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The Nordic counternarrative: Democracy, human development, and judicial review

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The Nordic countries' changing constitutional scenery is a largely unexplored paradise for theory building in the field of comparative constitutional law and politics. As the articles in this symposium illustrate, the Nordic countries provide what is, arguably, a most fitting test case for examining the impact of transnational law on domestic constitutionalism, with its patterns of global convergence alongside enduring national divergence. Likewise, the Nordic experience calls for the incorporation of comparative politics or political economy theory into the study of constitutional law. This is particularly true with respect to the empirical examination of some core insights of post-World War II constitutional theory concerning the origins of constitutionalization and judicial review and the supposedly critical role of the latter in facilitating democracy and high levels of human development.

1. Nordic constitutionalism as terra incognita

The Nordic countries have often looked somewhat enigmatic, even inexplicable, to outside observers. A bedrock of social democracy, political stability, and economic prosperity for most of the past century, the region has nonetheless remained in some important respects, exceptional. Having avoided much of the horror and destruction of World War II, the Nordic countries remain torn with respect to European Union membership (Denmark, Finland, and Sweden are EU members; at least for the time

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being, Iceland and Norway are not). And other dualities abound. Having adhered to a policy of generous foreign aid alongside honest brokerage in global affairs, the Nordic countries (in particular Denmark and Norway) are among the main protagonists in the brewing international battle for the Arctic. The region that brought to the world great winners such as Paavo Nurmi (renowned Finnish runner), Ingmar Bergman (celebrated Swedish film director), or Roald Amundsen (legendary Norwegian explorer) is also the same region whose residents exemplify humility and undertone. And whereas the Scandinavian welfare state has long been the paradigmatic example of successful Keynesianism, social democracy, and concern for the ordinary person, the region has produced economic empires such as Nokia, Volvo, and IKEA, alongside iconic enterprises of excellence and meritocracy such as the Nobel Prize.

Similar dualities characterize Nordic constitutionalism. In comparative law's canonical genealogy of "legal families" the Nordic legal tradition is often classified as being neither a pure civil law type of legal system (no emphasis on extensive codification) nor a classic common law type (no heavy reliance on case law or precedent). Instead, it is a bit of both. Sweden's Age of Liberty (mid-18th century) was one of the earliest experiments with meaningful parliamentary limits on the monarchy. The Constitution of Norway (adopted 1814) is the second-oldest constitution currently in existence. Sweden's 1809 constitution was replaced in 1974, at the age of 165. At the same time, the Nordic countries have traditionally been agnostic, at best, toward American-style high-voltage constitutionalism, rights talk, and judicial activism. Instead, deference to the legislature side by side with administrative review on procedural grounds characterized Nordic judicial review for most of the last century. Another case in point is the designation of the Evangelical Lutheran Church as the state church in Norway, Denmark, Finland, and Iceland—probably some of Europe's most liberal and progressive polities. Norway's head of state, for example, is also the leader of the church. Article 2 of the Norwegian Constitution guarantees freedom of religion but also states that Evangelical Lutheranism is the official state religion. Article 12 requires that more than half the members of the Norwegian Council of State be members of the state church.

Even with respect to the European Convention on Human Rights (ECHR), arguably the main convergence engine in European rights discourse, the Nordic countries have been speaking with an inconclusive voice. Having signed the ECHR in 1950 and ratified it in 1952, Norway, for example, deferred giving human rights explicit constitutional protection until 1994.¹ Prior to 2000, substantive judicial review of legislation was explicitly forbidden in Finland.² In Denmark and Sweden, non-technical judicial review has seldom been practiced.³ The Danish Supreme Court has

¹ See Eirik Bjorge, *The Status of the ECHR in Norway: Should Norwegian Courts Interpret the Convention Dynamically?* 16 EUR. PUB. L. 45–50 (2010).

² On the changing landscape of judicial review in Finland, see, e.g., Tuomas Ojanen, *From Constitutional Periphery toward the Center: Transformation of Judicial Review in Finland*, 27 NORDIC J. HUM. RIGHTS 194–207 (2009); Juha Lavapuro, Tuomas Ojanen & Martin Scheinin, *Rights-Based Constitutionalism in Finland and the Development of Pluralist Constitutional Review* (this symposium).

³ See Jens Elo Rytter & Marlene Wind, *In need of Juristocracy? The silence of Denmark in the development of European legal norms* (this symposium).

set aside legislation only once in the past 160 years, and the Danish Constitution is silent on the issue.⁴ The picture is similar in Sweden.⁵ Variations on a combination of well-established, ex ante parliamentary preview and restrained ex post judicial review, deployed in the Nordic region, have proven effective in mitigating the counter-majoritarian difficulty embedded in excessive judicial review and ensuring an alternative, nonjuristocratic way of going about protecting rights.⁶ In many respects, then, the Nordic model of judicial review, not the so-called “commonwealth model,” is the true, genuine weak-form judicial review.⁷

Yet, over the last few decades, the traditional Nordic reluctance vis-à-vis judicial review has come under attack.⁸ The shift toward economic neoliberalism that took place in the 1980s, alongside the changing character of global markets and a series of international economic shocks, have eroded the traditional Scandinavian welfare-state model. All the talk about the adoption of an EU constitution and, in particular, the Maastricht Treaty (1992) and the Lisbon Treaty (2009) has affected the political and constitutional discourse in the three Nordic EU members, as well as in Norway and Iceland. In particular, the emerging pan-European rights regime enforced by the European Court of Human Rights (ECtHR) has begun to affect constitutional rights jurisprudence in the region following the incorporation of the ECHR into the Nordic countries’ domestic law.⁹ In addition, the gradual weakening of the historic social democratic dominance in Nordic politics and the emergence of a more competitive, multiparty political market alongside a rise in the number of litigation-oriented interest groups has brought about an increased role for the courts in Scandinavian politics.¹⁰ Cosmopolitan voices within the Nordic countries have been increasingly successful in encouraging courts to jump on the pan-European rights discourse bandwagon or risk being left intellectually and institutionally behind.¹¹ In short, a

⁴ The *Tvind Case* (U 1999 841H), where the Danish Supreme Court held unconstitutional a government funding scheme that excluded certain schools from state subsidy on administrative grounds. The Court held that this had infringed upon separation-of-powers principle (article 3 of the *Grunlov*) as administrative review powers rest with the judiciary, not the legislature.

⁵ See Joakim Nergelius, *Judicial Review in Swedish Law: A Critical Analysis*, 27 *NORDIC J. HUM. RIGHTS* 142–159 (2009).

⁶ See Kaarlo Tuori, *Judicial Constitutional Review as a Last Resort*, in *THE LEGAL PROTECTION OF HUMAN RIGHTS: SCEPTICAL ESSAYS* 365–391 (Tom Campbell et al. eds., 2011); Thomas Bull, *Judges without a Court—Judicial Preview in Sweden*, in *THE LEGAL PROTECTION OF HUMAN RIGHTS: SCEPTICAL ESSAYS* 392–409 (Tom Campbell et al. eds., 2011).

⁷ The term was coined in Stephen Gardbaum, *The New Commonwealth Model of Constitutionalism*, 49 *AM. J. COMP. L.* 707–760 (2001). See also, Mark Tushnet, *Alternative Forms of Judicial Review*, 101 *MICH. L. REV.* 2781–2801 (2003); Janet Hiebert, *Parliamentary Bills of Rights: An Alternative Model?* 69 *MODERN L. REV.* 7–28 (2006).

⁸ Andreas Follesdal & Marlene Wind, *Introduction: Nordic Reluctance Towards Judicial Review under Siege*, 27 *NORDIC J. HUM. RIGHTS* 131–141 (2009); Kjell Å. Modéer, *Adjustment of Reluctance? Scandinavian Exceptionalism in Legal Cultures*, in *PARADOXES OF EUROPEAN LEGAL INTEGRATION* 287–298 (Hanne Petersen et al. eds., 2008).

⁹ See generally, *A EUROPE OF RIGHTS: THE IMPACT OF THE ECHR ON NATIONAL SYSTEMS* (Helen Keller & Alec Stone-Sweet eds., 2008).

¹⁰ See, e.g., Barry Holmström, *The Judicialization of Politics in Sweden*, 15 *INT’L POL. SCI. REV.* 153–164 (1994).

¹¹ For a recent take on this intellectual and judicial trend see MITCHEL DE S.-O.-L’E. LASSER, *JUDICIAL TRANSFORMATIONS: THE RIGHTS REVOLUTION IN THE COURTS OF EUROPE* (2009).

combination of endogenous and exogenous pressures has pushed the Nordic countries to join the march toward juristocracy.¹²

The unique combination of continuity and change makes the Nordic countries an ideal setting for assessing some of the core insights of canonical constitutional theory. Most notably, the traditional Nordic resistance to judicial hyperactivism alongside the region's exceptional record on both the democracy and human development fronts provide ample material to assess the perception of judicial review as a necessary supplement to democracy and its supposed contribution to human development and good governance. The Nordic countries also provide a perfect context for studying what may be termed glocalization in constitutional law as well as the emergence of amalgams of the local and the global reflecting centripetal convergence processes alongside patterns of enduring divergence. Likewise, it is difficult to think of a more suitable region for studying the links between economic liberalization, the reconstruction of the welfare state, and the rise of judicial review and rights discourse. The constitutional transformation of the Nordic countries may thus serve as a magnifying glass for similar processes of constitutional change elsewhere. However, despite this intriguing set up, constitutional events in the Nordic countries seldom generate international scholarly interest. Surprisingly, none of the major works critical of judicial review's legitimacy, democratic credentials, or effectiveness in limiting government draws on the Nordic experience to substantiate its claims. It is much less surprising, to be sure, that none of Ronald Dworkin's pro-judicial review works closely considers the possible lessons of the Scandinavian model of judicial review. With few notable exceptions, the region's potential contribution to contemporary debates in comparative constitutional law and politics remains, for the most part, unexploited and under-theorized.

In this essay, I offer several realist observations concerning the possible lessons from Nordic constitutionalism with respect to two core questions. First, how necessary, let alone sufficient, a condition is active judicial review, strong or weak, in accomplishing high levels of democracy, human development, and other such ideals? And, by extension, what is the place of constitutional rights in the larger scheme of the modern welfare state? Second, what are the links between economic liberalization and shifting political power constellations, on the one hand, and the rise of judicial review and rights jurisprudence, on the other? With respect to each of these two questions, Nordic constitutionalism offers a counternarrative to the canonical insights of constitutional theory. I discuss each in turn.

2. Judicial review, democracy, human development

The past few decades have seen sweeping global convergence toward democracy, real or professed, alongside a convergence upon constitutional supremacy and a corresponding increase in the political salience of constitutional courts and judicial review worldwide. Over 150 countries and supranational entities, ranging from Russia to South Africa to the European Union and covering approximately three-quarters of the

¹² RAN HIRSCHL, *TOWARDS JURISTOCRACY: THE ORIGINS AND CONSEQUENCES OF THE NEW CONSTITUTIONALISM* (2004).

world's population, have gone through major constitutionalization processes over the last few decades. Even countries such as Canada, Israel, Britain, and New Zealand—described merely two or three decades ago as the last bastions of Westminster-style parliamentary sovereignty—have embarked on a comprehensive constitutional overhaul aimed at introducing principles of constitutional supremacy into their respective political systems. The emergence of this new, all-encompassing form of managing public affairs has been accompanied and reinforced by an almost unequivocal endorsement of the notion of constitutionalism and judicial review by scholars, jurists, and activists alike. According to the generic version of this canonical view, judicial review by constitutional courts is a necessary supplement and a core element of a viable democracy.

To be sure, the sweeping worldwide convergence to constitutionalism has brought about tremendous advances—real and symbolic—in the legal protection and public awareness of basic rights and liberties. And it has certainly entrenched in the public mind the notion that there is far more to democracy than a mere adherence to the majority-rule principle. That said, simple and sweeping claims about the positive effects of the constitutionalization of rights ought to be taken with a grain of salt. Whereas the constitutionalization of rights, no doubt, affirms marginalized identities or promotes the status and awareness of procedural justice and negative liberties, its independent influence on promoting progressive notions of democratic or distributive justice appears somewhat exaggerated. If there is a region whose experience supports such a skeptical view of constitutionalism and judicial activism, it is Scandinavia.

While an exhaustive empirical study of the effect of constitutionalism on democracy is, of course, beyond the scope of this essay, some crude yet valuable information is easily available. The Democracy Index, conducted by *The Economist*, focuses on five general categories of democracy: electoral process and pluralism, civil liberties, functioning of government, political participation, and political culture. Regimes are assigned a score on a zero-to-ten scale, where ten is the closest a country can get to full democracy. North Korea scored the lowest with 1.08, while Norway scored a total of 9.80 (the highest result). The rest of the top dozen countries include Iceland, Denmark, Sweden, New Zealand, Australia, Finland, Switzerland, Canada, the Netherlands, Luxemburg, and Ireland. The United States was ranked seventeenth with a score of 8.18. In other words, the four most democratic countries in the world are Nordic countries, with the fifth Nordic country (Finland) ranked the seventh most democratic country worldwide. The countries are categorized into “Full Democracies” (score of 8–10); “Flawed Democracies” (score of 6–7.9); “Hybrid Regimes” (score of 4–5.9); and “Authoritarian Regimes” (score of less than 4). Of the 167 countries studied, 26 were designated full democracies, 53 flawed democracies, 33 hybrid regimes, and 55 authoritarian regimes. Judging by this study, Western countries—primarily Northern European, plus Canada, New Zealand and Australia—all with relatively small populations (up to 30 million or so), developed market economies, central regulation in most key policy areas (e.g., education, health care, transportation, agriculture etc.), and a relatively generous Keynesian welfare-state tradition, are clearly the most democratic countries in the world. And yes, none of the top twelve countries on the list

sport a long tradition of U.S.-style written constitutionalism, active judicial review, or a culturally engrained constitutional sanctity. To reiterate: we can count all five Nordic countries among the seven most democratic countries in the world. In other words, American-style constitutional faith is not a necessary precondition for democracy.

Even the independent freedom-enhancing aspects of the U.S. Constitution are not obvious. Whereas certain rights and liberties enjoy venerable constitutional protection, the United States has one of the most unequal distributions of income among advanced industrial societies; it has vast social and economic disparities, and sports one of the more hospitable constitutional environments for economic entities and corporate capital. Sweden, Finland, Norway, and Denmark—four of the most developed and prosperous nations on earth—have long adhered to a relatively egalitarian conception of democracy while being less than enthusiastic (to put it mildly) toward the American notion of rights and judicial review. Has this come at the expense of utter disregard for civil liberties in these countries? Hardly. The sections on alleged human rights violations in any of the Scandinavian countries are slim to nonexistent in all of the international human rights watchdog reports—Amnesty International, Human Rights Watch, and their various counterparts included. The status of individual freedoms in the Netherlands—one of the European countries that, until recently, had stringently opposed the idea and practice of judicial review—certainly has not been lower than in the United States, which has had more than two centuries' use of a widely celebrated Bill of Rights and two centuries of active judicial review. As Robert Dahl skeptically observed twenty years ago: “No one has shown that in countries such as the Netherlands or New Zealand, which lack judicial review, or in Norway and Sweden, where it is exercised rarely and in highly restrained fashion, or in Switzerland where it can be applied only to cantonal legislation, are less democratic than the United States, nor, I think could one reasonably do so.”¹³

Another way of assessing the significance of constitutional provisions per se is by looking at their contribution to human development. A common definition of that concept emphasizes access to an adequate standard of living, basic needs, services, protections, and meaningful life opportunities. It is premised on the notion that no one can fully enjoy or exercise any classic negative civil liberty in any meaningful way if they lack the essentials for a healthy and decent life in the first place. According to this notion, basic needs such as access to food and safe water, housing, education, and health care are both morally and practically more fundamental than any given classic negative right. One's ability to live a decent life, to be adequately nourished, substantive equality, and to have access to basic health care, education, employment, and shelter are essential preconditions to the enjoyment of any other rights and freedoms. According to many sources—from the Nobel Laureate Amartya Sen and the United Nations Human Development Program (UNDP) through to classic international human rights texts such as the Universal Declaration on Human Rights (UDHR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR)—assessing human development according to these standards is germane. Indeed, what

¹³ ROBERT DAHL, *DEMOCRACY AND ITS CRITICS* 189 (1989).

these authorities demonstrate is that it is as analytically justifiable to study the effects of constitutionalization on human development as any other definition of the ultimate indicators of human development, including the prevalent liberal mix of procedural justice, formal equality, and classic civil liberties (often bundled with the libertarian addition of property rights).

The Human Development Index (HDI) is a widely recognized metric combining standardized measures of life expectancy, literacy, educational attainment, and GDP per capita for countries worldwide. The basic use of HDI is to rank countries by level of “human development” on a scale of 0 to 1 (based on an updated, complicated yet reliable formula), which usually also implies whether a country is a developed, developing, or underdeveloped country. The most recent Human Development Report (2010) ranks Norway at the top with a score of 0.938, followed by Australia, New Zealand, the United States, Ireland, Liechtenstein, the Netherlands, Canada, Sweden, and Germany. Finland, Iceland, and Denmark are ranked 16th, 17th, and 19th, respectively. Other countries in the top thirty include the European powerhouses (France, Spain, Italy, and Britain) along with smaller polities, such as Greece, Belgium, Austria, Luxembourg, Israel, Slovenia, Singapore, Korea, and Hong Kong. With the exceptions of Japan (humble constitutionalism and limited judicial review) and the United States (extravagant constitutionalism and great judicial visibility), none of the world’s most populated countries are among the world’s leaders in terms of human development. Mexico, Nigeria, Brazil, Indonesia, Bangladesh, Pakistan, let alone India and China, make strides but do not excel in terms of HDI.¹⁴ In addition to moderate population size and stable electoral processes, the existence of a developed market economy combined with centralized planning that cherishes public investment in science, education, and health care appears to be the winning formula here. A large middle class and a well-developed civil society—precisely what the Nordic countries exemplify—are key societal factors. And what is the net impact of the variance on the constitutionalism axis? Quite negligible, frankly.

In other words, anyone who points to the traditional Scandinavian antagonism toward American-style constitutional rights and judicial review as a possible obstacle to the full realization of democracy or human development in the Nordic countries must take a close look at the numbers. Rights and judicial review alone certainly do not do the trick when it comes to human development. They may not even be an across-the-board necessary, *conditio sine qua non* supplement to democracy. Even more fundamentally, comparative data from the Nordic and various other polities suggest that factors such as manageable population size, high education and human capital, a developed market economy alongside a functional social safety net, and strong state capacity account for democracy, prosperity, and human development more than written constitutionalism, active judicial review, or the legalization of social relations. Constitutions and active judicial review matter; however, their net

¹⁴ United Nations Development Programme (UNDP), HUMAN DEVELOPMENT REPORTS (United Nations, 2010), available at: <http://hdrstats.undp.org/en/indicators/>.

significance is often exaggerated by overly legalistic accounts, while the significance of a constitution's social and political context is downplayed.

Along the same lines, the Nordic countries may also serve as a springboard for engaging in a comparative cross-disciplinary exploration of the intersection of socioeconomic rights and political realities. The Nordic welfare-state model has long been considered the most generous among the developed countries. The Scandinavian welfare state has traditionally been based on social security, health care, free education, and a commitment to full employment and egalitarianism “in exchange” for high taxation rates and levels of social expenditure.¹⁵ Welfare expenditure in the Nordic countries is over 30 percent of the national Gross Domestic Product—the highest in the world. In the United States, for example, that figure seldom tops 20 percent. Public social expenditure in Sweden and Denmark is ranked first and second, respectively, among OECD countries.¹⁶ As a result, the postwelfare transfer poverty rate in Norway, Sweden, Finland, and Denmark has been below 5 percent of the population—by far the lowest in the world. In the United States, by comparison, this rate hovers at around 15 percent of the population. Norway, Sweden, Denmark, and Finland sport the four lowest (respectively) Gini-coefficient readings (standardized measurements of income inequality) among OECD countries.¹⁷ At the same time, pertinent rights provisions in the Nordic constitutions are not more generous per se than equivalent provisions in any of the other countries whose constitutions protect such rights. It is the realization of these rights that matters most. The role of judicial review in fostering substantive egalitarianism in the Nordic countries? Negligible, just as it has been with respect to any aspect of governance other than administrative law.

Although the formal constitutional protection of positive socioeconomic rights is supposed to advance their actual status, there is no readily apparent correlation between these two aspects. Some countries (e.g., Brazil) have unqualified subsistence rights provisions in their constitutions, whereas other countries (e.g., South Africa) have qualified provisions (progressive realization, subject to available resources, etc.). In yet other countries (e.g., India), such rights have been protected under more generic provisions such as those of human dignity and security of the person. Despite these differences, measurements of income inequality and standardized development indicators are roughly similar in Brazil, South Africa, and India. Moreover, these gaps are no smaller than those in other developing-world countries, where no subsistence rights are granted constitutional status.

Unlike the constitutional sphere, government policy—shaped, in turn, by political factors—seems to matter a great deal when it comes to the realization of socioeconomic rights. Luiz Inácio Lula da Silva became president of Brazil on January 1, 2003. Lula, as he is known popularly, has been advocating a socialist-progressive agenda. His administration introduced a series of social policies and new spending priorities aimed at eradicating poverty and illiteracy in Brazil. The results have been nothing short

¹⁵ See, e.g., Bent Greve, *What Characterize the Nordic Welfare State Model*, 3 J. Soc. Sci. 43–51 (2007).

¹⁶ The OECD *FACTBOOK* 2010 (2010).

¹⁷ *Id.*

of staggering. From 2003 to 2009, the number of poor people in Brazil dropped from 58.2 million to 41.5 million while the overall population increased from 176 million to 198 million. The Gini-coefficient reading fell from 0.581 to 0.544; the illiteracy rate dropped from 13.6 percent to less than 10 percent; and the infant mortality rate per 1,000 live births fell from 35.8 to 22.6.¹⁸ The social and economic rights provisions in the Constitution of Brazil have not changed since 1988. As in the Nordic experience, the impressive improvements in alleviating poverty in Brazil have been achieved by targeted government policies, not by constitutional reforms or by more progressive constitutional jurisprudence as compared to jurisprudence in the pre-Lula years.¹⁹ There are, of course, numerous other variations among countries in equalization and poverty-reduction policies that may be derivative of differences in hegemonic cultural propensities or demographic trends, historical and institutional path dependence, domestic and international political economy factors, or strategic behavior by constitutional courts vis-à-vis other political actors and/or the public.²⁰

The sizable political economy scholarship on the modern welfare state is insightful in addressing some of this divergence, yet it is often overlooked by (or simply unknown to) scholars of constitutional rights and jurisprudence.²¹ Among the key factors in explaining cross-country variance in the redistribution of resources are the historical strength of the political left; the organization of labor and its relationship with the state (corporatism); most notably, the degree of centralization of unions and their incorporation into public decision-making processes; and median-voter preferences or voter turnout among low-income constituencies (the greater it is, the greater the redistribution level is expected).²² The relative size and type of national economy have also been suggested as important factors shaping such coordinated bargaining arrangements, particularly the greater or lesser degree of perceived shared exposure to risk on the international market by business and labour.²³ So, for example, relatively small

¹⁸ Data drawn from the CIA WORLD FACTBOOK 2010.

¹⁹ According to a recent study by the director of the World Bank's Development Research Group, Brazil's main cash-transfer program, called Bolsa Família, provides help to 11 million families, or 60 percent of all those in the poorest tenth. See Martin Ravallion, *A comparative perspective on poverty reduction in Brazil, China and India*, WORLD BANK POLICY RESEARCH WORKING PAPER 5080 (2009). Statistical analyses of large data sets suggest that there is little or no effect of the constitutional status of the right to health on actual health expenditure; of the right to social security on social policy outcome; and the right to education on education policy outcome. See, e.g., Avi Ben-Bassat and Momi Dahan, *Social rights in the constitution and in practice*, 36 J. COMP. ECON. 103–119 (2008).

²⁰ See Ran Hirschl & Evan Rosevear, *Constitutional Law Meets Comparative Politics: Socio-Economic Rights and Political Realities*, in *THE LEGAL PROTECTION OF HUMAN RIGHTS*, *supra* note 6, 207–228.

²¹ The following two paragraphs draw on Hirschl & Rosevear, *id.*, at 214–216. For an overview of this vast body of literature see, Torben Iversen, *Capitalism and Democracy*, in *OXFORD HANDBOOK OF POLITICAL ECONOMY* 601–623 (Barry Weingast & Donald Wittman eds., 2006).

²² See David Bradley et al., *Distribution and Redistribution in Postindustrial Democracies*, 55 *World Pol.* 193–228 (2003); Vincent Mahler, *Economic Globalization, Domestic Politics, and Income Inequality in the Developed Countries: A Cross-National Study*, 37 *POL. STUD.* 1025–1053 (2004).

²³ P. J. Katzenstein, *SMALL STATES IN WORLD MARKETS: INDUSTRIAL POLICY IN EUROPE* (1985). See also D. R. Cameron, *The Expansion of the Public Economy: A Comparative Analysis*, 72 *AM. POL. SCI. REV.* 1243 (1978).

industrial countries, say the Scandinavian polities, are likely to have a more generous welfare state so as to insure themselves against the vicissitudes of the global economy. Yet another theory—often referred to as “varieties of capitalism”—focuses on business interests as shaped by the structure of the economy. Industries that are highly exposed to risk will favor a relatively generous social insurance system so as to share costs and risks with the state. It has also been argued that the burden of contemporary welfare retrenchment is unequally borne in a systematic manner that is conditioned by the relative (collective) strength of those who benefit from specific programs.²⁴ If benefits do not cut across economic and/or social cleavages, it is argued, they tend to lack broad-based support and are more susceptible to elimination.

This literature, although marked by internal disagreement, represents a wealth of data and analysis that could be fruitfully incorporated into the comparative study of constitutionalism, particularly with regard to the analysis of the impact of constitutional rights guarantees and constitutional jurisprudence. Both the qualitative and quantitative elements of this field have much to offer by way of a more holistic approach to the comparative analysis of constitutionalism and its effects. And in starting to address the first of the two core questions introduced earlier, one can hardly think of a more fitting setting to study the place of socioeconomic rights in the larger matrix of the modern welfare state than Nordic social democracy and the Scandinavian welfare state, with its traditional emphasis on thoughtful public policy making by elected politicians and a dedicated bureaucracy, not on full-blown constitutionalism or on government with judges.

The Nordic constitutional tradition has been variously based on local and national democracy, popular sovereignty, parliamentary supremacy, and majority rule.²⁵ More broadly, it has featured a well-balanced system of government based on embedded common sense and overall good governance, political and judicial restraint, relative social cohesiveness, a traditional commitment to social democracy, a well-developed welfare state combined with a vibrant market economy, and celebrated national pride alongside global good deeds. The proof is in the pudding; as the data indicates, all Nordic countries continuously sport top rankings in comparative global indicators of democracy, human development, educational attainments, access to health care, gender equality, freedom of expression, political stability, economic prosperity, and contribution to international peacemaking. The Nordic constitutional tradition thus presents a possible counternarrative to the emerging global consensus that regards vibrant constitutional law and courts as the epicenter and sine qua non of any stable political system. Looking from the outside, the Nordic countries appear to be one of the last places on earth that need more emphasis on constitutionalism or judicial review to sustain their well-proven record of democracy, prosperity, and human development.

²⁴ Paul Pierson, *The New Politics of the Welfare State*, 48 *WORLD POLITICS* 143–179 (1996); GOSTA ESPING-ANDERSEN, *SOCIAL FOUNDATIONS OF POSTINDUSTRIAL ECONOMIES* (1999).

²⁵ Joakim Nergelius, *The Nordic States and Continental Europe: A Two-fold Story*, in *NORDIC AND OTHER EUROPEAN CONSTITUTIONAL TRADITIONS* 3–7 (Joakim Nergelius ed., 2006).

3. The extrajudicial origins of constitutional change

To some extent, contemporary debates in the Nordic countries concerning the democratic credentials and legitimacy of judicial review have a certain déjà vu feel to them. While the specific content and style of these debates are distinctly Nordic, they ultimately echo similar arguments and counterarguments raised by critics and proponents of judicial review in other polities, most notably in former Westminster-style political systems (e.g. Canada, New Zealand, or the United Kingdom), where, much like the Nordic countries, long-standing traditions of parliamentary sovereignty and judicial restraint have given way to extensive constitutionalization trends. At the same time, the increasing prevalence of rights jurisprudence and judicial review, in a region where constitutional courts have traditionally played a limited role, provides an ideal setting for exploring possible extrajudicial catalysts of constitutional change. In particular, the Nordic experience may point to the significance of global forces of constitutional convergence acting on the state from outside alongside economic liberalization and increased political competition from within as possible catalysts of constitutionalization.

An increasingly common scenario of constitutional change is that of “incorporation,” where the constitutionalization of rights is done via the incorporation of international and trans- or supranational legal standards into domestic law. This scenario is particularly evident with respect to countries joining international human rights treaties (e.g. the Convention on the Elimination of All Forms of Discrimination against Women [CEDEW]) or regional human rights regimes such as the African Charter of Human and Peoples’ Rights, the Inter-American Convention on Human Rights, or the ECHR. Numerous such incorporations of international and trans- or supranational legal standards into domestic law have taken place in Europe and in Latin America, most notably, the 1994 incorporation of ten international treaties and covenants protecting fundamental human rights and civil liberties into Argentina’s domestic law or the passing of the Human Rights Act in Britain in 1998. The European Union’s eastward expansion of 2004 (the addition of ten new member states) and later in 2007 (with the addition of two new member states) ushered in a new constitutional and legal era in these twelve new EU member states. In virtually all instances, such incorporation has led to a rise in the significance of courts and to the judicialization of politics and public policy making, more generally.²⁶

The Nordic countries have been under the jurisdiction of the ECtHR in Strasbourg—arguably the most prestigious, tone-setting transnational rights-jurisprudence tribunal in the world—for several decades now by virtue of being signatory parties to the ECHR. However, it was not until the early 1990s that the five Nordic countries formally incorporated the ECHR into their domestic constitutional regimes. The ECHR was incorporated into Finnish law in 1990, Danish law in 1992, Swedish and Norwegian law in 1994, and Iceland’s law in 1995. The impact on domestic law has been transformative. One illustration is Denmark. In 1989, the ECtHR ruled in the *Hauschildt* case that Denmark was in violation of certain aspects of article 6 of the

²⁶ See, e.g., ALEC STONE-SWEET, *GOVERNING WITH JUDGES* (2000); DANNY NICOL, *EC MEMBERSHIP AND THE JUDICIALIZATION OF BRITISH POLITICS* (2001).

ECHR (criminal due process rights) in allowing a judge who had decided on a suspect's pretrial detentions to preside over the accused's main trial.²⁷ Within less than a year, the Supreme Court of Denmark echoed the ECtHR's ruling when it held in the *Jydebrode* case (1990) that a judge who ordered the detention of a suspect during a criminal investigation cannot sit on the bench that tries the accused, as this would create judicial bias in contravention of article 6 of the ECHR.²⁸ Since the incorporation of 1992, still closer attention to ECHR provisions has become prevalent in both courts and administrative bodies in Denmark.

Such incorporation of international and trans- or supranational legal standards into domestic constitutions goes well beyond subjecting the laws of the incorporating country to scrutiny by the judicial organs established by the incorporated international treaty's rights regime. It also grants domestic courts the authority to draw on provisions of the incorporated documents in scrutinizing primary legislation in their own countries. No other region in the world, perhaps with exception of the former Eastern bloc, has undergone such a transformative constitutional change in such a short period of time. Unlike in the postcommunist world, however, the incorporation of the ECHR into the Nordic countries domestic law was not accompanied by any change of regime type or by a major economic transformation. Thus, it provides a methodologically clean setting for assessing the net impact of incorporation on constitutional jurisprudence and judicial behavior.

The globalization factor has another aspect to it. Constitutional jurisprudence in the early twenty-first century is quite open to the international migration of ideas (the U.S. apparent exception notwithstanding) and to foreign influence more generally. Given other broad economic, technological, and cultural convergence processes, let alone the dramatically improved availability of, and access to, comparative constitutional jurisprudence, jurisprudential cross-fertilization and the globalization of constitutional law seem almost inevitable.²⁹ In a transnational age, even bastions of insular parochialism cannot avoid a certain degree of international influence.³⁰ However idiosyncratic or rooted in local traditions and practices a given polity's constitutional law may be, it is unavoidably open to liberalizing global influences. Constitutional courts worldwide increasingly rely on comparative constitutional law to frame and articulate their own position on a given constitutional question. This trend has been described as "a brisk international traffic in ideas about rights," carried on through advanced information technologies by high-court judges from different countries.³¹ Indeed, "constitution interpretation across the globe is taking on an increasingly cosmopolitan character, as comparative jurisprudence comes to assume a central place in constitutional adjudication."³² In short, "Courts are talking to one another all

²⁷ *Hauschildt v. Denmark* (ECtHR, application number 10486/83, 24/05/1989).

²⁸ *Jydebrode* case, November 1, 1989, U1990. 130.

²⁹ See Mark Tushnet, *The Inevitable Globalization of Constitutional Law*, 49 *VIRG. J. INT'L L.* 985 (2009).

³⁰ See, generally, VICKI JACKSON, *CONSTITUTIONAL ENGAGEMENT IN A TRANSNATIONAL ERA* (2010).

³¹ MARY ANN GLENDON, *RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE* 158 (1991).

³² Sujit Choudhry, *Globalization in Search of Justification: Toward a Theory of Comparative Constitutional Interpretation*, 74 *IND. L. REV.* 819, 820 (1999).

over the world.”³³ This has given rise to what may be termed “generic constitutional law”—a supposedly universal, Esperanto-like discourse of constitutional adjudication and reasoning, primarily visible in the context of core civil rights and liberties.³⁴ Precisely because the Nordic countries have long drawn on their human rights record to bolster their international reputation, they cannot ignore the emergence of such a universal rights discourse.

The changing nature of the domestic economic and political markets in the Nordic countries has also been a pro-judicial empowerment vector. As with other countries with small to midsize populations, funding a generous welfare state while maintaining an investment-friendly economic environment has proven an increasingly difficult challenge for the Nordic countries. (The meltdown of Iceland’s economy in 2008 is merely one extreme example). This challenge was given added weight by the global trend toward social and economic neoliberalism. Over the last few decades, calls have been made in each of the Nordic countries to shelve the local version of the Keynesian welfare state in favor of more market-oriented, “small state” economic policies. New or looming budgetary deficits have been used to legitimate a measured pullback of the state from the social welfare and labor arenas. Industrial, taxation, trade, and social policy initiatives have been used as political instruments to reestablish dominance of the market in civil society. New Zealand, Israel, Hungary, Poland, and, let us not forget, the Thatcherite revolution in the United Kingdom are all examples of countries that underwent significant economic liberalization processes over the last few decades. In virtually all of these countries these economic reforms leading to the rollback of big government and decline of labor unions have been accompanied by an astounding rise of rights legislation and jurisprudence.

While theorizing on the possible causal links between economic liberalization and the rise of rights discourse may take us in various directions, one point may be made with some confidence. There is little doubt that the canonical interpretation of rights as predominantly negative freedoms has not done much to reduce disparities in fundamental living conditions within and among polities. It has proven virtually futile in mitigating, let alone reversing, wide-ranging social and economic processes of deregulation, privatization, reduced social spending, removal of “market rigidities,” a prevalent stock-market culture, and an overarching “cult of efficiency.” It has failed to promote the notion that no man, woman, or child can fully enjoy or exercise the classic civil liberties in a meaningful way if they lack the basic essentials for a healthy and decent life in the first place.³⁵ In most postcommunist countries, for example, the

³³ Anne-Marie Slaughter, *A Typology of Transjudicial Communities*, 29 UNIV. RICH. L. REV. 99 (1994).

³⁴ David Law, *Generic Constitutional Law*, 89 MINN. L. REV. 652 (2005); Jiunn-Rong Yeh & Wen-Chen Chang, *The Emergence of Transnational Constitutionalism: Its Features, Challenges and Solutions*, 27 PENN. STATE INT’L L. REV. 89 (2008).

³⁵ This notion is based on Amartya Sen’s “capabilities” or “basic needs” approach to human development. It has been adopted by the UNDP and numerous other international human development agencies. See Amartya Sen, *Equality of What?*, in TANNER LECTURES ON HUMAN VALUES (S. McMurrin ed., 1980); and INEQUALITY REEXAMINED (1992).

constitutionalization of rights has been associated with precisely the opposite ethos, placing private ownership and other economic freedoms beyond the reach of majoritarian politics and state regulation. In fact, it is difficult to find even a single recent example in the industrial world (perhaps with the exception of post–WW II Germany) where the rise of judicial review and individual rights discourse has been associated with an expansion, not decline, of corporatism, organized labor, or the welfare state. The expansion of rights talk in the Nordic countries is no exception.

In that respect, there seem to be deeper ideological links, yet to be fully fleshed out, between the shrinkage of the Keynesian welfare state, lenient regulation, the small-state economic and social thought prevalent in the decades prior to the economic meltdown of 2008 and the prevalent conceptualization of rights as essentially negative liberties that shield the private sphere from the long arm of the encroaching state. The dominant notion of rights as negative freedoms is based on a view of society as composed of an unencumbered, autonomous, and self-sufficient private sphere, whose members' full realization of freedom is constantly threatened by the encroaching state. Deregulation and privatization, so-called free and flexible markets (that is, markets with low wage and welfare safety nets, disincentives for collective bargaining, minimal job security, and removal of trade shields), economic efficiency and fiscal responsibility (the latter often perceived as a call for reduced public spending on social programs) are all fundamentals of the 1980s and 1990s orthodoxy of economic neoliberalism. These objectives are rooted in concepts of individualism, social atomism, and existential fear of a big-brother state all of which inform the current hegemonic discourses of rights.³⁶

The rise of an effective transnational human rights regime in Europe is obviously a key factor in explaining the changing nature of constitutional law in the Nordic countries. However, the expansion of judicial power in that region may also help test several other grand theories that purport to explain the rise of judicial review as a political or sociological, not juridical, phenomenon. To begin with, the Nordic experience appears to pose a challenge for functionalist, systemic need-based explanations of judicial empowerment. Such theories see judicialization as emanating from the proliferation of democracy; the rise of federalism (which, in turn, necessitates the existence of a neutral umpire);³⁷ or as stemming from the proliferation in levels of government and the corresponding emergence of a wide variety of semiautonomous administrative and regulatory state agencies (independent and active judiciaries armed with judicial review practices are seen as necessary for efficient monitoring of the ever-expanding administrative state).³⁸ Along the same lines, the expansion of judicial power is also said to stem from the increasing complexity and contingency of modern societies, and/or from the creation and expansion of the modern welfare state with its numerous

³⁶ JOEL BAKAN, *JUST WORDS: CONSTITUTIONAL RIGHTS AND SOCIAL WRONGS* (1997).

³⁷ See, e.g., Martin Shapiro, *The Success of Judicial Review*, in *CONSTITUTIONAL DIALOGUES IN COMPARATIVE PERSPECTIVE*, 193–219 (Sally Kenney ed., 1999).

³⁸ See, e.g., MARTIN SHAPIRO & ALEC STONE-SWEET, *ON LAW, POLITICS, AND JUDICIALIZATION* (2002).

regulatory agencies.³⁹ Moreover, the modern administrative state embodies notions of government as an active policy maker rather than a passive adjudicator of conflicts. It therefore requires, so the argument goes, an active, policy-making judiciary.⁴⁰

None of these macroexplanations, however, accounts for the precise timing of the expansion of judicial power in the Nordic countries, most of which has occurred over the last twenty-five years and had not been preceded by any major change in regime type or transition to democracy. It is not clear why judicial review came to be seen as necessary for the efficient monitoring of the administrative state in the last decade of the twentieth century and not in the 1960s, say, during the hey-day of the Scandinavian welfare-state model. Likewise, it is hard to see why the problems of complex multilevel governance and coordination reached a point where active judicial review became necessary precisely in the 1990s. Moreover, if anything, the expansion of judicial power in the Nordic countries may be associated with economic liberalization and the calls for less, not more, government. At best, then, functionalist factors could provide a broad, fuzzy pro-judicialization ambience, within which key political actors operate. Any explanation of why judicial empowerment happened in Scandinavia in the 1990s and not thirty years earlier or later must be more concrete.

Certain accounts of the rapid growth of judicialization at the supranational judicial level portray it as an inevitable institutional response to complex coordination problems deriving from the systemic need to adopt standardized legal norms and administrative regulations across member states in an era of converging economic markets.⁴¹ The Nordic countries offer a “natural experiment” (Sweden, Finland, and Denmark are EU members; Norway and Iceland are not) for testing arguments about the impact of the EU’s extensive regulatory regime on the Americanization of Europe’s way of “doing law” (“Eurolegalism,” as Daniel Kelemen has recently called it, referring to a European mode of what Robert Kagan had famously described as American-style “adversarial legalism”).⁴² A related, intriguing idea that seems worth exploring in the Nordic context, is the possibility that economic liberalization may be an important projudicialization catalyst as in the regulatory arena, where the combination of privatization and liberalization create regulatory gaps that, in turn, may encourage “juridical regulation.”⁴³

The Nordic experience appears to be in line with a realist-strategic approach to the rise of judicial review. As the seminal works of political scientists Robert McCloskey, Robert Dahl, and Martin Shapiro (among others) established, constitutional courts and their jurisprudence are integral elements of a larger political setting. Their establishment and behavior cannot be understood in isolation from their surrounding political

³⁹ See, e.g., NIKLAS LUHMANN, *A SOCIOLOGICAL THEORY OF LAW* (1985); GUNTHER TEUBNER, *JURIDIFICATION OF THE SOCIAL SPHERES* (1987); Jürgen Habermas, *Law as Medium and Law as Institution*, in *DILEMMAS OF LAW IN THE WELFARE STATE* (Gunther Teubner ed., 1988).

⁴⁰ See, e.g., MALCOLM FEELEY & EDWARD RUBIN, *JUDICIAL POLICY MAKING AND THE MODERN STATE: HOW THE COURTS REFORMED AMERICA’S PRISONS* (1998).

⁴¹ ALEC STONE-SWEET, *GOVERNING WITH JUDGES*, *supra* note 26.

⁴² See R. DANIEL KELEMEN, *EUROLEGALISM: THE TRANSFORMATION OF LAW AND REGULATION IN THE EUROPEAN UNION* (2011); Daniel Kelemen & Eric Sibbitt, *The Globalization of American Law*, 58 *INT’L ORG.* 103 (2004); ROBERT KAGAN, *ADVERSARIAL LEGALISM* (2001).

⁴³ See STEVEN VOGEL, *FREER MARKETS, MORE RULES: REGULATORY REFORM IN ADVANCED INDUSTRIAL COUNTRIES* (1998).

context. Thus, the judicialization of politics may reflect the strength and unity of the political sphere more than it is reflective of courts' and judges' quest to expand the ambit of their influence. For example, an extensive judicialization of politics is, *ceteris paribus*, less likely to occur in a polity featuring an assertive and unified political system that is capable of restraining the judiciary. In such polities, the political sphere may signal credible threats to an overactive judiciary that have a chilling effect on any activist tendencies of the courts. Conversely, the more dysfunctional or deadlocked the political system and its decision-making institutions are, in a given rule-of-law polity, the greater the likelihood of expansive judicial power in that polity.⁴⁴ Greater fragmentation of power among political branches reduces their ability to rein in the courts and, correspondingly, increases the likelihood of courts asserting themselves.⁴⁵ Indeed, the limits of judicialization in this respect are easily analyzed through what has been termed "relative autonomy." Since judicialization is made possible on the basis of fissures in the political sphere, then where these fissures are minimal, judicialization cannot proceed very far, regardless of what the courts' own interests or ideological preferences may be.

Taking the notion of courts as political institutions even further, recent political science scholarship, quantitative and qualitative, suggests that political deference to the judiciary and the consequent judicialization of politics—indeed, the profound expansion of judicial power, generally—are manifestations of the concrete social, political, and economic struggles that shape a given political system. A core finding of this body of literature is that strategic behavior by politicians, elites, and the courts plays a key role in explaining the tremendous variance in the scope, nature, and timing of constitutional reform. Whereas ideational factors may provide a platform that constrains the scope and nature of choices, the actual form of constitutional revolutions and certainly their timing are explained by concrete political factors. Key factors are the time-horizon or perceived threats to power holders, the arrival of credible political competition, or a new constellation of power that make those who operate in an insecure contractual environment, either politicians or social groups, see the utility of constitutional protection and powerful courts.

Having opposed judicial review for most of the twentieth century, white elites in South Africa miraculously discovered the virtues of judicial review when it became clear that the days of apartheid were numbered. Pierre Elliott Trudeau's drive to adopt the Canadian Charter of Rights and Freedoms came on the heels of his electoral defeat in 1979, the electoral rise of the separatist Parti Québécois in Quebec in 1976, and, above all, the credible threat of a Quebec secession as signaled by the 1980 secession referendum. In Mexico, the ruling PRI could not care less about judicial review for over seventy years but discovered its charms in the mid-1990s when credible political opposition emerged. Israel's Labor Movement and its predominantly secular Ashkenazi constituencies were, for decades, agnostic toward judicial review but embraced constitutional supremacy once their cultural and electoral dominance begun to erode, their historic grip over Israel's governing bodies faded, and new elites and their policy preferences had gained influence. The constitutional revolution of the mid-1990s then followed.

⁴⁴ See, e.g., CARLO GUARNIERI ET. AL., *THE POWER OF JUDGES: A COMPARATIVE STUDY OF COURTS AND DEMOCRACY* (2002).

⁴⁵ John Ferejohn, *Judicializing Politics, Politicizing Law*, 61 L. & CONT. PROB. 41–68 (2002).

Conversely, little or no judicial empowerment has taken place in countries such as Japan or Singapore, where a single political force has controlled the political system for most of the last half century. For other nations, scholars have drawn on this “insurance” logic to explain the variance in judicial power between, for example, different periods in the late nineteenth-century United States; between two Argentine provinces; between postauthoritarian Asian countries (South Korea, Mongolia, and Taiwan); between periods of single-party domination and multiparty competition in Latin American political history; between several polities in Eastern Europe; and between new democracies in southern Europe (Greece, Spain, and Portugal).⁴⁶ A similar logic has been drawn upon to explain the timing of various polities’ commitment to regional human rights regimes.⁴⁷

The main assertions of such a realist position—most notably, that the degree of political uncertainty and competition facing politicians, either those on the decline or those insecure in their newly acquired power, is an important predictor of whether or not a constitutional court will be established—have been supported in a variety of studies ranging from formal modeling to large-N statistical analyses.⁴⁸ Furthermore, its basic premise that people tend to be risk averse under conditions of systemic uncertainty has been advanced by a wide array of thinkers in other scholarly domains, from Rawls’s “principles of justice” agreed upon behind a veil of ignorance to Marshall Sahlins’s paradigm-shifting explanation for the lack of food accumulation or storage among hunter-gatherer societies (a perception of unlimited resources and a pervasive belief in a “giving environment”) and to Tversky and Kahneman’s seminal work on the psychology of choice.⁴⁹

The emerging body of arguments concerning the political origins of constitution-alization and the construction of judicial review could be enriched considerably by turning one’s gaze to the changing constellation of political power in the Nordic region, the subject of this symposium. For example, in the span of thirty-six years from 1945 to 1981, the Norwegian Labour Party—main architect of the Norwegian welfare state—held power almost without interruption. Popular support levels for Labour during that period reached approximately 45 to 50 percent, and parliamentary representation peaked at 85 out of 150 seats in the mid-1960s (since 2005, the Norwegian parliament, the Storting, has had 169 seats). However, over the last three decades, support for Labour went down considerably, plunging to a low of less

⁴⁶ See, e.g., J. Mark Ramseyer, *The Puzzling (In)Dependence of Courts: A Comparative Approach*, 23 J. LEG. STUD. 721–748 (1994); Howard Gillman, *How Political Parties can use the Courts to Advance their Agendas: Federal Courts in the United States, 1875–1891*, 96 AM. POL. SCI. REV. 511–524 (2002); Pedro Magalhães, *The Politics of Judicial Reform in Eastern Europe*, 32 COMP. POL. 43–62 (1999); Jody Finkel, *Judicial Reform as Insurance Policy: Mexico in the 1990s*, 47 LATIN AM. POL. & SOC. 87–113 (2005); Rebecca B. Chavez, *The Construction of Rule of Law in Argentina: A Tale of Two Provinces*, 35 COMP. POL. 417–437 (2003); TOM GINSBURG, *JUDICIAL REVIEW IN NEW DEMOCRACIES: CONSTITUTIONAL COURTS IN ASIAN CASES* (2003).

⁴⁷ Andrew Moravcsik, *The Origins of Human Rights Regimes*, 54 INT’L ORG. 217–252 (2000).

⁴⁸ Matthew Stephenson, *When the Devil Turns . . .: The Political Foundations of Independent Judicial Review*, 32 J. LEG. STUD. 59–89 (2003); Francisco Ramos, *The Establishment of Constitutional Courts: A Study of 128 Democratic Constitutions*, 2 REV. L. & ECON. (2006).

⁴⁹ See, e.g., JOHN RAWLS, *A THEORY OF JUSTICE* (1971); MARSHALL D. SAHLINS, *The Original Affluent Society*, in *STONE AGE ECONOMICS* 1–39 (1972); Amos Tversky & Daniel Kahneman, *The Framing of Decisions and the Psychology of Choice*, 211 SCIENCE 453–458 (1981).

than 25 percent in the 2001 elections before bouncing back to a 30 to 35 percent level, more recently. During the same period, support for the libertarian right-wing Progress Party rose from less than 45,000 votes and no seats in the 1977 elections to more than 610,000 votes or 23% of the popular vote translated into 41 seats in the 2009 elections. Support for the Conservative Party (Høyre, literally “right,” and a proponent of fiscal conservatism, reduced taxation, and small-state policies), peaked in the early to mid-1980s at just over 30 percent.⁵⁰ From 1981 to 1997, governments alternated between minority Labour governments and Conservative-led center-right governments. The center-right governments gained power in three out of four elections during this period (1981, 1985, 1989), whereas Labour toppled those governments twice between elections (1986, 1990) and stayed in power after one election (1993). It was during this period that relative judicial activism began to pick up in Norway.⁵¹

The Swedish Social Democratic Party, to pick another example, led coalition governments in Sweden for most of the post-World War II era. However, popular support for the party has declined considerably over the last few decades. The party received 43 to 53 percent of the votes in all elections between 1940 and 1988. In the 2006 and the 2010 elections, it received the lowest support since universal suffrage was introduced (just below 35 percent and just over 30 percent, respectively), resulting in the loss of office to the center-right coalition Alliance for Sweden, led by the Moderate Party. In 1976, the Social Democratic Party lost the elections for the first time in forty-four years. The new coalition government was quick to initiate constitutional reforms “in line with the bourgeois parties’ ambitions to strengthen the protection of fundamental rights and freedoms.”⁵² The proposed reform recognized the courts’ authority to exercise judicial review. This amendment was approved in parliament in 1979 after the proconstitutionalization coalition had maintained its power in the elections held earlier that year.

Similar trends are evident in Denmark, where conservative and neoliberal political forces have gained more popular support than in any other Nordic country. The historically hegemonic Social Democrats were the most popular political party and controlled the government for over fifty years from World War II to 2001. It then lost power and was in opposition for a decade until a center-left coalition regained power in the 2011 general elections, thereby marking a major political shift in Denmark’s political market. Even in its relatively successful 2011 electoral campaign, the once dominant Social Democrats managed to garner just a little over 25 percent of the popular vote, translating into 44 seats in the 179-seat parliament, one seat less than its 2007 tally of 45. The Danish Liberal Party (Venstre), which supports liberalization of the economy and lower tax rates, won over 26 percent of the popular vote in both the 2007 and the 2011 elections, making it the largest party in the Danish parliament. The populist-nationalist right-wing Danish People’s Party

⁵⁰ On the transformation of Norwegian politics, see *NORWAY IN TRANSITION: TRANSFORMING A STABLE DEMOCRACY* (Øyvind Østerud ed., 2006); Per Selle & Øyvind Østerud, *The Erosion of Representative Democracy in Norway*, 13 J. EURO. PUB. POL. 551–568 (2006).

⁵¹ See Carsten Smith, *Judicial Review of Parliamentary Legislation: Norway as a European Pioneer*, PUB. L. 595–606 (Winter 2000).

⁵² Barry Holmström, *Sweden*, in *THE GLOBAL EXPANSION OF JUDICIAL POWER* 345–367, 357 (C. Neal Tate & Torbjorn Vallinder eds., 1995).

garnered nearly 14 percent of the popular vote in 2007 and over 12 percent in 2011. The Conservative People's Party—another liberal-conservative party that extols the virtues of capitalism—gained over 10 percent of the popular vote in 2007, and was a junior partner of the Venstre-led coalition from 2001 to 2011. In short, the days of uncontested social democratic dominance in Nordic politics are gone. And with the increased political competition and shortened time horizons of political power holders, an environment conducive to a growth in judicial review and an expansion of the constitutional domain emerged.

The changing Nordic constitutional landscape of the last few decades seems to support other extrajudicial explanations for the judicialization of politics. In recent years, reliance on constitutional courts worldwide to resolve core moral predicaments has expanded its scope beyond flashy rights issues to encompass what we may term the judicialization of “mega” politics—matters of outright and utmost political significance that often define and divide whole polities.⁵³ These range from the judicialization of electoral outcomes (for example, the *Bush v. Gore* scenario) to ex post judicial corroboration of regime transformation (for example, the Supreme Court of Pakistan's deep entanglement with all six political transformations that took place in that country since 1990 alone), and from fundamental transitional justice dilemmas in postauthoritarian settings to the judicialization of formative collective identity struggles over the very definition or *raison d'être* of the polity as such. Think of the Turkish Constitutional Court's zealous defense of militant secularism or rulings such as that of the Supreme Court of Canada in the *Quebec Secession Reference*—the first time a democratic country had ever tested in advance the legal terms of its own dissolution.

Despite the increasing prevalence of rights jurisprudence, no judicialization of that calibre has taken place in the Nordic countries. Frequent judicial involvement with foundational political questions remains largely foreign to the restrained Nordic constitutional tradition. Consequently, debates over judicial appointments and the politicization of the judiciary are not nearly so prevalent or vocal in the Nordic countries as they are in polities where an ever-accelerating judicialization of megapolitics has taken place. To the extent that this process has taken place in the region, it has been limited to the tension between national sovereignty and pan-Europeanism, namely, cases where courts were asked to determine the constitutionality of apparent national sovereignty concessions made by EU accession. A notable illustration is the Danish Supreme Court's ruling (1998) that there was no undue concession of constitutional sovereignty by Denmark's accession of the Maastricht Treaty.⁵⁴

⁵³ Ran Hirschl, *The Judicialization of Politics*, in *THE OXFORD HANDBOOK OF LAW AND POLITICS*, 119–141 (Keith Whittington et al., eds., 2008); Ran Hirschl, *The Judicialization of Mega-Politics and the Rise of Political Courts*, 11 *ANN. REV. POL. SCI.* 93–118 (2008); *THE GLOBAL EXPANSION OF JUDICIAL POWER* (C. Neal Tate & Torbjorn Vallinder, eds. 1995).

⁵⁴ *Hanne Norup Carlsen et al. v. Prime Minister of Denmark*, “Maastricht Decision” of April 6, 1998, Ugeskrift for Retsvaesen H 800 [1999] 3 CMLR 854. Rulings similar in nature were made by France's Conseil Constitutionnel (1992)—*Décision 92-308 DC* of April 9, 1992, “Maastricht I,” *Recueil des Décisions du Conseil Constitutionnel* 55, [1992] RJC1-496, [1993] 3 CMLR 345; and by the German Federal Constitutional Court in 1994 (with respect to the Maastricht Treaty) and most recently in 2009 (with respect to the Lisbon Treaty)—*BverfG*, 2 BvR 2134/92, and 2 BvR 2159/92 [1994] (Maastricht Case); *BVerfG*, 2 BvE 2/08 [2009] (Lisbon Treaty Case).

The mixed experience supports several arguments concerning the extrajudicial vectors behind the judicialization of politics. Charles Epp suggests that the impact of constitutional catalogues of rights may be limited by individuals' inability to invoke them through strategic litigation. Hence, bills of rights matter to the extent that a support structure for legal mobilization—a nexus of rights-advocacy organizations, rights-supportive lawyers and law schools, governmental rights-enforcement agencies and legal aid schemes—is well developed.⁵⁵ In other words, while the existence of written constitutional provisions may be a necessary condition for the effective protection of rights and liberties, it is certainly not a sufficient condition. The effectiveness of rights provisions in planting the seeds of social change in a given polity is largely contingent on the existence of a support structure for legal mobilization.

Although the number of lawyers in the Nordic countries has been growing steadily over the last three decades, it remains relatively low in relation to the size of the population. As of 2010, there is one lawyer per approximately 700 people in Norway; 1,200 in Denmark; 2,100 in Sweden; and 2,900 in Finland.⁵⁶ Among OECD countries, only Japan and South Korea feature lower ratios than Finland. By contrast, these ratios are notably higher in more litigious societies. In Germany, for example, there is one lawyer per approximately 580 people; in the United States this increases to one per approximately 400 citizens; and in Israel even more so to one per approximately every 200 people.⁵⁷ What is more, the number of accredited law schools remains low; in Finland, for example, there are only three law schools, and of those only two (at the University of Helsinki and the University of Turku) are certified by the Finnish Bar Association. In short, to the extent that the relative size of the legal profession may be viewed as a proxy of judicialization, the Nordic countries are notably less judicialized than most other developed democracies.

The Nordic experience of a growing prevalence of rights issues alongside limited judicialization of core political questions also supports the argument that the judicialization of foundational collective identity questions may reflect a “constitutional disharmony” or an inherently incoherent constitutional identity, to use Gary Jacobsohn's terms.⁵⁸ Systemic political deference to the judiciary may emanate from a disharmonic constitutional order caused by a polity's commitment to apparently conflicting values (for example, Israel's self-definition as a Jewish and democratic state or Ireland's strong Catholic morality and ECHR membership), or by a misfit between the values protected in a country's constitution contrasted with values prevalent among its populace; for example, Turkey's strict separation of religion and state despite the fact that the vast majority of Turks define themselves as devout Muslims, or India's ameliorative secularist aspirations

⁵⁵ CHARLES EPP, *THE RIGHTS REVOLUTION: LAWYERS, ACTIVISTS AND SUPREME COURTS IN COMPARATIVE PERSPECTIVE* (1998).

⁵⁶ As of June 2010, Norway's Bar Association reports a membership of approximately 7,000; the Danish Bar Association reports a membership of approximately 5,000; the Swedish Bar Association reports a membership (“Advokat”) of 4,400; and the Finnish Bar Association reports a membership of 1,850.

⁵⁷ See Gad Barzilai, *The Ambivalent Language of Lawyers in Israel: Liberal Politics, Economic Liberalism, Silence, and Dissent*, in *FIGHTING FOR POLITICAL FREEDOM: COMPARATIVE STUDIES OF THE LEGAL COMPLEX AND POLITICAL LIBERALISM* 250–251 (Terence Halliday et al. eds., 2007).

⁵⁸ See Gary Jacobsohn, *The Disharmonic Constitution*, in *THE LIMITS OF CONSTITUTIONAL DEMOCRACY* (Stephen Macedo & Jeffrey Tulis eds., 2010). See also, RAN HIRSCHL, *CONSTITUTIONAL THEOCRACY* (2010).

advanced against a religion-laden sociopolitical reality. No existential disharmonies of that nature exist in the Nordic countries. Thus, to the extent that a judicialization of politics has taken place in the region, it has been confined to rights jurisprudence but has not extended to core political dilemmas. It remains to be seen whether the increasingly heated debates over immigration policy, the future of the Nordic welfare state, and the region's place in a transnational Europe will bring about increased judicialization of these issues.

Theories that emphasize the needs of systemic coordination, the rise of the administrative state, federalism, or democratization as the main reasons for the rise of judicial review do not have much explanatory power in the Nordic context. By contrast, the evidence suggests that a combination of powerful transnational pressures, mainly economic liberalization and the impact of European rights instruments, alongside the decline of pro-social democratic parties and the transformation of domestic electoral markets generally, are the main catalysts behind the changing landscape of Nordic constitutionalism.

4. Conclusion

As we have seen, the Nordic countries' unique constitutional scenery is a largely unexplored paradise for theory building in the field of comparative constitutional law and politics. The region's gradual political, economic, and constitutional transformation offers an ideal setting—a living laboratory, as it were—for developing and testing hypotheses about some of the core issues in the field. As the articles in this symposium illustrate, the Nordic countries provide what is, arguably, the most fitting test case for examining the impact of transnational law on domestic constitutionalism, with its patterns of global convergence alongside enduring national divergence. Likewise, the Nordic experience calls for the incorporation of comparative politics or political economy theory into the study of constitutional law. This is particularly true with respect to the empirical examination of some core insights of post-World War II constitutional theory concerning the origins of constitutionalization and judicial review and the critical role of the latter in facilitating democracy and high levels of human development.

Scandinavia has been a featured case in the prolific literature on the modern welfare state and its reconstruction. Nearly eighty years ago, John Wigmore, author of the seminal *Panorama of the World's Legal Systems* (1928), suggested that: “since the time of Sir Henry Maine, the social scientists have done a great deal in the field of comparative social institutions, but the jurists have not been so fertile in the field of comparative legal ideas.”⁵⁹ He could well have been thinking about the paucity of studies of Nordic constitutionalism when he wrote this. In spite of the Nordic countries' great promise, an adequate scholarly treatment of the region's constitutional transformation and its lessons for constitutional theory has materialized only partially. Scholars of comparative constitutionalism would be well advised to take a closer look at the Nordic countries. Satisfaction is guaranteed!

⁵⁹ John Wigmore, *Comparative Law: Jotting on Comparative Legal Ideas and Institutions*, 6 *TULANE L. REV.* 48, 50 (1931).