *The Progress and Failure of Comparative Law in the Second Half of the Twentieth Century*, 50 AM. J. COMP. L. 671 (2002).

175. Ginsburg, *supra* note 10.

176. Ugo Mattei has also suggested that taxonomic approaches may be of limited use when dealing with problems of democratization. Mattei, *supra* note 3.

why has judicial review (almost) conquered democracy; (ii) whether empowering courts to construe constitutions has a democratic payoff; and (iii) how best to make sense of the variation that judicial review exhibits around the world.

The map of comparative judicial review scholarship reveals three hidden maps, whose illumination is critical to our understanding of the global expansion of judicial power. The first is whether the emergence of judicial review and the emergence of democracy rest on similar causal factors. Students of democracy vigorously debate the relative importance of elite bargains and citizen demands, whereas the leading scholarly accounts of judicial review discount the importance of citizens and emphasize the role of elites.<sup>177</sup> This Article argues that our understanding of the emergence of judicial review would be improved if the role of ordinary citizens were brought back into the picture. Institutions are created as the result of both “supply” and “demand” factors. Elite bargaining explains institutional variation, but it does not explain why judicial review snowballed in importance after World War II. To understand why so many people in so many parts of the world entrusted so much power to judges, one must take into account the long-term changes that moved human rights to the center of constitutional discourse.<sup>178</sup>

The second map that needs illumination is the role that constitutional courts play in maintaining or undermining democracy. Judicial optimists argue that there is an affinity between judicial review and democracy. They draw their examples from transitional democracies such as Germany after World War II or South Africa after apartheid. Judicial review can play an important role in new democracies by providing a public symbol that constitutions will henceforth be taken seriously. Judicial pessimists, on the other hand, sharply contest the perceived link between democratic success and judicial review. They draw their examples from consolidated democracies such as the United States. Judicial review is designed to prevent majorities from occasionally getting their way, so it is no surprise that constitutional courts can present a roadblock to solving collective action problems. Both optimists and pessimists, however, fail to deal adequately with the core issue of whether judicial review facilitates or erodes the values needed to sustain democracy for the long haul. The argument for or against judicial review should turn not on normative

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177. GINSBURG, *supra* note 47; HIRSCHL, *supra* note 16.

178. HUNT, *supra* note 12.

arguments but on the role, if any, that judicial review plays in the construction of democracy.

The third is that our understanding of judicial review would be improved if scholars were to deemphasize the U.S. experience. Lumpers and splitters agree on little but their disagreements illuminate the role that the United States plays in the comparative constitutional imagination. The United States has been a model and anti-model to all the world's constitutional democracies.<sup>179</sup> This Article argues that our scholarly maps of judicial review have for too long viewed the world through the prism of the exceptional United States Supreme Court. Our understanding of judicial review would be improved if our maps were to deemphasize and contextualize the U.S. experience.

In short, the map of comparative judicial review scholarship reveals a series of linked, hidden maps. Any map that is of any use emphasizes certain features while eliminating others. Those choices are not an ineluctable part of the landscape that is being described but rather reveal the biases of the mapmaker. Comparative law scholarship would be enriched if it were to forthrightly address its hidden maps. Maps, after all, reveal the method or path of inquiry of the mapmaker. The deepest canons underpinning the law are the "habits of thought" that scholars share.<sup>180</sup> To uncover these assumptions, comparative public law inquiry should turn not to comparative private law but to a broader stream of scholarship on democracy.<sup>181</sup> Questions about the emergence and maintenance of democracy and the problematic relationship that the United States has to the world's constitutional democracies lie at the root of our understanding of comparative judicial review.

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179. Klug, *supra* note 125.

180. LEGAL CANONS 401–02 (J.M. Balkin & Sanford Levinson eds., 2000).

181. Ran Hirschl has argued forcefully that comparative constitutional law should look to comparative politics in seeking solutions to methodological problems. Hirschl, *supra* note 9.