Constitutional Transplants

Morton J. Horwitz[*]

How does one explain the dramatic spread of judicial review after World War II, which culminated in a world-wide constitutional revolution during the 1990s? In order to explore this question, this Article first attempts to examine some methodological difficulties that regularly impede the study of constitutional transplants. It concludes with speculation about the relationship between the rise of judicial authority and the decline in the legitimacy of democratic institutions.

I. METHODOLOGICAL PROBLEMS

If the term "legal transplants" refers to the ways in which one legal system is derived from or is influenced by another, we do not usually have any difficulty in identifying constitutional transplants when it comes to comparing the texts of written constitutions. With the important qualification that a written constitution first has to exist, it can easily be shown, for example, that most of the new nations of the British Commonwealth derived their constitutions from the British parliamentary system ("The Westminster System");[1] that the former French African colonies modeled their constitutions on that of the French Fifth Republic;[2] that the post-Communist constitutions of Eastern Europe heavily borrowed from the German Constitution of 1949; and that the Latin American constitutions followed the model of the United States.

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* Charles Warren Professor of the History of American Law, Harvard Law School. I wish to thank the staff of the Institute for Advanced Studies in Jerusalem for their generous support and my colleagues in the Legal Transplants Group led by Ron Harris and Assaf Likhovski for their success in creating real intellectual engagement and exchange.

1 *See* William Dale, *The Making and Remaking of Commonwealth Constitutions*, 42 INT'L & COMP. L.Q. 67, 67-68, 72-73 (1993).

2 Filip Reyntjens, *Recent Developments in the Public Law of Francophone African States*, 30 J. AFR. L. 75, 75-77 (1986).

The problem lies not in identifying the textual borrowings, but in ascertaining their meaning or significance. To an even greater extent than ordinary law, constitutions present a great gap between "law in books" and "law in action." One need only recall the Soviet Constitution of 1936 with its praise of "democracy" and guarantees of the "rights" of its citizens.

The gap between a formal constitution and the practice under its aegis is perhaps greater than with ordinary law because constitutions often perform symbolic or aspirational functions that have little relationship to the ways in which constitutional law actually operates. The references to positive social rights in most of the post-World War II constitutions of Western Europe seem to be radically different from the more limited "negative" rights mentioned in the U.S. Constitution, written under the influence of eighteenth century social-contract theories of limited government.[3] The same can be said of the dramatic differences between the U.S. Constitution and the constitutional document imposed on a defeated Japan. Drafted by New Deal lawyers, the Japanese postwar Constitution goes even further to "guarantee" citizens a full array of welfare rights. Yet in both Western Europe and Japan, judges and jurists have held that the constitutional provisions are merely "aspirational" and unenforceable in any court.[4]

While these examples do illustrate the gap between a formal constitutional text and actual constitutional practice, we should not forget to note that in both Western Europe and Japan the state is expected to help improve citizens' lives in ways that are unheard of in the United States. Perhaps the "aspirational" provisions of these texts do actually influence the ways in which governments are expected to behave. Or perhaps both constitutional and non-constitutional mandates are expressions of a still more basic "political culture" that has little to do with the formal constitution itself.

The easiest place to study the relationship between constitutional provisions and institutional practices is in those areas involving the organization of the government and the electoral system. Comparative constitutional scholars often begin by classifying constitutions as fitting one of four "models": Britain, France, Germany and the U.S. This categorization is primarily an effort to classify the relationship between executive and legislative power. The first three models purport to be different variations on the theme of a parliamentary system, in contrast to the independence of the American executive under separation of powers. The British and German

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3 *See* Mary Ann Glendon, *Rights in Twentieth-Century Constitutions*, 59 U. CHI. L. REV. 519, 520-26 (1992).

4 *Id.* at 527-29.

systems are distinguished primarily on the basis of an anachronistic view of British parliamentary supremacy before the emergence of top-down cabinet government in the 20th century. At the present time, there hardly seems to be a significant difference between actual executive authority in Germany and Britain. By contrast, France under the Fifth Republic Constitution has abandoned its Cartesian past by making the prime minister dependent on both a powerful elected President and parliament, thus making U.S.-style divided government possible under the suggestive label of "cohabitation."[5] Finally, the U.S. presidency has been aptly called a "republican monarchy" or even "a non-hereditary, elected monarchy,"[6] though recent experience raises the question whether it is, in fact, non-hereditary.

One obvious difference in constitutional practice is that in both France and the U.S. the president exercises much greater independent control over foreign policy than the prime minister under the British or German systems. The resignations of Anthony Eden (immediate) after the failed 1956 Suez War, and of Tony Blair (delayed) as a result of the failures in Iraq, stand in sharp contrast to the virtual autonomy of George W. Bush in continuing an unpopular war. But, even here, there may be only differences of degree, if one contrasts Bush's stubborn persistence with Lyndon B. Johnson's reversal of Vietnam policy in the face of congressional opposition.

Those who wish to develop more complex constitutional models of governmental organization must also factor in other structural features — whether the constitution creates a federal system (Germany or the U.S.), as well as to what extent the organic document specifies limits on legislative power. There is also the question of bicameralism, which leads directly to an investigation of the powers of an upper house as well as the ways in which it is chosen. More important still is the question whether, in a parliamentary system, the constitution specifies the rules of election, beyond the now usual guarantee of universal suffrage and the term of the parliament's existence.

These questions involving the structure and organization of government are referred to by political scientists as questions of "constitutional design." As with the presidential/parliamentary distinction in powers over foreign affairs, it is often possible to suggest a link between formal constitutional design and one or another actual tendency in political practice. Authoritarian government would seem to be easier to institute under a presidential system rather than under a parliamentary system with free and fair elections. That is, after all, what "Bonapartism" is meant to suggest. The current "French"

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5 CINDY SKACH, BORROWING CONSTITUTIONAL DESIGNS 17 (2005).

6 MAURICE DUVERGER, LA MONARCHIE REPUBLICAINE *passim* (1974).

Constitution in Pakistan makes it easier to institute authoritarian rule, as we have seen, but it is also mitigated by the possibility of "cohabitation" with a prime minister selected by parliament. Military rule in Nigeria or Latin America seems to be enhanced by an American-type separation of powers. On average, there appear to be fewer authoritarian regimes in countries with British parliamentary constitutions than in the Francophone states of Africa.[7]

Federal systems do seem to offer not only greater resistance to statism and authoritarianism, but also an opportunity to foster and protect cultural, religious and linguistic diversity. But this often is achieved at the cost of encouraging all of the well known centrifugal tendencies of federalism — tribalism, ethnic and cultural chauvinism, and localism — that may finally undermine all feelings of nationhood and real governing authority. But the point here is *not* to choose between centralization and decentralization. Rather, it is to suggest that in trying to make some headway with the difficult problem of whether it is possible to close the empirical gap between formal constitutional arrangements and actual social practices, federal systems might be shown, for example, to have a strong tendency to enhance pluralism and multiculturalism. But, at most, such a demonstration would serve as one example of closing the gap between text and practice. There still remains the difficulty of actually proving that a federal system enhances pluralism because virtually all federal systems were created in the first place only because strong regional minorities — or independent states — already were in existence and had the leverage to insist on retaining some power for tribal, ethnic, religious, linguistic or cultural minorities or, as in the U.S., for slaveholding interests.

In short, there are two essential methodological problems with all comparative law study that carry over to the problem of constitutional transplants. The first difficulty involves finding a way to overcome the pervasive gap between form and function, between "law in books" and "law in action," and between constitutional provisions and political behavior. The second difficulty concerns the issue of causation or "the chicken and egg" problem. Does federalism cause or is it caused by, for example, social heterogeneity? To what extent are constitutional structures the result of "political culture," and to what extent do they shape that culture? How does one distinguish between "causation" and "correlation"?

The causation/correlation problem is most clearly evident in the many empirical political science studies that seek to find a relationship between

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7 Reyntjens, *supra* note 2.

constitutional provisions and political behavior. One study, for example, has found a statistically significant correlation between only two constitutional provisions — guaranteeing freedom of the press, and providing for the assumption of emergency powers — and, respectively, the absence or presence of repression.[8] Putting to one side the difficulties of measuring repression, studies of this type can never move beyond "correlation," which always raises the possibility of the existence of a still more fundamental set of cultural factors that may account for all of the measured variables.[9]

One way to make some headway in overcoming these difficulties is through a multi-factor analysis that compares "systems" that include several factors. For example, Jackson and Tushnet compare centralization/decentralization under the federal systems of Australia and the U.S. as follows: "[A] federal system in a nation with strong political parties organized nationally along distinctive ideological lines, as in Australia, is likely to be quite different from a federal system in a nation with relatively weak and less ideological parties, as has been true for much of U.S. constitutional experience."[10]

As the Jackson and Tushnet example suggests, the problem of form and substance in constitutional design is heightened by the pervasive influence of two institutions that are often not mentioned in the text of constitutions — political parties, and the relationship of the military to the government. Under the influence of Leninist theories of "democratic centralism" or "the dictatorship of the proletariat," before the fall of Soviet Communism many African and East European states, as well as contemporary China, entrenched one-party government in their constitutional texts. As in the U.S., the constitutions of many more relatively democratic political systems say nothing at all about political parties. Relatively democratic party systems range from (1) a thriving competitive multi-party system, as in present day Israel or in France under the Third and Fourth Republics; through (2) the present systems in Western Europe consisting of two main parties, plus a few smaller parties; to (3) one entrenched party (postwar Japan, pre-1977 Israel, Mexico and India). These entrenched parties, operating within relatively democratic regimes, are usually controlled by the founding elite of a new nation. Additionally, the design of the electoral system, ranging from proportional representation to the German 5% system to the American

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8 Christian A. Davenport, *"Constitutional Promises" and Repressive Reality*, 58 J. POL. 627, 627, 645, 648 (1996).

9 *See id.* at 649-50.

10 VICKI C. JACKSON & MARK TUSHNET, COMPARATIVE CONSTITUTIONAL LAW 142 (2d ed. 2006).

single-member district elections, can dramatically affect the shape of the party system. In Part V, I speculate whether one or another party system is more susceptible to political corruption or more conducive to political disillusionment.

II. CONSTITUTIONAL TRANSPLANTS AND JUDICIAL REVIEW

One of the best places to study constitutional transplants is in the post-World War II adoption of judicial review of legislation, and the adoption of an enforceable Bills of Rights, discussed in Part V. But we should first say a word about the meaning of constitution-making.

The emergence of written constitutions after the American and French Revolutions is an expression of modernity. It symbolizes a new consciousness of nationhood and of national beginnings. It is the first self-conscious effort to move beyond the customary British idea of fundamental law and to self-consciously write down a nation's fundamental law.

Written constitutions as expressions of fundamental law have from the beginning embodied basic cultural and ideological contradictions. The first set of contradictions involves a wavering between looking forward and looking backward, between a recognition of new beginnings and a wish to express what has always been, between the opportunity to break with the past and the need to build on a foundation of timeless truths. This blends into a second set of contradictions about law, between declaring or finding fundamental law, on the one hand, and making or creating it, on the other. In the American case, there has always been a conflict between a pre-modern, religiously-based higher law (or natural law) conception of fundamentality, modeled ultimately on Moses at Mount Sinai, and a modern conception of law as an act of will, expressed during the Revolutionary period in the idea of sovereignty.[11]

One concrete expression of this split is that in 1780 only a minority of state constitutions provided for constitutional amendment while the majority did not. The majority, in other words, appeared to think of fundamental law as unchanging, either because natural law was timeless or because the Newtonian laws of nature, embodied in a system of checks and balances,

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11 Edward S. Corwin, *The "Higher Law" Background of American Constitutional Law*, 42 HARV. L. REV. 149, 151-53 (1928); *see* Thomas C. Grey, *Do We Have an Unwritten Constitution?*, 27 STAN. L. REV. 703 (1975).

could produce "a machine that would go of itself."[12] Even on the eve of the Constitutional Convention, five states had no provision for amending their constitutions.[13]

The same sort of split between natural law and sovereignty has also been reflected in the radical differences between U.S. colonial constitutional historians who emphatically ascribe significance to 17th century codes and charters on the one hand, and historians who subscribe to theories of a sharp break produced by the introduction of the idea of sovereignty around the time of the American Revolution on the other. For the first group, commitment to fundamental law was a gradual cultural accretion over almost two centuries of American colonial history; for the second group, there was a sharp break produced by the intrusion of modernity.

The idea of sovereignty itself was dichotomized between the British (parliamentary) and the American and French (popular) ideas of sovereignty, as well as in the basic difference between the American and the French views on the significance of sovereignty for the binding character of written constitutions. It is important to emphasize that the French example demonstrates that there is nothing in the "logic" of sovereignty that leads to the American idea of the legally binding character of written constitutions. Indeed, even the "American" idea of a constitution did not instantly result in the general triumph of judicial review. While it was clear at the American Constitutional Convention that the Framers did authorize "vertical" judicial review to umpire the boundary between the powers of the states and the Federal government, a stunning silence was maintained regarding the power of judicial review of congressional legislation.

The view that written constitutions reflect popular sovereignty has polarized between the French conception of an aspirational document addressed only to the conscience of the people or their representatives and an American conception of a constitution as fundamental law enforceable like any other law by the judiciary.[14] But for *Marbury v. Madison*[15] (1803), it would have taken until the *Dred Scott* case (1857)[16] for the first instance of invalidation of a congressional statute to have occurred. And although the story is more complex under state constitutions, it was not until the 1820s that the practice of "horizontal" judicial review became clearly established in some states.

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12 MICHAEL KAMMEN, A MACHINE THAT WOULD GO OF ITSELF 17-18 (1986).
13 LARRY D. KRAMER, THE PEOPLE THEMSELVES 273 n.87 (2004).
14 *Id.* at 74-78.
15 5 U.S. 137 (1803).
16 Scott v. Sandford, 60 U.S. 393 (1857).

Marbury v. Madison can best be understood as one of the great accomplishments of Federalist political domination during the first two decades of American nationhood. It produced a still broader cultural and jurisprudential hegemony that eventually succeeded in establishing a view of constitutions as legally binding fundamental law. In contrast to the French conception, it focused political and constitutional thought on the tension between fundamental law and democracy and, in particular, on the threat of "tyranny of the majority." Perhaps the main reason why the Americans ultimately succeeded, while the French failed, to entrench the idea of written constitutions as legally binding was the unavoidable necessity of judicial review in a federal system, a practice that allowed Americans to become gradually accustomed to treating judges as legitimate enforcers of constitutional provisions, while managing to postpone difficult questions about the relationship between constitutions and popular government.

III. JUDICIAL INDEPENDENCE AND JUDICIAL REVIEW

Formal separation of powers does not necessarily guarantee an independent judiciary free of corruption or political favoritism. Judicial independence is both rooted in political culture and dependent, *inter alia*, on the process of judicial appointment and the actual autonomy of the legal profession from politics. One study of judicial independence of supreme courts in Latin America since World War II has developed a typology of degrees of independence.[17] The only "independent-activist" court in postwar Latin America is the Supreme Court of Costa Rica.[18] Because of military coups in 1973, the high courts of both Chile and Uruguay are demoted to the next group of "attenuated-activist" courts.[19] And Mexico alone fills the next rung of "stable-reactive" courts.[20] The basis for these designations becomes clearer with the explanation for Mexico's classification:

> [The Supreme Court] has not experienced direct assaults on its integrity or authority by an arbitrary executive or by a new military regime. The court's semi-independent status has evolved gradually and predictably within a rather favorable and stable political environment. It is a

17 Joel G. Verner, *The Independence of Supreme Courts in Latin America*, 16 J. LATIN AM. STUD. 463, 478 (1984).

18 *Id.* at 479.

19 *Id.* at 481.

20 *Id.* at 484.

> "reactive" court because it consistently sets general limits to executive, legislative, and administrative behavior. Not an "activist" court, it does not attempt to make or change basic public policies initiated and supported by the government. This court is routinely respected by the government as long as it restricts itself to "non-political" questions; that is, it does not concern itself with questions of partisan politics nor fundamental public policy.[21]

Judicial review would seem to be an excellent measure of judicial independence, since the striking down of legislation (presumably approved by the executive) is, by definition, resistance to the will of the "political" branches.

As we have seen, written constitutions do not necessarily produce judicial review. We have already observed that there are four basic models of judicial review that derive from the constitutional histories of Britain, Germany (and Austria), France and the U.S.

In Britain, as we know, there is no written constitution, and courts may not strike down parliamentary legislation. This formal statement, however, captures neither the history of "interpretation" of statutes to avoid "constitutional" problems nor the development of "activist" doctrines of administrative law that may permit a court to decide that an executive official acted "ultra vires," even under a statute that seems clearly to have conferred the disputed power.

It has been said that the history of British administrative law since the 1960s has gradually morphed into a form of constitutional review.[22] Similar observations about the Israeli system may perhaps be suggested. Even before the Israeli Supreme Court institutionalized judicial review by appealing to the text of its Basic Laws, Israeli administrative law may have begun — to some extent — to assume the character of constitutional review of legislation.

France before the Fifth Republic (1958) provides an example of a written constitution without judicial review. "For all their willingness to state fundamental rights in constitutions and legal texts, the French have traditionally treated them as political ideals, rather than as binding legal norms. By contrast, the Germans have been more willing to treat them as legal norms, especially after the enactment of the Basic Law in 1949."[23]

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21 *Id.* at 484-85.

22 Martin Shapiro questions this. See Roderick Munday's review of Shapiro's book, *Courts, a Comparative and Political Analysis*: Roderick Munday, Book Review, 42 C.L.J. 154, 155 (1983).

23 JACKSON & TUSHNET, *supra* note 10, at 152 (quoting John Bell).

The American model of decentralized judicial review has been "followed" in such countries as Argentina, Australia, Canada, India, and Japan.[24]

As France under the Fifth Republic has become more like Germany and the U.S. in treating constitutional provisions as binding legal norms, another important distinction — between "decentralized" and "centralized" forms of judicial review — has become prominent. The "decentralized" or "American" model allows any court to entertain a challenge to the constitutionality of a legal provision. (In parallel, Dicey drew the same distinction in comparing British and European administrative law, insisting that the "decentralized" British practice — without specialized administrative courts, as in Europe — was a necessary condition for the existence of "the rule of law."[25])

The "centralized" or "Austrian" or "European" model — begun under the Austrian Constitution of 1920 — "is characterized by the existence of a special court with exclusive or close to exclusive jurisdiction over constitutional rulings." The centralized model is followed today in Germany, France, Italy, and some of the eastern European nations.[26]

Judicial review has clearly spread after World War II. In the previous century and a half, it was mostly regarded as a quaint American anomaly, seen as a contradiction of popular (France) or parliamentary (Britain) sovereignty or, in federal systems, as a contradiction of the dogma of the indivisibility of sovereignty. The period after World War II saw the creation of many new federal systems, eventually including the European Union, which, given the defeat of a European constitution in 2002, has not yet managed to move beyond confederation. These federal systems, having lent urgency to the question of who would arbitrate the constitutional boundaries between nation and states, have generated considerable new interest in judicial review.

Interestingly, the British Empire was not thought to contradict the dogma of indivisible sovereignty because all sovereignty was said to reside in Parliament, or the King in Parliament, or the Crown. It is remarkable how few references to the constitutional system of the British Empire were made by the Framers of the U.S. Constitution, as they sought to work out the constitutional principles of divided sovereignty. The real interest of Europeans in the constitutional mechanisms of federalism can be traced to

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24 *Id.* at 465.

25 A.V. DICEY, LECTURES INTRODUCTORY TO THE STUDY OF THE LAW OF THE CONSTITUTION 200 (London, Macmillan & Co. 1885).

26 *Id.* at 466.

the recent development of European institutions and to the European Charter of Human Rights.

IV. IDENTIFYING CONSTITUTIONAL TRANSPLANTS: A BRIEF SKETCH OF THE "AMERICANIZATION" OF CANADIAN CONSTITUTIONAL CULTURE

In this Part, I offer a brief sketch of modern Canadian constitutional history in order to illustrate how a more detailed historical inquiry ("thick description") might be able to overcome the difficulties of proving causation. The specific historical narrative focuses upon the connection between the invalidation in 1937 of the Canadian New Deal by the British Privy Council and the promulgation in 1982 of a Canadian Charter of Rights. During that 45-year period, I suggest, Canada slowly shifted its loyalties from British to American constitutional culture.

In his book entitled *The Founding of New Societies* (1964), Louis Hartz schematically extended his influential analysis of *The Liberal Tradition in America* (1955), seeking to explain the modern histories of Australia and Canada.[27] In addition to the Lockean or bourgeois hegemony that he asserted had always dominated American society, as compared to European, he now described three "fragments," spin-offs from different stages of European history, that had separated to create very different political developments in American, Canadian and Australian history. America continued to represent bourgeois culture, but he now added that Australia represented the "radical fragment," while Canada represented the Tory or "feudal fragment."

In perhaps the most widely read piece of Canadian political thought, Gad Horowitz, a student of Hartz's, tried to turn the tables on him to show that there had been an underlying consensus in Canada on something he called "Tory socialism," a cultural/political formation quite resistant to capitalist individualism. Whereas Hartz thought he had answered the question "why did socialism not come to America?", Horowitz, accepting the Hartzian answer, sought to explain why socialism might have come to Canada.[28]

Whatever the merits of either set of explanations, Horowitz did manage to underline the empirical reality of a broad Canadian communitarian consensus, at least as defined in opposition to American capitalist

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27 LOUIS HARTZ, THE FOUNDING OF NEW SOCIETIES (1964); LOUIS HARTZ, THE LIBERAL TRADITION IN AMERICA (1955).

28 GAD HOROWITZ, CANADIAN LABOUR IN POLITICS (1968).

individualism. Whether he also undermined Hartz's assumption that the early history of a society, like the first four notes of Beethoven's Fifth, determines what follows, we need not now address. Canada became polarized, to the extent that it did, not around socialism but around nationalism and cultural pluralism.

Most of Canadian history can be understood in terms of cultural conflict along two dimensions — either between English/Protestant vs. French/Catholic or between English vs. American national identity. Which brings us to Canadian constitutional history.

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In 1935, the Canadian Government enacted a series of statutes designed to combat the Great Depression, which came to be known as the Canadian New Deal. Similar to Roosevelt's New Deal, these laws introduced regulation of wages and hours, established a social insurance system, and regulated trade and commerce in unprecedented ways. In 1937, the British Privy Council, exercising the power of appeal granted under The British North American Act of 1867, declared the bulk of the Canadian New Deal unconstitutional.[29]

The invalidation of the Canadian New Deal by decisions of the British Privy Council could not have come at a worse moment for the legitimacy of the Council's decisions. The Privy Council was always a creature of the vagaries of British politics, its composition largely determined by the particular British government that happened to be in power — "if not according to the size of the British Lord Chancellor's foot," mocked Pradyumna Tripathi, "according to his party associations."[30] Beginning with the victory of the Labour government in 1929, the Privy Council had begun substantially to revise earlier interpretations of the British North America Act that had both limited the powers of the dominion government and created a principle of "provincial autonomy" decidedly contrary to the spirit of the Act. In the most striking reversal, the Privy Councilors had begun to refer to the British North America Act not as an Act of Parliament to be construed according to the usually "narrow and technical" British rules of statutory interpretation, but as a "Canadian Constitution," entitled to a "large and liberal interpretation" of national powers. The British North America Act was now

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29 *See* Ivor Jennings, *Constitutional Interpretation: The Experience of Canada*, 51 HARV. L. REV. 1, 32-34 (1937).

30 Pradyumna K. Tripathi, *Foreign Precedents and Constitutional Law*, 57 COLUM. L. REV. 319, 333 (1957).

understood as a "living tree capable of growth and expansion within its natural limits."[31] At this point, the Privy Councilors could have — but did not — quoted Chief Justice Marshall's famous words — "It is a *constitution* we are expounding."[32]

Just as Canadians had begun to enact their own "New Deal" in the full expectation that the Privy Council had finally agreed to treat their government as "mistress in her own house,"[33] the British government in 1935 suddenly changed once more. "It is possible, though it cannot be proved," Ivor Jennings wrote at the time, "that the desire of Mr. Ramsay MacDonald in 1935 to safeguard his son's political career, and the anxiety of Lord Hailsham to leave the War Office for the more exalted and better-paid position on the Woolsack — circumstances which sent Lord Sankey into retirement upon the change of Government — invalidated a large part of the Canadian New Deal."[34] The abrupt shift by the Privy Council — as well as the overtly political circumstances surrounding the change — could only have been experienced by Canadians as an arbitrary, and even lawless, set of rulings.

The invalidation of the Canadian New Deal in the midst of the Great Depression may be the signal event that began the process of realigning Canadian legal culture away from Britain and towards the U.S. Yet, it was certainly a very slow process. As of 1954, one scholar could not find "any instance where American precedents have been depended upon for direction to any material extent; in fact, even their mention is rare."[35] But the invalidation of the Canadian New Deal produced a younger generation of Canadian academic constitutional lawyers — among them future Chief Justice Bora Laskin — who, after studying in the United States, devoted their academic careers not only to remedying what they saw as "betrayal" by the Privy Council, but, perhaps more broadly, to undermining the dominant position of British legal culture in Canada.[36]

Laskin studied for an LL.M. at Harvard with Felix Frankfurter,[37] just as the U.S. Supreme Court had begun its sharp reversal of constitutional jurisprudence[38] (Frankfurter himself was soon after appointed to the Supreme

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31 Jennings, *supra* note 29, at 28-29.
32 McCulloch v. Maryland, 17 U.S. 316 (1819).
33 Jennings, *supra* note 29, at 29.
34 *Id.* at 36.
35 Tripathi, *supra* note 30, at 334 n.71 (1957).
36 *See* R.C.B. Risk, *On the Road to Oz*, 51 U. TORONTO L.J. 143, 150-51 (2001).
37 *Id.* at 148.
38 *See* C. HERMAN PRITCHETT, THE ROOSEVELT COURT (1963); *Forum: The Debate over the Constitutional Revolution of 1937*, 110 AM. HIST. REV. 1046 (2003).

Court). Laskin's writings during the postwar years demonstrate that he had absorbed the critical perspective of American sociological jurisprudence and Legal Realism. For example, he denounced the Privy Council for "mechanical jurisprudence," "wooden reasoning," and "conceptualism," leading to its unwillingness to consider "the context of our society and its contemporary problems."[39] He scorned the "delusion that constitutional adjudication is 'pure' law, divorced from social, or economic, or political (in the highest sense) beliefs."[40]

Laskin's generation brought back to Canada the New Deal court's constitutional analysis supporting a strong national government.[41] Upon returning to Canada, he also became a leading advocate of repatriation of the Canadian constitution by ending appeals to the Privy Council. Postponed during the chaos of the war years, the proposal to bar civil appeals was finally enacted in 1949. But it was not until 1982, two years before Laskin retired as Chief Justice, that the complete repatriation of the Canadian constitution was achieved despite Quebec's opposition. By that time, the generation after Laskin's had already flooded into U.S. law schools, where they had become acquainted with the "rights jurisprudence" of the Warren Court. In 1982, as this next generation of academic lawyers reached the pinnacle of their own legal and political careers, they were influential in enacting an American-style Charter of Rights.

Even two decades after the invalidation of the Canadian New Deal, we saw, there still was no discernible influence of American constitutional precedents on the Canadian Supreme Court — this a decade after Canada, in practice, if not yet in constitutional theory, had gained control over its own constitutional destiny. Trained in a prewar British approach to constitutional questions, the Canadian judges continued to reflect the hegemony of British legal culture. It took almost a half-century before the shock waves of 1937 finally resulted in an Americanized legal and constitutional culture.

It is only through a detailed account of the legal biographies of Bora Laskin and others that we are able convincingly to trace the shift within Canada away from British to American legal culture, eventuating in the adoption of a Charter of Rights in 1982. The "external shock" that produced this shift was clearly the invalidation in London of the Canadian New Deal, and the political and nationalist reaction to it among the younger generation

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39 *Id.* at 151.
40 *Id.* at 152.
41 *See id.* at 150-51.

of Canadian academic lawyers. Trained in the United States, they brought back to Canada American constitutional preconceptions.

V. EXPLAINING THE GLOBAL CONSTITUTIONAL REVOLUTIONS SINCE WORLD WAR II

The spread of judicial review after World War II has frequently been traced and commented upon. Jeffrey Goldsworthy summarizes some of the key developments as follows:

> Judges in many countries have been proactive in enhancing the constitutional protection of democracy, individual rights, and judicial independence. Judicial activism in the United States since the 1950s [The Warren Court, 1953-1969], which has expanded guarantees of democracy and individual rights, is too well known to need discussion. In France, the Constitution of 1958 did not confer power to enforce fundamental rights on the Constitutional Council, but in a series of activist decisions in the 1970s, the Council conferred that power on itself. In the 1990s, the Supreme Court of Israel is widely believed to have radically changed the national Constitution by converting two Basic Laws into judicially enforceable guarantees of rights, contrary to the intentions of the Knesset that enacted them. In India, the Supreme Court over many decades has dramatically extended the scope of many rights, forbidden amendments that would alter the "basic structure" of the Constitution, and required that new judicial appointments only be made according to the advice of the Chief Justice. The Canadian Supreme Court recently purported to discover an unwritten constitutional principle of judicial independence, which goes much further than the express provisions which protect that principle. In Australia, the High Court in the 1990s extended the principle of judicial independence so that it protects most state as well as federal courts, and purported to discover an implied freedom of political communication in a Constitution whose founders chose not to include a bill of rights. In New Zealand, the Court of Appeal in the 1990s added new remedies to a statutory Bill of Rights that was not intended to include them.[42]

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42 Jeffrey Goldsworthy, *Questioning the Migration of Constitutional Ideas*, *in* THE MIGRATION OF CONSTITUTIONAL IDEAS 117 (Sujit Choudhry ed., 2006).

I propose to try to explain these developments primarily from an "external" perspective, but, before I do so, I think it may be useful to list some key postwar constitutional developments.

1. The adoption of written constitutions as fundamental law in Western Europe, India and Japan, 1947-1958.
2. The adoption by Canada of a Charter of Human Rights, 1982.
3. The creation of the European Union and the adoption of the European Charter on Human Rights, 1992-1994.
4. The adoption of constitutions in Eastern Europe after the collapse of the Soviet Union in 1989.
5. The adoption of the South African Constitution containing a Bill of Rights and judicial review in 1996.

A. The Emergence of Theories of Rights in Postwar Jurisprudence

World War II provided a powerful stimulus to the spread of the idea of written constitutions as fundamental law, which became the intellectual precondition for the further adoption of judicial review. At the most general level, the war produced three interrelated reactions: first, a general antipathy towards statism, which was reinforced over the next generation by the continuing example of Soviet totalitarianism; second, a widespread skepticism about the reliability and stability of democratic regimes, which, especially in Germany, had succumbed to popular dissatisfaction; and third, a new appreciation of the pathology of racism and its potentially murderous consequences.

By the 1970s, the reaction against statism extended to social-democratic regimes and welfare states, whose planned economies, with the partial exception of Scandinavia, had succumbed to stagflation, high taxes, bloated bureaucracies and large budgetary deficits. In the U.S., these reactions set in much earlier. According to one version, the effective end of the New Deal can be traced to the reestablishment of a Republican/Southern Democratic coalition in 1938, which retained control of the legislative process for the next twenty years. According to another version, the rise of Reaganism after 1980 more or less parallels reactions to the regulatory/welfare state in Britain and Western Europe set out above.

There seem to be two, perhaps contradictory, accounts of the rise of a rights discourse shortly after World War II. In the first account, rights theories emerged as a reaction against or alternative to programs of economic redistribution, welfare statism or egalitarianism practiced by the New Deal or postwar social-democratic regimes. Alan Brinkley, for one, sees an historical connection between growing political resistance to the New Deal program of economic redistribution and the emergence

of a rights discourse during the 1940s.[43] Just one year after a New Deal majority, devoted to affirming the regulatory powers of both state and federal governments, was finally consolidated on the Supreme Court, Justice Stone wrote his *Carolene Products* footnote (1938),[44] foreshadowing the shift in American liberalism from concern with economic injustice to concern with racial or cultural injustice.

A similar pattern can be seen in Britain, where, just as a Labour government came to power in 1945 on a program of egalitarian redistribution, philosophical and economic thought abruptly shifted against utilitarianism. The dominant version of prewar utilitarian economic thought had assumed the declining marginal utility of money, and, as a result, only a thin layer of concepts stood between utilitarianism and egalitarianism. Now, suddenly, a new dogma of "the incommensurability of inter-personal utilities" was proclaimed, which meant that it was no longer possible to claim that greater equality necessarily also maximized utility. Individual welfare and social efficiency were suddenly reconceived as conflicting goals, requiring tradeoffs, eventually culminating in Rawls' *A Theory of Justice* (1971).[45]

A similar pattern can be seen more directly in the postwar efforts of Oxford philosophers to charge utilitarianism with a willingness to "sacrifice" an individual's rights in order to maximize the social good.[46] The culmination of this line of thought appeared in Isaiah Berlin's *Two Concepts of Liberty* (1958),[47] which equated the "positive" liberty of the welfare state ("freedom to") with totalitarianism (being "forced to be free"), while unfavorably contrasting it with the "negative" liberty ("freedom from") that he claimed was the essence of authentic liberalism.

There is, however, another account of the development of rights theory which is equally plausible. The triumph of democracy as a fundamental value in the postwar world generated an effort to explore the preconditions for authentic democracy beyond universal suffrage, majority rule, and a competitive party system, initially broadening the definition of the "political" to include guarantees of "free and fair elections" and freedoms of speech and press. Eventually, the power of money to influence political campaigns and control the media was also brought within the debate over the social and institutional preconditions for democracy. And, finally, "social" rights,

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43 ALAN BRINKLEY, THE END OF REFORM 10 (1995).

44 United States v. Carolene Products Co., 304 U.S. 144, 152 n.4 (1938).

45 JOHN RAWLS, A THEORY OF JUSTICE (1971); *see* Morton J. Horwitz, '*Why is Anglo-American Jurisprudence Unhistorical?*', 17 O.J.L.S. 551 (1997).

46 *See* Horwitz, *supra* note 45, at 582.

47 ISAIAH BERLIN, TWO CONCEPTS OF LIBERTY (1958).

including guarantees of healthcare, education, welfare and employment came to be thought of as necessary social underpinnings of an authentic democratic system.

The debate over what constitutes democracy would soon spread from the political and economic to the cultural realm. Initially, the main focus was on the treatment of racial, religious or cultural minorities, what Justice Stone called "discrete and insular minorities" that are too weak or politically isolated to be able to defend themselves through the electoral or legislative processes.

As the definitions of democracy and rights were broadened to encompass a more extensive set of guarantees, there also emerged internal contradictions among various rights.

The development of "human rights" after World War II recapitulated all of these problems. Here the main tension was between a universalistic conception of "unalienable human rights" and particularistic accounts of embedded traditional or customary rights, often conflicting with the universalistic model. This contest was often expressed in conflicts between traditional religious practices (the "veil" or female circumcision) and freedom from religious coercion. In the American constitutional context, the conflict between the two religion clauses of the First Amendment expresses similar potential contradictions.

Every conception of rights, when applied to particular situations, has the potential for what we might call a "conservative" or a "progressive" application, what I have elsewhere called the "two-edged sword" of rights discourse.[48] But this may express a still more general phenomenon — the inevitable indeterminacy of results whenever very abstract concepts are applied to particular situations.

Without a test or criterion for balancing among them, all claims to "unalienable" rights dissolve into incoherence. This occurs because there is frequently a conflict among or within particular rights, and the process of drawing the boundaries inevitably produces tradeoffs among rights or interests. Unless one knows what the concrete result of these tradeoffs is, it is not possible to judge whether the transplant, migration or borrowing of rights has had one effect or another.

A similar problem arises for the purely descriptive task of providing an "external" account of constitutional transplants in the postwar era. Unless one knows which particular "interests" or ideological "forces" have generated

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48 Morton J. Horwitz, *Rights*, 23 HARV. C.R.-C.L. L. REV. 393 (1988).

constitutional migrations, it becomes very difficult to connect them to the changes in institutions and modes of thought.

The mantra of the Reagan administration — "free markets and free elections" — may provide us with a key to understanding the twin foundations of the constitutional revolutions of the past quarter-century. Two ideas, capitalism and democracy, once experienced as contradictory, were brought together in a new paradigm under the umbrella of "the rule of law." This is similar to the convergence of social forces that produced laissez-faire ideology in the twenty years before the U.S. Civil War. Traditional conservative fears of the redistributive potential of democratic government joined together with a Jacksonian fear that government would be captured by the "interests."

B. Another Convergence Scenario

What follows is a somewhat different, quite schematic picture of the social forces that converged to produce a rights revolution during the past quarter-century. Let us begin with the familiar scheme of a shift from status to contract to status. The reversion to status is supposed to reflect the shift from a nineteenth-century, European "liberal," laissez-faire capitalism to a late twentieth-century "welfare" or "corporate" or "mixed" capitalist system. There are also various versions of the shift in legal regimes that accompanied the shift back to status. Perhaps one will do. At the end of the nineteenth century, during the era of "classical legal thought," there was one general, abstract, so-called "will theory" of contract. Then there began a disaggregation of contract into "transaction types" and "statuses" — insurance, labor, commercial, landlord-tenant, express-implied contracts — reflecting a new recognition of unequal bargaining power. Each of these subcategories developed specialized rules that deviated from the supposed general theory of contract.[49]

I now propose to offer an analogous schema involving property rights. Thus far, I have put human rights and property rights at opposite poles. Now, I wish to schematize property rights along the same lines as the above discussion of the history of contract theory.

Philosophical discussions of property often feature the familiar Aristotelian assertion of the need for property as autonomy or personality

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49 GRANT GILMORE, THE DEATH OF CONTRACT (Ronald K.L. Collins ed., 1995); MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1870-1960, at 14 (1992).

or security.[50] Now let us try to tie these ideas together with social class and historicize the result. It might look something like this: The post-Revolutionary American development of the right to property (in both constitutional and political theory) from the Fifth Amendment's just compensation clause through Chancellor Kent and the Jacksonians' wish to protect smallholders expresses an American version of the wish to assure autonomy to, for example, yeoman farmers, the backbone of the Republic. The constitutional development of the right to property in the early Republic was, above all, about the desire to protect the land grants of yeoman farmers.

Like freedom of contract, by the late nineteenth century property rights had also been transformed into an instrument of corporate capitalism.

By analogy to the shift from contract to status, a new group of smallholders arose by the middle of the twentieth century. This is the central message of Reich's *The New Property*.[51] These holders of new property range from social security and welfare beneficiaries to government grantees and licensees; from recipients of workers' seniority benefits to recipients of pension benefits. They are the new Jacksonian smallholders in need of recognition of property rights in order to protect their newly created Aristotelian autonomy and security.

In this version, the convergence of democracy with capitalism and of human rights with property rights occurs after this tripartite transformation in the idea of property in developed societies, analogous to the well-known status-contract-status shift. The convergence is conceived of not as a compromise between property rights and personal rights, but as a shift within the very idea of property itself, corresponding to real historical changes in the social character of property.

The constitutional revolution of the past quarter-century is thus conceived of as a consequence of this expansion of the very idea of rights, or as a result of a broader consensus about the desirability of treating rights as legally enforceable though courts.

C. The Delegitimization of Democracy and the Spread of Judicial Review

During the past half-century, there has been a strange double movement in regard to democracy. As democracy has become a virtually universal

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50 Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957 (1982); GREGORY ALEXANDER, COMMODITY AND PROPRIETY: COMPETING VISIONS OF PROPERTY IN AMERICAN LEGAL THOUGHT, 1776-1970 (1997).

51 Charles A. Reich, *The New Property*, 73 YALE L.J. 733 (1964).

global ideal, the very institutions that constitute democracy seem to have been delegitimized in ways reminiscent of the 1920s and 1930s. The result has been a substantial disenchantment with the possibility of achieving government of, by and for the people, resulting in a flight from the "political" to other forms of governance.

The recent factors most responsible for these changes are rooted in globalization — in particular, the rise of large, concentrated media, especially television, and the massive influence of money in politics, both in political campaigns and, more generally, in the increasingly unmediated domination of the government by interest groups.

There are formidable difficulties in gaining real perspective on these developments. Let us look at two phenomena that would seem, at first glance, to offer unmistakable evidence of the causes and effects of disillusionment — voting and corruption.

There has been a long-term, almost half-century decline in the percentage of citizens who vote in developed countries — North America, Western Europe and Japan. Less than two decades after freeing themselves from Soviet domination, many of the states of Eastern Europe see barely 50% of their populations exercising the right to vote.

A large literature which seeks to explain the meaning of this phenomenon has arrived at strikingly contradictory conclusions.[52] For some, it represents the quintessential reflection of a growing long-term disillusionment with government and politics; for others it is an expression of "contentment" with politics and a growing recognition of the practical unimportance of an individual's vote compared to other forms of achieving personal satisfaction.

There are also many more "local" explanations, ranging from increasing geographical mobility and a concomitant loss of community to growth in competing demands of work and family. Two factors appear to be true. The amount of leisure time has not declined over this period; and the bulk of the decline in voting has taken place among the youngest cohort of potential voters.

There are structurally similar questions about whether there has been a long-term growth in public and private corruption. The responses raise questions about how to define corruption (e.g., bribery vs. campaign contributions); whether changing forms of corruption — public vs. private;

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52 See, for example, in the context of the United States, Francis Moran III, Book Review, 59 REV. POL. 944 (1997) (reviewing TOM DELUCA, THE TWO FACES OF POLITICAL APATHY (1995)); Warren E. Miller, *Disinterest, Disaffection, and Participation in Presidential Politics*, 2 POL. BEHAV. 7 (1980).

legislative vs. party, etc. — are really all that different; and, finally, whether, in market economies, what is called corruption is just as legitimate as other forms of market competition.

Anyone who has studied American history can hardly fail to acknowledge that, though its forms may have changed, there has been pervasive corruption during every period of American history. Some examples include widespread bribery to secure grants of land and corporate charters in the antebellum period, and — after the Civil War — infamous scandals in the Grant and Harding administrations; pervasive corruption accompanying the development of party machines in the major cities; and consistent corruption at the state level in road-building, licensing, and the grants of monopolies.

However, there are also well-known examples of pockets of more or less corruption-free government — the New Deal at the federal level; turn-of-the-20th-century Progressive state governments in Wisconsin and California; and occasional "good government" regimes in cities.

Perhaps there is a hierarchy among different forms of corruption because each has culturally and historically specific meanings, and therefore contributes differentially to disillusionment and disenchantment with politics. In America, for example, the following distinctions seem relevant:

1. "Private" corruption (e.g., executive compensation; insider trading) draws less condemnation and therefore causes less disillusionment than "public" corruption.
2. Bribery-taking by public officials, for their own gain, is more widely disparaged than gifts to individual political campaigns. The latter, in turn, is thought more corrupt than donations to political parties.
3. The person who bribes a public official is thought less immoral than the person who receives the bribe.
4. Apart from First Amendment issues, there hardly seems any condemnation of rich candidates who contribute their own extensive resources to winning political office. In 2004, one-third of senators and congressmen *earned* more than one million dollars a year. In 2006, half of the congressional freshman class had *incomes* of more than $1 million.[53]

Though the *forms* of domination of money in politics (e.g., bribery, jobs, individual vs. party campaign contributions) both have changed over time and vary across developed countries, it does appear — and certainly is widely believed to be true — that powerful interest groups and wealthy

53 *Cf.* N.Y. TIMES, Nov. 26, 2007.

individuals have increasingly come to dominate the political systems of developed societies. This has been the source of a massive disenchantment with political systems and of a flight from the political. While it is impossible to say that, standing alone, the long-term decline in voting is a result of political satisfaction or dissatisfaction, when combined with the evident perception of the domination of money in politics, it does seem to be a further symptom of a long-term pattern of alienation from the institutions of democratic government.

One might also ask similar questions about whether particular electoral design — ranging from Israeli proportional representation and the multiparty systems of the Third and Fourth French Republics to the various two-party systems — differentially contribute to political disenchantment. *Even if* it could be shown that there were a constant amount of political corruption regardless of the electoral system, we once more encounter the question whether some forms of corruption produce more disenchantment than others. For example, the spectacle, common in Israel, Italy and the Third and Fourth French Republics, of members of small parties openly being "bribed" by the government to change their party alignment may produce more disenchantment than less visible large campaign contributions to political action committees of U.S. congressmen.

The general disillusionment within democracies has focused on legislatures and resulted in parallel delegitimizing theories of both the Left and Right. For the Left, legislatures use the taxing and spending power to serve the wealthy and powerful; for the Right, legislatures engage in illicit redistribution and allow "monopoly rents" to be extracted by interest groups through licensing and regulation. The idea that the legislature expresses some objective "public interest," once a staple of democratic political discourse, has been deconstructed into the simple mantra that "the public interest is simply the sum of the vectors of private interests."[54]

This disillusionment with the political has resulted in a long-term effort to create subsystems dominated by science, expertise, professionalism and role morality,[55] which are thought to be autonomous from the pressures of both the market and politics. (For the Right, the objectivity of the market is a check on politics; for the Left, the state, expressing the "public interest," is a check on the domination of private power through the market. There is a parallel

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54 JAMES M. BUCHANAN & GORDON TULLOCK, THE CALCULUS OF CONSENT (1962).

55 For professional ethics and role morality, see ÉMILE DURKHEIM, PROFESSIONAL ETHICS AND CIVIL MORALS (1958); MAGALI S. LARSON, THE RISE OF PROFESSIONALISM: A SOCIOLOGICAL ANALYSIS (1977).

Left/Right critique of the objectivity, expertise and political autonomy of the bureaucracy.)

What follows is an effort to illustrate a parallel between two institutions, the judiciary and central banks, that rely on professional expertise or role morality as an alternative source of legitimacy to democratic politics. One of the most important recent institutional changes in the balance between politics and bureaucratic expertise occurred with the establishment of the European Union and, in particular, the creation of a European Central Bank in the aftermath of the 1982 Maastricht Agreement. The Agreement, promulgated at the moment of maximum neo-liberal disillusionment with the profligate inflation-inducing fiscal practices of most member states, was designed to end the Keynesian fiscal powers of European parliaments — whose irresponsible spending was thought to be the accumulated result of political pandering — and to delegate sole regulation of the economic cycle to monetary authorities limited to operating on the basis of science and expertise. In contrast to the U.S. Fed's sphere of authority, the European Bank's mandate was restricted to combating inflation, while the Fed's more "political" goal of achieving a balance between combating inflation and pursuing "full employment" was eliminated.

The difference between the behavior of the two central banks can be seen in the frequent willingness of the Fed to dramatically cut interest rates to avoid a recession, which the European Bank, citing its more restricted mandate, has, until the recent financial crisis, been reluctant to do. The economic results have also been dramatically different — for two decades after Maastricht, Europe endured massive unemployment and low growth, in contrast to a robust U.S. economy.

A parallel disenchantment with the political produced an analogous increase in faith in the expertise of bureaucrats and role morality of judges, creating an ideological environment in which both Left and Right in numerous developed countries converged in agreement on an institutional framework that made a global constitutional revolution possible.

In describing the results in individual countries that have undergone postwar constitutional revolutions, we might find analogies in the contrasting mandates and behavior of the Fed and the European Bank. In the case of the European Bank, a "conservative" mandate produced "conservative" policies that were largely favorable to the globalizing goals of economic elites. In the case of the Fed, a more "balanced" mandate produced the results that one would have expected from a framework encouraging "tradeoffs" between growth and inflation.

The same structure has governed the variation in results among different countries that have undergone constitutional revolutions. At one pole are

countries that have given more emphasis to human rights, including the rights of racial, religious, and cultural minorities, especially rights of indigenous people and underclass immigrants. At the other pole are countries where constitutional rights have supported increased property rights and Lochner-era type rights to pursue a calling (anti-quotas; job seniority as a property right).[56] The two poles are most notable in free-speech jurisprudence that (1) distinguishes between the rights of political dissenters, at one pole, and the "money is speech" decisions, at the other pole, striking down various campaign regulations; or (2) deploys a balancing test between individual freedom and state security.

I hasten to add that, in evaluating outcomes, one must take account of the actual threats posed by anti-state or terrorist activities. Thus, one cannot mechanically label the results as "conservative" which are obtained under a balancing test applied in favor of security over free expression. India or Israel in 1948 were in a different situation from the U.S. or Britain during the Cold War and McCarthyism. Germany has been notably self-conscious of its past in regularly tilting the balance in favor of free expression. By contrast, Hungary may be excessively haunted by the ghosts of its past in its recent willingness to prefer security over free speech.[57]

Thus, from a very general perspective, it is evident that the global constitutional revolution has the potential to produce results analogous to the variation in theory and practice of the European and American central banks. It represents a convergence of the dual (and often conflicting) theories of rights that underlie capitalism and democracy as well as the contradictions within each of these ideas (e.g., property vs. competition; security vs. insecurity; majority rule vs. minority rights; government of laws vs. government of men). One or another of these dualisms (or a balancing test between them) can be invoked under specific social and political conditions to favor or disfavor "conservative" or "progressive" outcomes. Even the self-conscious transplantation of a specific provision of the U.S. Bill of Rights, like the free-speech clause of the First Amendment, has the potential

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56 Guy Mundlak, *The Right to Work — The Value of Work*, *in* EXPLORING SOCIAL RIGHTS 341 (Daphne Barak-Erez & Aeyal M. Gross eds., 2007); Guy Mundlak, *The Right to Work: Linking Human Rights and Employment Policy*, 146 INT'L LAB. REV. 189 (2008); Alon Harel, *Theories of Rights*, *in* THE BLACKWELL GUIDE TO THE PHILOSOPHY OF LAW AND LEGAL THEORY 191 (Martin P. Golding & William A. Edmundson eds., 2005).

57 *Cf.* Michel Rosenfeld & Andras Sajo, *Spreading Liberal Constitutionalism: An Inquiry into the Fate of Free Speech Rights in New Democracies*, *in* THE MIGRATION OF CONSTITUTIONAL IDEAS, *supra* note 42, at 176.

to achieve a very different result from the one that the U.S. Supreme Court might achieve (also itself subject to different interpretations over time).

What does seem clear is that one of the preconditions for the constitutional revolution of the postwar era has been a growing disillusionment with politics and a growing skepticism — and even fear — of the ability/inability of democratic institutions to achieve either efficiency or justice. The increased power given to judges is in part a result of this flight from democratic institutions and a more general wish to create autonomous subsystems and find sources of judgment that are independent of both the market and democratic politics (science, expertise, professionalism, role morality).