

**“Beyond Manicheanism: Assessing the New Constitutionalism”**  
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To my fellow schmoozers: It’s Monday 2/28, 1:30 a.m. and I’m sending off what I have. The first ten or twelve pages are more or less complete, but after that (as you will see), it’s more of a detailed outline. Still, I think you will be able to see the flow of the argument, and I look forward to your feedback.

### **Introduction**

Over the past twenty-five years, the “judicial turn” that began in Europe in the wake of World War II has spread to almost all corners of the globe (Cappelletti 1971; Tate and Vallinder 1994). In established and emerging democracies alike, parliamentary sovereignty is in decline and constitutional courts with broad powers have become commonplace (Scheppelle 2000; Stone Sweet 2000; Ginsburg 2003; Hirschl 2004). As Ginsburg (2003: 3 and 6) notes, “Judicial review...has made strong inroads in those systems where it was previously alleged to be anathema,” and where new constitutions are being drafted, “providing for a system of constitutional review is now a norm.” Although the formal introduction of judicial review mechanisms does not necessarily translate to an energetic assertion of judicial authority in all places (O’Brien and Okoshi 1996; Couso YEAR), it is certainly true that in many polities, courts now play an unprecedented role in the policy making process (Stone Sweet 2000; Scheppelle 2001; Guarnieri and Pederzoli 2002; Hirschl, resituating article).

Perhaps not surprisingly, normative responses to the rise of the new constitutionalism among Anglo/American-trained scholars of law and courts have

followed the contours of the debate over judicial review in the United States, splitting generally between liberal enthusiasm and democratic dismay. Enthusiasts view courts as an important mechanism for protecting citizens' rights, and their strengthening thus as a positive step toward securing a meaningful and sustainable democracy (Dworkin 1990; Ackerman 1997; Scheppele 2001). Opponents see judicial empowerment as a move away from popular self-determination and away from policymaking in the interest of the masses (Tushnet 1999; Morton and Knopff 2000; Hirschl 2004). While the former tend to idealize judges and the role they play in a constitutional democracy, the latter err in the opposition direction, vilifying judges as agents of the elite.

In this paper, I advocate moving beyond this binary perspective, emphasizing that the substantive role judges play in a democratic regime depends on a whole host of factors not captured by either the sunny liberal or the skeptical democratic views. While the radical democrats<sup>1</sup> are correct to warn that the spread of judicial review is not necessarily a boon for democracy, I find their cynicism to be as simplistic and sweeping as the unbridled enthusiasm of the liberals. Judicial behavior and influence is not a given; it is shaped by numerous factors, including but not limited to the institutional characteristics of the legal and political systems, which furnish judges (and the legislators they interact with) with particular understandings and incentives. Rather than insisting, then, that the global rise of constitutionalism must be a wholesale good or bad thing, then, we should seek to identify the conditions under which judges in different countries have proven more or less willing and able to behave in ways supportive of democracy. The international diffusion of bills of rights and judicial review offers us an unprecedented

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<sup>1</sup> I adapt this term from Dyzenhaus's (1999) discussion.

opportunity to build empirically-informed arguments that will move us beyond the stark, essentializing claims of the established debate.

### **Judges: Heroes or Anti-heroes?**

Until World War II, most of the world's democracies rejected judicial review as a peculiar and highly conservative American institution, unacceptable in any polity committed to popular sovereignty. Only government officers whose tenure was subject to electoral control possessed the legitimacy to determine what the law was, or to determine any substantive limits thereto. In many cases, this translated to a strong commitment to "parliamentary sovereignty."<sup>2</sup> However, "when the Nazi-Fascist era shook this faith in the legislature, people began to reconsider the judiciary as a check against legislative disregard of [fundamental democratic] principles" (Cappelletti 1971:viii). In the "second wave" of global democratization that followed WWII, then, new constitutions were written to entrench rights principles, and, in places like Italy, Germany, and Japan, courts were empowered to review the decisions of elected officials for compliance with these principles. In the years that followed, the appeal of the American model grew (largely in response to the activism of the Warren Court<sup>3</sup>), the German Constitutional Court acquired its own prestige, and the international human rights movement expanded, such that by the time the "third wave" of democratization began in the mid-1970s (Huntington 1991), judicial review had become a central element of new "democratic" constitutions (Scheppelle 2000; Ginsburg 2003).

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<sup>2</sup> I say "many," because there were also presidentialist systems, as in Latin America, where law-making power was split between the executive and legislature, and often dominated by the former, be it *de jure* or *de facto*.

<sup>3</sup> The role of the Supreme Court in the American "rights revolution" has been disputed (Rosenberg 1991). Rightly or wrongly, though, its image/reputation did travel. (NEED TO FLESH THIS OUT.)

Notable American liberal theorists responded to these developments with great enthusiasm, encouraging new and old democracies alike to embrace the promise of judicial review, and chiding U.S.-based skeptics for being largely indifferent to or out of step with the international trend. For example, Ronald Dworkin, the standard-bearer for active judicial rights protection, made his approval clear when he wrote in 1990 in favor of the incorporation of the European Convention on Human Rights into British domestic law and the empowerment of British judges to interpret and apply it against statutes passed by the parliament. He claimed not only that such incorporation would help cultivate (or re-invigorate) a “culture of liberty” in Britain, but also that it would be in no way incompatible with a correct or “true” understanding of democracy. He wrote:

[T]rue democracy is not just *statistical* democracy, in which anything a majority or plurality wants is legitimate for that reason, but *communal* democracy, in which majority decision is legitimate only if it is a majority within a community of equals....[P]olitical decisions must treat everyone with equal concern and respect, that [is,] each individual person must be guaranteed fundamental civil and political rights no combination of other citizens can take away, no matter how numerous they are or how much they despise his or her race or morals or way of life... That view of what democracy means is at the heart of all the charters of human rights, including the European Convention. It is now the settled concept of democracy..., the mature, principled concept that has now triumphed throughout Western Europe [and] North America (Dworkin 1990:PAGE).

In a similar spirit, Bruce Ackerman (1997) claimed that “the Enlightenment hope in written constitutions is sweeping the world,” (772) and that the future of liberal democracy looked bright since “when judges intervene, they tend to operate on behalf of internationally-recognized norms of human dignity” (790-1).

This celebration of constitutionalism’s spread did not go unchallenged, however. Indeed, towards the end of the 1990s, a number of highly skeptical, in some cases downright cynical, works emerged challenging the value of judicial review both in theory

and practice (Kennedy 1997; Waldron 1999; Tushnet 1999; Morton and Knopff 2000; Dahl 2001; Hirschl 2004). Reviving the older (and in some circles, persistent) concerns about the “counter-majoritarian difficulty” (Bickel 1986) or the “gouvernement des juges” (CITE), these authors attacked the liberal enthusiasts as, at best, naïve idealists or, at worst, disingenuous elitists. These “radical democrats” (Dyznehaus 1999) hold that because definitions of and relationships between rights can never be settled definitively, any liberal society will have the difficult task of resolving such matters; but to delegate this task to a small, unelected, tenured set of individuals (high court judges) is an affront to the most basic principle of democracy: political equality. While they accept that rights protection, even beyond that necessary to the democratic process (Ely 1980), is integral to democracy, they object to the delegation of the power to define and protect rights to an unelected (and hence unaccountable) elite.<sup>4</sup>

While most of these works build their arguments in the abstract or with a single country as the empirical referent,<sup>5</sup> Ran Hirschl’s (2004) book stands out for its attempt to ground its claims in an explicitly comparative study. Taking the liberal triumphalists to task for failing to ground their claims in comparative, empirical data, Hirschl offers a critical analysis of the origins and impact of constitutionalization in four countries (Israel, Canada, New Zealand, and South Africa). His central claim is that both the motivations for and the consequences of the introduction of bills of rights (BORs) and judicial review have been gravely misunderstood by many observers. Far from being a reflection of “these polities’ genuine commitment to entrenched, self-binding protection of basic rights

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<sup>4</sup> Waldron (1999: 309) even goes so far as to characterize the U.S. Supreme Court as “a nine man junta clad in black robes and surrounded by law clerks.”

<sup>5</sup> Dahl (2001) is an exception, as his goal is to try to show how poorly the U.S. performs on a number of measures of democratic performance. However, while he discusses judicial review, assessing the independent effect thereof is not his main focus.

and civil liberties” for vulnerable groups and individuals (p. 2), he argues, the constitutionalist reforms have been part of “an essentially self-serving agenda” (p. 99) on the part of social and economic elites who see their prerogatives threatened in the electoral sphere. (NEED TO SAY A BIT MORE...)

The increased level of involvement (he would say intervention) by courts in the policy making process should not be celebrated by those who care about justice, but rather condemned. Does not represent humanitarian progress, but rather victory for narrowly self-interested elites. Why?

- Represents a “wholesale transfer” of policy making to insulated, professional policy-making bodies, favoring those with disproportionate understanding of, access to and influence on those bodies (i.e., the elite) p. 186
- Judges will tend to adopt “uninhibited Lockean individualism” in their interpretations, throwing support behind anti-statism/neoliberalism, and thereby increasing control of dominant elites (and exacerbating inequality) 151
- Removes fundamental political decisions from hands of elected officials (or allows them to abdicate power), thereby stunting political debate/democratic deliberation, discouraging citizen participation, and further disempowering “the people.”p. 186

In sum, Hirschl argues that with the introduction of bills of rights and judicial review, “They the Jurists are granted an elevated status in determining policy outcomes at the expense of We the People, laypersons who make up the vast majority of the population” (p. 187).

These constitute very strong, generalizing claims about the new constitutionalism, all of which Hirschl claims are bolstered by the empirical evidence he offers in the book. Were this a book review, this would be the place for me to pull out specific examples of where and how the data he offers do or do not support his arguments. However, my purpose here is not so much to take issue with the strength of his evidence or with the particular interpretation he offers of the constitutional revolutions in his four cases (though this can and should be done). Rather, in the pages that follow, I seek to challenge some of the more sweeping statements or assumptions that he makes as he steps back from his cases and assesses the “new constitutionalism” in general, as well as to suggest areas for further empirical inquiry.<sup>6</sup>

### **Government of Judges or Governing With Judges<sup>7</sup>?**

The premise of Hirschl’s (2004) book is that unrepresentative and unaccountable judges are usurping democratic decision making around the world, dramatically diminishing the role played by citizens and legislatures. Indeed, he opens the book by stating that “over the past few years the world has witnessed an astonishingly rapid transition” to what he subsequently dubs a “new political order: juristocracy” (p. 1 and p. 222). If this is indeed the case, anybody who claims to care at all about democracy should be seriously alarmed. But how plausible is this claim?

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<sup>6</sup> I don’t mean to pick on Hirschl, but since he has thrown down the gauntlet regarding the need for public law theorists to ground their claims empirically, I make him the target of my critique below. Obviously, the criticisms don’t apply only to him (see esp. the conclusion of this paper).

<sup>7</sup> I borrow this second formulation (“governing with judges”) from the title of Stone Sweet (2000).

*How Insulated Are High Court Judges in NC Countries?*

Hirschl's central argument is based on a stark distinction between courts as "insulated, . . . semi-autonomous, professional policy-making bodies," on the one hand, and legislatures as faithful mirrors of popular will, on the other. Following other radical democratic theorists, he casts judges as unrepresentative, unaccountable members (or agents) of the social elite, and elected officials as responsive and responsible delegates of average citizens. However, he devotes little attention to how judicial selection and tenure work in his four focus cases, much less anywhere else, and he offers no systematic discussion of legislative structure and representativeness in the four countries.<sup>8</sup>

Hirschl offers the most information about selection and composition of the high court for the Israeli case, and it is to that case that his argument perhaps best applies. As he explains, justices to Israel's high court (in fact, to all of the nation's courts) are appointed by a nine-member appointments committee, composed of three sitting high court judges, two representatives from the Israeli Bar Association, two members of the Knesset chosen by majority through a secret ballot, and two ministers, one of whom is the Minister of Justice (Hirschl 2004: 66). Hence, as Hirschl himself notes, the process is formally depoliticized; that is, there is no explicit procedure (be it an institutional rule or informal norm) for achieving any measure of political party, ethnic, gender, or religious representation on the high court, except for a customary chair reserved for a religious justice, which Hirschl notes was, until recently, only honored in the breach (p. 67). Not surprisingly, then, the SCI (Supreme Court of Israel) has tended to reproduce itself over the years, such that "of the thirty-six judges who served on the Court during the country's

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<sup>8</sup> It would have been nice, for example, to have some tables showing the change over time in the four countries of both ascriptive (race/ethnicity, religion, gender) and party representation (explicit or implicit) in the legislature and on the high court.



first forty-five years, all were Jews and thirty were Ashkenazi,” and decisions have overwhelmingly favored secularist views (pp. 66-7).<sup>9</sup>

This practice appears to reflect an American-style understanding of constitutional law as analogous to ordinary law (Griffin 1996). In Israel, as in the U.S., the high court has (at least since the introduction of the Basic Laws), a dual function: it has jurisdiction over both ordinary cases and cases involving constitutional questions. In other words, constitutional law is just another form of law, and constitutional adjudication requires from judges no more and no less than ordinary adjudication. This is not the way it works in most new constitutionalist (NC) countries, however.

In many NC countries, reformers have recognized the deeply political nature of constitutional decision making, and have established formal institutional mechanisms and/or informal norms to ensure that judges who decide constitutional cases have a (much) higher level of representative legitimacy than ordinary judges. Indeed, in the NC countries of continental Europe, which share the civil law tradition, constitutional courts are often not even considered part of the judiciary. Because of their obvious legislative function (constitutional decision making cannot but involve law making, even if it is in a negative sense (Kelsen YEAR)), constitutional courts in the civil law world have been constructed completely separate from, and sometimes in tension with, the ordinary judiciary. While the ordinary judiciary is conceived as a civil service bureaucracy, whose function it is to be the “mouthpiece of the law,” constitutional courts are (rightly) understood as institutions whose function is fundamentally political (not partisan; but definitely not “neutral”) (Favoureu YEAR?; Stone Sweet 2000). Thus, the appointment

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<sup>9</sup> For an in-depth analysis of how another autonomous, bureaucratic judiciary reproduced conservatism and conformity in the judicial ranks, favoring the traditional elite, see my work on Chile (Hilbink 1999, 2003, and forthcoming).

rules for constitutional courts in the civil law world allow explicitly for political negotiation and aim at political inclusion.

For example, half of the members of the sixteen-member German Constitutional Court are chosen by a twelve-person Judicial Selection Committee of the Bundestag (lower house). The committee's membership is determined by proportional representation, and the committee must propose a slate of candidates for up or down approval by the Bundestag assembly. The other eight justices are chosen by the Bundesrat (upper house), composed of delegates from provincial governments, who must approve candidates by a 2/3 vote. As Helms (2000: 87) notes, "almost from the very beginning there has been a strong attempt [on the part of the two major parties] at establishing a consociational system of nominating judges to the Court." While never perfectly representative, the appointment process has brought in enough actors to achieve rough balances in partisan, religious, and geographic representation (Kommers 1997: PAGE).

Hungary, whose post-Communist reformers followed closely the German model, also uses a committee composed of one representative from each party in parliament to handle Constitutional Court nominations, and requires 2/3 approval by the full assembly. The political parties are thus the principal players in Constitutional Court appointments (Körösiényi 1999).

South Africa, meanwhile, which has been influenced by both the common and civil law traditions, has a Judicial Services Commission (JSC) that integrates representatives from the legislature (10 total, 6 chosen by the National Assembly and 4 from the National Council of Provinces), the executive (5, four chosen by the President in

consultation with all the party leaders represented in the National Assembly, plus the Minister of Justice), the judiciary (3, including the Chief Justice and the President of the Constitutional Court), and the bar (4 practicing lawyers and one law professor). The JSC prepares a list of nominees with three names more than the number of appointments to be made (to the Constitutional Court or any other court), and the President makes appointments from the list. The Constitution stipulates that “The need for the judiciary to reflect broadly the racial and gender composition of South Africa must be considered when judicial officers are appointed” (Section 174).

Even in Canada, where the executive has control over all judicial appointments, there is, as Hirschl (2004: 80) notes, “a provincially representative formula” for Supreme Court appointments, guaranteeing three justices from Ontario, three from Québec, two from the western provinces, and one from the Maritime provinces.<sup>10</sup>

All of these procedures reflect a recognition of the crucial, and ultimately political, role that judges with constitutional decision making authority play in a liberal democracy, and I submit that they mitigate somewhat (albeit not entirely) the “insulated” and unrepresentative nature of these courts. Moreover, with the exception of Canada, in all of the systems just discussed, constitutional court judges do not serve for life. In Germany and South Africa, they serve twelve-year, non-renewable terms. In Hungary, the terms are nine years and renewable. In addition, all three countries have a mandatory retirement age for judges: 68 in Germany, 70 in South Africa, and XX in Hungary (ask Kim). Even Canada requires that its judges step down at 75. Thus, it is far less likely in these countries than it is in the United States (for example) that judges will be grossly

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<sup>10</sup> I could go on with other examples, and maybe I could provide a table for a published version of the paper.

out-of-step with the rest of the political system, representing perspectives that have been long since rejected by strong popular majorities.

As this small sampling of judicial appointment and tenure rules demonstrates, the degree of insulation/remove from politics that high court judges enjoy varies from country to country, such that not all judges everywhere are equally unrepresentative or unaccountable. Granted, high court judges never have to answer directly to voters, and, even in the stingiest countries, they enjoy term lengths that elected officials can only dream about. However, the fact that they do not face elections is often considered enabling: because they don't have to cater to constituents with particular demands, they are freer to decide cases on principle than a legislator, who must keep one eye always on the polls (Cropsey YEAR?; Eisgruber 2001). Moreover, no assessment of a political institution's representativeness should be done in a vacuum; honest scholars must evaluate the relative levels of representation (ascriptive, class, party, etc.) and accountability for *all* branches of government, including the legislature, over time. As Scheppele (2001) argues, in certain times and places, one might even be able to argue that courts have been more representative of and accountable to "the people" than have legislatures.

### *Are Judges Really Usurping Policy Making Power?*

The second assumption that Hirschl makes, or at least asks his readers to make, is that the undeniable increase in judicial involvement in political decision making in the past several decades means that the direct representatives of the people, the elected legislators, have been increasingly sidelined. In this "zero-sum" view, one institution's

gain is, by definition, another's loss. Once again, I submit that this is a perspective that those most familiar with the U.S. case might accept, but that doesn't apply equally to all NC countries. Because the U.S. Constitution is considered to be analogous to ordinary law (Griffin 1996), it is the "province and the duty" of the judiciary to say what it means (*Marbury v. Madison*), and once the high court has spoken, the matter is settled, or so the justices, and many of their supporters, would have it (*Cooper v. Aaron; City of Boerne*). If instead the executive or the legislature had the power to overrule the Court, to assert an independent interpretation of the Constitution, the reasoning goes, then the Constitution's status as law would end, and there would be little point in having a written constitution (*Marbury v. Madison*).

This is not exactly the way constitutionalism is conceived and practiced, however, in other polities.<sup>11</sup> Although constitutions are almost always written today, they are not always treated as super codes or statutes to be rigidly applied by technically trained and expert judges. Indeed, in a number of NC countries, there are explicit invitations for judges to engage in value balancing, meaning the text is not always absolute and adjudication is *explicitly* not that distinct from legislation (Canada-sec. 1 of Charter; South Africa-sec. 36 of Const'n). While this might seem an odd defense against the charge that in these polities judges are filling in where legislators should be, my argument is that this kind of constitutional language permits greater transparency on the part of judges, encouraging them to speak in terms understandable to average citizens about the competing values at stake, rather than, as can happen in the United States, asserting a "correct" and absolute meaning of some clause or another that judges to which judges somehow have unique access. Moreover, some NC countries provide explicit

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<sup>11</sup> And many would say this does not accurately capture the U.S. practice either (e.g., Friedman YEAR).

mechanisms for legislative override (Canada, Britain, technically Israel, OTHERS?), meaning that if judges rule in a way deemed sufficiently outrageous to the (simple!) legislative majority, they can be overruled. Hence, rather than playing a “trumping” function, asserting their superior position and shutting out the legislature, high court judges in a number of NC countries might instead be viewed as participating in and (arguably) nurturing a polity-wide constitutional dialogue (Hogg and Bushell 1997; Stone Sweet 2000).<sup>12</sup> CAN AND WILL SAY MORE HERE...

Even in places where there is no provision for a simple majority legislative override, amendment rules tend to be far more easily met than in the United States (cite Griffin 1996: U.S. requires “virtual unanimity”). NEED TO FLESH OUT WITH EXAMPLES HERE... So if courts get really out of line (and for strategic reasons, they are unlikely to do so --as Hirschl admits), this option is more realistic than in the U.S.<sup>13</sup>

Finally, Hirschl emphasizes the use of courts by politicians to AVOID deciding things they know will be unpopular. But courts are channels that can be used by citizens as well as politicians (that elected officials might perpetually ignore some issue that the courts MUST address, thereby forcing a debate/increasing deliberation...cite Scheppele on Hungary, Smulovitz on Argentina, Klug on South Africa, etc.); Discuss standing...I think Hirschl does acknowledge this at some point, but doesn't dwell on it, since it doesn't help his argument...NEED TO FLESH THIS OUT A LOT MORE....

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<sup>12</sup> Overrides may not be exercised regularly, but the fact that they are not indicates either that politicians don't see it in their interest to assert them (they would pay an electoral price for doing so) OR that there are barriers to cooperation within the legislature...somehow majority preferences are not getting translated into majority action in legislature (and this inability to reach simple majority consensus problematizes the judicial elite minority/legislative popular minority assumption).

<sup>13</sup> There is, in some countries, the thornier issue of “unconstitutional constitutional amendments” (Germany, South Africa, India), which really does set the Court up as “guardians,” BUT, again, judges don't inherit their positions, there is the political check and limit on who they are (they are not as “unguarded” as even SCOTUS is).

In sum, just as a slightly more detailed look at judicial selection and tenure rules weakens the claim that high court judges everywhere are insulated and unrepresentative, a brief consideration of the variation in the way the role of the high court is constructed and limited in different countries throws into doubt the claim that judges everywhere are brandishing constitutions to impose their will on legislatures. Indeed, a more accurate critique of constitutional decision making by judges might be NOT that they are frustrating/trumping majorities, but that they fail to protect minorities. (After all, Hirschl is incorrect to argue that constzn is sold as a means to greater socio-economic equality/social justice; in fact, it is explicitly advertised as a means for protecting MINORITY rights. Actually, he starts out saying this, but shifts away from it almost immediately.) If it is true, as Dahl (1957) notes, that because of the judicial selection process, the American judiciary/SC tends to reflect the interests of the dominant political coalition, the logic should apply even more strongly in many of the NC countries, where judicial tenure is shorter and judicial appointment more openly politicized/politically determined. A rigorous comparative empirical analysis of how and why courts respond to rights claims by historically or structurally disadvantaged minorities versus how they respond to rights claims by social elites might be very revealing (Hirschl doesn't do this, because he sets it up as negative vs. positive rights claims), but evidence of failure to protect such minorities would not support the claim that democracy (majority rule) is losing ground to juristocracy; rather, it would reveal an inability on the part of courts to challenge dominant views and policies, revealing the ultimate triumph of democracy/politics over law.

Ironically, Hirschl provides more evidence (of an anecdotal sort) for this than for his claim that courts are undermining democracy:

Israel: Court refuses/fails to protect either the Orthodox minority (174-8) or Arab minority (137-8)...its rulings seem pretty majoritarian, and those opposed seem to be intense minorities (he even uses the terms 'radical right' and 'extreme right-wing' 72-3).

Canada: Court has been inconsistent in its protection of aboriginal peoples (196-8) and Francophones (178-82) (not zealous defenders), accommodating them within the parameters favored by the national political elite

South Africa: AZAPO decision against Biko relatives et al (192) and for dominant parties/leg; several decisions favoring national policy against (white elite!) claims (183-4).

So question is: if courts do not offer reliable protection for these kinds of minorities (and this still needs to be established), then what value added is there to introducing judicial review?

### **The Proof Is in the Eating**

If "They the Jurists" are not entirely usurping the power of "We the People" (as Hirschl would have it), or if the distinction between "They the Jurists" and "We the People" is overdrawn in the first place (assuming none of the countries in question is in a position to introduce direct democracy), then we get to the heart of the matter, "the proof in the eating."



SO, Are the substance of judicial decisions in BOR cases fundamentally at odds with or necessarily secondary to democratic principles (equal respect and dignity; human dignity)? Let's look at Hirschl's evidence...

Although some of his evidence seems to point to a failure to advance the interests of historically disadvantaged or permanent ethnic/religious minorities, Hirschl actually shows that the contribution of courts in NC countries is not negligible. Total success rate in cases involving negative rights is high, ranging from 39% to 55%. No breakdown as to what percentage of these were economic cases, but even Hirschl is forced to concede that there is something positive here (due process rights, gay rights, etc.) p. 122 and p. 137ish..reduces social injustice p. 168: "constitutionalization of rights does have crucial importance in affirming marginalized identities and enhancing the status of individual freedoms"

((This data is perhaps the most valuable contribution of the book; hope it is publicly available, and hope other scholars will contribute to building similar databases for other country cases.)

Radical democrats/populists like Hirschl (or Waldron or Tushnet) tend to reject liberalism outright, in my view throwing the baby out with the bathwater. Even if one believes the state has a role to play in regulating the economy and redistributing wealth through taxation and social services, one can still find value in "negative rights" protection. As millions of people around the world who have suffered under authoritarian and totalitarian regimes will attest, bodily integrity, due process, and free association, assembly, and expression are nothing to turn one's nose up at. Hence, evidence that courts in (at least four) NC countries are providing relatively high levels of

negative rights protection (at least in terms of their decisions; enforcement is another matter) should come as welcome news for those with humanitarian concerns. This is more liberal than democratic, but most people would refuse to separate the two today, and are content to live with the tensions and trade-offs between individual rights of this kind and collective self-determination.

As for positive rights outcomes, more evidence is needed. Where the constitution most strongly protects positive rights (S. Africa in Hirschl, but also E. European/former Soviet cases), courts have actually been quite responsive. Success rate of positive rights claims in South Africa was 45%! So whether courts are inherently hostile to positive rights is unclear. Indeed, Hirschl himself acknowledges that where social rights are more explicitly protected in constitutional texts, reflecting a “more progressive social ideology 147” (Canada and S. Africa), courts demonstrate to a lesser degree a “narrow conception of rights, emphasizing uninhibited Lockean individualism and...antistatist[m].” 146 Actually, I think it is quite striking that they have been able to this in an “age of neoliberalism” 218.

Having said that, it is still possible that turning to courts to enforce positive rights is inefficient/ineffective. Hirschl 298: channeling pressures for social justice to courts “has a considerable potential to harm reformist social movements by pacifying activists with illusions of change by luring resources away from political processes and lobbying strategies through which more substantial change might be achieved.” This is possible, but begs investigation.

Also, any gains in terms of judicial rights protection might still be outweighed by costs in terms of other measures of democratic quality. For example, one might ask: Has judicial intervention in the policy making process precluded or undermined progressive reform legislation, stunted or stifled debate in civil or political society, or otherwise prevented equally or more desirable outcomes from being realized? (Note assumption of radical democrats is that without judicial review, both the majority and minorities (“the people”) would be better off; there would be both much richer deliberation and more justice.) To my knowledge, nobody to date, including Hirschl, has tackled these questions for countries outside the U.S. (FN: obviously lots on Lochner era; Rosenberg; Lovell?; maybe Lisa Conant for EU??...but article on US and England? Suggestions from fellow schmoozers?) Requires very close, historical analysis, examining such sources as congressional/legislative records, media coverage, etc. to look for clear quantitative and qualitative declines in legislative debate, press coverage, civil society mobilization that can be plausibly linked to the introduction of judicial review/“judicialization of politics.” Need also to be able to construct credible counterfactual accounts (Fearon) about the likelihood that the absence of judicial involvement would have resulted in better outcomes, paired with a compelling normative argument for why these hypothetical outcomes would really have been superior (and not just a trade-off).

### **Conclusion: Beyond Manicheanism**

Both sides in the debate over constitutionalism/judicial review tend to portray the issues at stake in binary terms (need to rethink the order here, but possibilities include:)

- i. Judges vs. Legislators: heroic, principled vs. venal, self-interested...or vice-versa: disdainful elitists vs. authentic reps;
- ii. Principles/Ideals vs. Interests/Mere preferences: Dworkin guiltier here...as if judges are above the fray; at the same time, Hirschl is too cynical: since origins aren't uniquely noble, they must be uniquely self-interested.
- iii. Law vs. Politics: constraint/objectivity vs. discretion/subjectivity/value choices...to be legitimate, judges must do the former; to admit they do the latter is to give up on judicial review (Waldron/Hirschl 188).
- iv. Legal vs. Political questions...Hirschl, at least, accepts this dichotomy, implying that there are questions that are clearly "political" (or moral) and not legal (192, 198, 211), and therefore should only be decided by elected officials or "the people."
- v. Zero-sum view of policy making...By definition for Hirschl, any increase in judicial involvement is a loss for "democracy." But Dworkin, too: principle vs. policy!

But, in fact, there is nothing "essential" about con interp...and simplistic, sweeping responses to constzn of ALL STRIPES, sunny and skeptical, should be rejected (218).

Are we witnessing the creation of a "new political order" called juristocracy? No; there has clearly been a growing involvement of courts in the policy making process in

numerous polities, but, even the countries with the highest levels of judicialization of politics are a long way from having judges dominate and control policy making.

Hyperbole.

In most countries, it is inaccurate to characterize high court judges as insulated and aloof technocrats or self-appointed philosopher-kings; they have a democratic pedigree and, in many NC countries, are not set above the legislative process, but are rather an integral part thereof...not necessarily short-circuiting or shutting off debate.

Should we be troubled by the expansion of the judicial role? Maybe; but political scientists have a long way to go before we will have the data necessary to draw this conclusion.

Where to put?: Hirschl 198-9: the legal system is “inherently pacifying” and “pro-status-quo;” “inherently more conservative” than the “potentially open-ended political sphere.” This is true, in general. Certainly, social revolution will never happen through legal means (as Allende sadly discovered). But not all legal systems are equally conservative, and it is possible to have reform, even progressive reform, be supported by judges (pace Rosenberg...not protagonists of social change). Moreover, not all “status quos” are the same...where social rights are part of the “status quo,” or the prevailing ethos of a society, it is even likely that judges will support them.

In all likelihood, there are and always will be too many variations from case to case to make sweeping (universalizing) normative claims. There may be no such thing as (the

“real nature of 21<sup>st</sup> century constitutional democracy” 218). Rather, as Hirschl says in the conclusion to his book: “Judicial interpretation and implementation of constitutional rights depend to a large extent on the ideological atmosphere, specific institutional constraints, and economic and social meta-conditions within which they operate.” I couldn’t agree more. So let’s get down to the business of trying to figure out what matters most. Hirschl has thrown down the gauntlet; let’s rise to the challenge.

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