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## Comparative Research in Law & Political Economy

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Adam Dodek

### A Tale of Two Maps: The Limits of Universalism in Comparative Judicial Review

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**Adam Dodek**

**A TALE OF TWO MAPS: THE LIMITS OF UNIVERSALISM IN  
COMPARATIVE JUDICIAL REVIEW**

**Abstract:** The explosion of scholarship in comparative constitutional law in the last decade tends to overshadow the traditional suspicion that comparative law exhibited towards public law. For the greater part of the 20<sup>th</sup> century, the dominant paradigm in comparative public law was particularism and strong skepticism towards universalist features and possibilities in public law, especially constitutional law. With the rise of judicial review after World War II and especially in Eastern Europe after the collapse of the Soviet Union, comparative judicial review has begun to flourish. This paper is a comment on a paper by Professor Miguel Schor entitled “Mapping Comparative Judicial Review” presented at the Second Osgoode Hall Law School Constitutional Law Roundtable in Toronto in February 2007. In this paper, the author argues that the comparative scholarship on judicial review overemphasizes the centrality of “the Question of Legitimacy” of judicial review in a democratic polity. This is attributed to the mistaken extrapolation of the American debate over judicial review to universal application. Drawing on the examples of Canada, South Africa and Israel, the author argues that the Question of Legitimacy has less importance and a decisively different character in those countries than in the United States. It is time to recall and embrace some of the particularist skepticism in comparing judicial review across different legal systems.

**Keywords:** comparative constitutional law, judicial review, particularism, universalism, legitimacy

**JEL classification:** K33, K39

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# A TALE OF TWO MAPS: THE LIMITS OF UNIVERSALISM IN COMPARATIVE JUDICIAL REVIEW\*

Adam Dodek\*\*

## I. INTRODUCTION

Until relatively recently, comparative law tended to be rather dubious about the universalist possibilities of constitutional law. The dominant paradigm in comparative public law until the late 20<sup>th</sup> century was particularism. It found expression in Montesquieu's skepticism that laws of one nation could be suitable for another because of the belief that laws must be appropriate to the people for whom they are made.<sup>1</sup> Modern scholars posited that the transfer of political institutions from one country to another simply was not possible.<sup>2</sup> Constitutional particularists contended that the intimate connection between a nation and its constitution meant that nations differ so much as a result of factors such as political structure, social organizations and legal culture that meaningful

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\* A comment on Professor Miguel Schor's "Mapping Comparative Judicial Review" at the 2<sup>nd</sup> Osgoode Constitutional Law Roundtable: Comparative Constitutional Law and Globalization: Towards Common Rights and Procedures, Toronto, February 24, 2007. Thank you to Professor Peer Zumbansen for inviting me to participate in the Roundtable and to the participants for their insightful comments throughout the day and to Jamie Cameron and Richard Goldstone for providing comments on an earlier draft of this paper. A later version of Professor Schor's paper can be found at Miguel Schor, "Mapping Comparative Judicial Review" (May 27, 2007). Suffolk University Law School Research Paper No. 07-24 Available at SSRN: <http://ssrn.com/abstract=988848>.

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<sup>1</sup> C. Montesquieu, *The Spirit of the Laws*, A. Cohler et al., eds. and trans. (Cambridge: Cambridge University Press, 1989) 8-9 (Book 1, ch. 3).

<sup>2</sup> See Carl J. Friedrich, *The Impact of American Constitutionalism Abroad* (Boston: Boston University Press, 1967) 10 (noting and critiquing this argument).

comparisons of constitutional law simply are not possible.<sup>3</sup> In a word, the historical nexus between public law and national identity may not readily transfer to other countries.<sup>4</sup> As a practical matter, the leading comparativists in the 20<sup>th</sup> century were private law scholars and the field of comparative law thus largely focused on this area. This dominant particularist paradigm prevailed until the fall of the Soviet Union and the subsequent explosion of scholarship in comparative constitutional law.

The reinvigoration of comparative law in the early 1990s brought with it not only an exponential growth in comparative constitutional law scholarship but also the ascendancy of universalism over particularism within the field. This school of thought is best captured in the words of one leading scholar that "the basic principles of constitutional law are essentially the same around the world..."<sup>5</sup> There are strong links between this universalist constitutionalism and international human rights law.<sup>6</sup> In addition, it possible to identify both a *thick* and a *thin* version of this universalism. *Thick universalism* contains both normative and process claims. It posits the strong universal application of specific norms and values as well as a global network that facilitates the communication and reinforcement of these values.<sup>7</sup> In contrast, a *thin universalism* presents a

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<sup>3</sup> See C. Osakwe, "Introduction: The Problems of the Comparability of Notions in Constitutional Law" (1985) 59 *Tulane L. Rev.* 875 at 876 (stating that public law reflects inner relationship; spiritual and psychological connection with people); Donald P. Kommers, "The Value of Comparative Constitutional Law" (1976) 9 *John Marshall J. of Practice and Procedure* 685 at 688.

<sup>4</sup> See Osakwe, *ibid.* at 876.

<sup>5</sup> David Beatty, *Comparative Law in Theory and Practice* Toronto: University of Toronto Press, 1995) 10. See also *ibid.* at 15, 17, 105 and 142.

<sup>6</sup> See Mark Tushnet, "Some reflections on method in comparative constitutional law" in Sujit Choudhry, ed., *The Migration of Constitutional Ideas* (Cambridge: Cambridge University Press, 2006) 67 at 69.

<sup>7</sup> Leading examples of thick universalism are Aharon Barak's purposive interpretation (see Aharon Barak, *Purposive Interpretation in Law* (Princeton & Oxford: Princeton University Press, 2005)), David Beatty's ultimate rule of law (see David Beatty, *The Ultimate Rule of Law* (Oxford and New York: Oxford University Press, 2004)) and Lorraine Weinrib's postwar paradigm (Lorraine E. Weinrib, "The postwar paradigm and American exceptionalism" in Sujit Choudhry, ed., *The Migration of Constitutional Ideas* (Cambridge: Cambridge University Press, 2006) 84 and Lorraine E. Weinrib,

more modest argument about universal values. It recognizes the existence of a global network of courts as an interchange for ideas, but its focus is more on the universal nature of problems that courts face rather than on the norms to apply. It is problem-based rather than norm-centred.<sup>8</sup>

In this comment on Professor Miguel Schor's paper "Mapping Comparative Judicial Review",<sup>9</sup> I assert that it is time to recall and embrace some of the particularist skepticism in comparing judicial review across legal systems. In his paper, Schor uses mapping as a metaphor for the process of organizing various approaches to the comparative analysis of judicial review around the world. The mapping metaphor is one that has been frequently invoked in comparative law at different times as comparativists have attempted to map the world's legal systems into various legal families or traditions<sup>10</sup> much as the way that cartographers

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"Constitutional Conceptions and Constitutional Comparativism" in Vicki C. Jackson & Mark Tushnet, eds., *Defining the Field of Comparative Constitutional Law* (Westport, CT: Praeger, 2002) 3). Other forms of universalism are referred to variously throughout the literature as "the Convergence Model," "normative universalism" and the like. See Vicki C. Jackson, "The Supreme Court, 2004 Term—Comment: Constitutional Comparisons: Convergence, Resistance, Engagement" (2005) 119 *Harvard Law Review* 109 at 112 and Mark Tushnet, "Some reflections on method in comparative constitutional law" in Sujit Choudhry, *The Migration of Constitutional Ideas* (Cambridge: Cambridge University Press, 2007) 67 at 68.

<sup>8</sup> Anne Marie Slaughter is the leading proponent of a thin universalism. See e.g. Anne-Marie Slaughter, *A New World Order* (Princeton & Oxford: Princeton University Press, 2004) 1-15, 65-103.

<sup>9</sup> Miguel Schor, "Mapping Comparative Judicial Review" (Paper delivered at the 2<sup>nd</sup> Osgoode Constitutional Law Roundtable: Comparative Constitutional Law and Globalization: Towards Common Rights and Procedures, Toronto, February 24, 2007). A revised version of Professor Schor's paper can be found at Miguel Schor, "Mapping Comparative Judicial Review" (May 27, 2007). Suffolk University Law School Research Paper No. 07-24 Available at SSRN: <http://ssrn.com/abstract=988848>.

<sup>10</sup> See e.g. René David & John E.C. Brierley, *Major Legal Systems in the World Today: An Introduction to the Comparative Study of Law*, 2<sup>nd</sup> ed. (New York: The Free Press, 1978) (describing the idea of legal families and identifying the legal families in the world); Konrad Zweigert & Heins Kötz, *Introduction to Comparative Law*, 2<sup>nd</sup> ed. trans. Tony Weir (Oxford: Clarendon Press, 1992) (same); Mary Ann Glendon, Michael W. Gordon & Christopher Osakwe, *Comparative Legal Traditions* (St. Paul, Minn.: West Publishing, 1982) at 4-5 (explaining that comparativists "believe that the grouping of legal systems into legal traditions or families is possible because within every national



charted the continents and the oceans.<sup>11</sup> The mapping metaphor has also been invoked literally, with one leading comparativist noting that “the legal map of the world today is not what it was in 1798, or in 1898, or even in 1989, and it no doubt will continue to change in the future.”<sup>12</sup> However, Schor departs from prior usage and proposes a different type of conceptual map. His map focuses on questions rather than phenomena; Schor maps out the questions that scholars of comparative judicial review ask and assesses their answers. As a general matter he finds their explanations wanting; they are often too polar or overly reliant on single-variable explanations. In short, in Schor’s map, the answers provided by the conventional accounts of judicial review are overstated. This is the theme that I take up in this comment.

While Schor rightly takes existing scholarship to task for painting judicial review with too broad a brush, I suggest that conventional accounts give judicial review too much prominence. The indomitable quest for explanations for the conceptual “problem” of judicial review across different legal systems at times may be a solution in search of a non-existent problem. This emphasis on comparative judicial review reveals the dominant theme in comparative law – especially in comparative constitutional law – which is the tension between

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legal system there are certain constants as well as certain variables and identifying the three major legal traditions as the common law, civil law and socialist law tradition); John Henry Merryman & David S. Clark, *Comparative Law: Western European and Latin American Legal Systems: Cases and Materials* (Indianapolis: The Bobbs-Merrill Company, Inc., 1978) at 2 (identifying three principal legal traditions in the world as civil law, common law, and socialist law).

<sup>11</sup> See e.g. Chester G. Hearn, *Tracks in the Sea: Matthew Fontaine Murray and the Mapping of the Oceans* (New York: International Marine, 2002); Robert Kunzig, *Mapping the Deep: The Extraordinary Story of Ocean Science* (New York: W.W. Norton, 2000); Thomas Suarez, *Early Mapping of the Pacific: The Epic Story of Seafarers, Adventurers and Cartographers Who Mapped the Earth’s Greatest Ocean* (North Clarendon, Vermont: Periplus, 2004); Nicholas Crane, *Mercator: The Man Who Mapped the Planet*, 1<sup>st</sup> Amer. ed. (New York: Henry Holt 2003). See generally Nicholas Crane, *The Map Book* (Toronto: McArthur and Company, 2005). See also Arthur J. Klinghoffer, *The Power of Projections: How Maps Reflect Global Politics and History* (Westport, Connecticut: Praeger, 2006).

<sup>12</sup> Rudolf B. Schlesinger et al, *Comparative Law: Cases-Text-Materials*, 6<sup>th</sup> ed. (New York: Foundation Press, 1998) at 283.

universalism and particularism. Schor's paper demonstrates how stressing judicial review overemphasizes its importance as a universal phenomenon in a manner somewhat similar to how our standard Mercator projection map centralizes and over-represents Europe at the expense of other continents.<sup>13</sup> Here, I endeavour to demonstrate this argument through reflecting on a tale of two maps of my own.

## II. A TALE OF TWO MAPS

### A. THE FIRST MAP: THE MAPPARIUM

In Boston – not too far from Professor Schor's law school – there is an incredible map room like no other. The “Mapparium” is located in the Mary Baker Eddy Library at the headquarters of the Christian Science Center Publishing Society in Boston's Back Bay neighbourhood.<sup>14</sup> The Mapparium is by no means a conventional map room in the sense of a room that contains maps where one can go and spread them out on a table for examination. Rather, the Mapparium *is* a map; it is a room that consists of a single map – or rather a globe. This three-story room was built between 1934 and 1935, a time when the United States was in the midst of the turmoil of the Great Depression and Hitler was on the rise in Europe. Designed by Boston architect Chester Lindsay Churchill, the Mapparium was based on Rand McNally's 1934 map of the world. To the visitor, it appears that the Globe has been turned inside out, with the map on the inside of the sphere. The visitor stands inside the Globe – three stories of it – and is able to peer at locations in every direction. It is a full three hundred and sixty degree cartographical visual experience. While apparently some thought was given to updating the map from time to time – by the time it was nearing completion in 1935, the world had changed since Rand McNally's 1934 version – the futility and the expense of

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<sup>13</sup> See Mark S. Monmonier, *Rhumb Lines and Map Wars: A Social History of the Mercator Projection* (Chicago: University of Chicago Press, 2004).

<sup>14</sup> Mary Baker Eddy was the founder of Christian Science as well as *The Christian Science Monitor* in 1908. See generally Willa Cather, *The Life of Mary Baker G. Eddy and the History of Christian Science* (University of Nebraska Press, 1993).

attempting to keep the map of the world current resulted in the freezing of the Mapparium in time.<sup>15</sup>

The visitor standing on the glass bridge/observation deck traversing one end of the room to the other is propelled back in time to 1934.<sup>16</sup> Great Britain and her colonies and mandates are in imperial pink and other “mother” countries share the same colour with their colonies. The Mapparium alters one’s perspective, viewing the world in three-dimensional terms from the inside out as it were. The oceans have different shades of blue to denote depth, a frequent feature on maps which was critical for sailors, to say the least for divers. The Mapparium is a remarkable work of art, stimulating thought about history, geography, politics and perhaps about comparative law as well.

## B. THE SECOND MAP: MR. FOSTER’S COLD WAR MAP

The second map fast forwards five decades from the Mapparium to my high school social studies class in Vancouver in the mid-1980s, *i.e.* during the end of Cold War. Our class was taught by a relatively young and hippyish Mr. Dave Foster who was one of those rare teachers who is able to capture the attention of otherwise hormonally distracted fourteen year olds and succeed in inspiring a few of them. Mr. Foster showed us a map of how Americans perceived the world at that time; it was a conceptual map more akin to the type we might use in comparative law. Not surprisingly, the size and centrality of the United States was hugely distorted. Eastern Europe and the Soviet Union were similarly inflated and described with the simple moniker “Commieland”; the Middle East

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<sup>15</sup> All references in this paragraph are based on a visit by the author to the Mapparium on February 18, 2007 and on the history of the Mapparium contained in its webpage online at <http://www.marybakerredylibrary.org/exhibits/mappariumhistory.jhtml>. According to the website, “In 1939, 1958, and again in 1966, different committees discussed updating the map. In 1966, the estimated cost was \$175,000 to create and install new glass panels. It was decided that the Mapparium held much more value as an art object, and the idea of updating was finally dropped.”

<sup>16</sup> The Mapparium is a three-dimensional encounter of experiencing maps as “a ‘window’ into times now passed.” Lez Smart, *Maps That Made History* (Toronto: The Dundurn Group, 2004) at 14.

was enlarged and denoted with the sole explanation: “oil”. Africa and South America were shrunken, as was Canada with the simple denotation of “cold”. A similar map traverses the internet entitled “The World According to Ronald Reagan” which offers much of the same perspective. The world is divided into “West (Us)” and “East (Them)”. The United States is divided into four regions: a hugely disproportionate California, a tiny Northwest swath called “Ecotopia”, an oversized Northeast pocket called “Democrats and other welfare bums” and a rump east of the Mississippi in red and white stripes labeled “Republicans and other Real Americans”. Great Britain (aka “Thatcherland”) is expanded beyond its normal size and Europe or “socialists and pacifists” lies in the red shadow of the USSR, referred to as “Godless Communists, Liars and Spies”.<sup>17</sup>

Mr. Foster’s Cold War Map was a useful tool of engagement to articulate who Americans saw in the world and how Americans perceived them.<sup>18</sup> It was a simplistic depiction of what international relations theorists would describe in more conceptual terms as a bi-polar international system, almost to a *reductio ad absurdum*. But in presenting the Cold War Map’s view of a bi-polar world through the eyes of one superpower (we might imagine a similar exercise from the Soviet perspective), the map is also notable for what it omitted. The Cold War Map sees the United States at the center of a world struggle and in dividing the world into “us” and “them”, the perspectives of the “others” are literally diminished or excluded from the map altogether.

What is the connection between my two maps and Professor Schor’s mapping of comparative judicial review? It is this. In our own conceptual mapping of judicial review, we tend to exaggerate the importance of the problem of the legitimacy of judicial review in constitutionalism. Like Mr. Foster’s Cold War Map or the World

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<sup>17</sup> For example, in this Map, Canada is grey and labeled “Acidrania”, Mexico is simply “Mariachi Land”, a tiny South America aka “Bananaland” is about the same size as the Falkland Islands. The Middle East is divided into Israel and “Our Oil” with Beirut the only city in the region noted. Africa is shrunken and Asia is simply “Their China” and “Our China” which appear to be roughly the same size. See “The World According to Ronald Reagan” online at <http://humor.beecy.net/misc/world/> or online at <http://strangemaps.wordpress.com/2006/11/23/38-the-world-according-to-ronald-reagan/>

<sup>18</sup> For a modern version of the World According to Ronald Reagan, see the depiction of “George Bush’s World” online at <http://www.dailykos.com/story/2006/11/16/8490/2873>

According to Ronald Reagan, we as comparative constitutional scholars tend to view the centrality of judicial review through the prism of the American experience. By universalizing “the problem” of judicial review from the American experience, we may be creating a false positive in some constitutional systems as well as creating a false negative in others, missing other important features and elements in constitutional systems because of our collective fixation on judicial review.

### III. FROM THE PARTICULAR TO THE UNIVERSAL OR AMERICAN EXCEPTIONALISM?

Comparative judicial review extrapolates the well-developed theoretical issues from the American context and applies them universally. A number of factors should cause us to question the extent to which the concerns raised in the American context have broader universal application. As a starting point, the burgeoning literature on American exceptionalism gives us reason to treat extrapolations from the American experience with judicial review with some degree of skepticism.<sup>19</sup> In particular, we should begin by acknowledging the origins of judicial review in the United States, the centrality and persistence of the debate over its legitimacy and the politicized nature of that debate.

Judicial review was born in the United States. The United States contributed a distinct conception of constitutionalism to the international community consisting of judicially-enforceable rights grounded in the power of judicial review.<sup>20</sup> However, the text of the American

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<sup>19</sup> On American Exceptionalism, see e.g. Michael Ignatieff, ed., *American Exceptionalism and Human Rights* (Princeton & Oxford: Princeton University Press, 2005); Seymour Martin Lipset, *American Exceptionalism* (New York: W.W. Norton, 1997); Siobhan McEvoy-Levy, *American Exceptionalism and U.S. Foreign Policy* (New York: Palgrave, 2001); Deborah Madsen, *American Exceptionalism* (Jackson, MI: University of Mississippi Press, 1998); Jack P. Greene, *The Intellectual Construction of America: Exceptionalism and Identity from 1492 to 1800* (Chapel Hill, NC: University of North Carolina Press, 1993); and Harold Hongju Koh, “Foreword: On American Exceptionalism” (2003) 55 *Stanford Law Review* 1479.

<sup>20</sup> See Louis Henkin, *The Age of Rights* (New York: Columbia University Press, 1990) xviii, 65 (“The United States is commonly acknowledged to be a principal ancestor of the contemporary ideas of rights”). See also Elizabeth Borgwardt, *A New Deal for the*

Constitution is silent on the issue and it was not until the 1803 in *Marbury v. Madison*<sup>21</sup> that Chief Justice Marshall declared the existence of the power of judicial review. It was not exercised for a half-century until the infamous *Dred Scott* decision<sup>22</sup> which contributed to the American Civil War. Thus, it has been said that judicial review in the United States was “born in sin . . .”<sup>23</sup> What is critical for comparative purposes is that judicial review originated with the Supreme Court, not with democratically-elected representatives and not within the text of the Constitution itself.

In the United States, the persistence of the debate over the legitimacy of judicial review and the centrality of that debate is notable. Former Stanford Dean of Law Paul Brest has rightly called the controversy over the legitimacy of judicial review in a democratic polity “the historic obsession of normative constitutional law scholarship” in the United States.<sup>24</sup> Since before and after Herbert Wechsler’s endeavour at neutral principles,<sup>25</sup> American constitutional law scholars have embarked on a collective quest for a theory of interpretation to justify judicial

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*World: America’s Vision for Human Rights* (Cambridge, Mass. & London: The Belknap Press, 2005). On the American contribution of the Declaration of Independence to the global community see David Armitage, *The Declaration of Independence: A Global History* (Cambridge: Mass: Harvard University Press, 2007). On the American conception of rights see Lynn Hunt, *Inventing Human Rights: A History* (New York & London: W.W. Hunt, 2007) 113-126, 214.

<sup>21</sup> 5 U.S. (1 Cranch) 137 (1803).

<sup>22</sup> 60 U.S. (19 How.) 393 (1856).

<sup>23</sup> Lino A. Graglia, “Constitutional Law without the Constitution: The Supreme Court’s Remaking of America” in Robert H. Bork, ed., *A Country I Do Not Recognize: The Legal Assault on American Values* (Stanford: Hoover Institution Press, 2005) 1 at 8.

<sup>24</sup> Paul Brest, “The Fundamental Rights Controversy: The Essential Contradictions of Normative Constitutional Scholarship” (1981) 90 Yale L.J. 1063 at 1063. See also Roger P. Alford, “In Search of a Theory for Constitutional Comparativism” (2005) 52 UCLA Law Review 639 at 644 (claiming that constitutional law scholars are “obsessed with the latest nuance of a grand constitutional theory”).

<sup>25</sup> Herbert Wechsler, “Toward Neutral Principles of Constitutional Law” (1959) 73 Harv. L. Rev. 1.

review. These include formalists,<sup>26</sup> neo-formalists,<sup>27</sup> originalists,<sup>28</sup> textualists,<sup>29</sup> process-theorists,<sup>30</sup> moral theorists,<sup>31</sup> populists,<sup>32</sup> pragmatists,<sup>33</sup> judicial minimalists,<sup>34</sup> and many others. There are also

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<sup>26</sup> See e.g. James Bradley Thayer, “American Doctrine of Constitutional Law” (1893) 7 Harv. L. Rev. 129.

<sup>27</sup> See e.g. Adrian Vermeule, *Judging Under Uncertainty: An Institutional Theory of Legal Interpretation* (Cambridge, Mass.: Harvard University Press, 2006).

<sup>28</sup> See e.g. Robert Bork, *The Tempting of America* (New York: Free Press, 1990) and Antonin Scalia, “Originalism: The Lesser Evil” (1989) 57 U. Cincinnati L. Rev. 861.

<sup>29</sup> See e.g. Antonin Scalia, *A Matter of Interpretation: Federal Courts and the Law*, ed. Amy Guttmann (Princeton: Princeton University Press, 1998).

<sup>30</sup> See e.g. John Hart Ely, *Democracy and Distrust* (Cambridge, Mass.: Harvard University Press, 1980); Cass Sunstein, *Designing Democracy: What Constitutions Do* (New York: Oxford University Press, 2001); Frank Michaelman, “Law’s Republic” (1988) 97 Yale Law Journal 1493.

<sup>31</sup> See e.g. Ronald Dworkin, *Taking Rights Seriously* (Cambridge, Mass.: Harvard University Press, 1977); Ronald Dworkin, *A Matter of Principle* (Cambridge, Mass.: Harvard University Press, 1985); Ronald Dworkin, *Law’s Empire* (Cambridge, Mass.: Harvard University Press, 1986); David Richards, *Toleration and the Constitution* (New York: Oxford University Press, 1986); Michael Perry, *The Constitution in the Courts: Law or Politics?* (New York: Oxford University Press, 1994).

<sup>32</sup> See e.g. Larry D. Alexander, *The People Themselves: Popular Constitutionalism and Judicial Review* (New York & Oxford: Oxford University Press, 2004); Bruce Ackerman, *We The People, vol. 1: Foundations* (Cambridge, Mass: Harvard University Press, 1991); Bruce Ackerman, *We The People, vol. 2: Transformations* (Cambridge, Mass: Harvard University Press, 1998); Mark V. Tushnet, *Taking the Constitution Away from the Courts* (Princeton: Princeton University Press, 1999). Richard D. Parker, “*Here, the People Rule*”: *A Constitutional Populist Manifesto* (Cambridge, Mass: Harvard University Press, 1994).

<sup>33</sup> See e.g. Richard A. Posner, *Law, Pragmatism, and Democracy* (Cambridge, Mass.: Harvard University Press, 2003); Richard A. Posner, “Pragmatic Adjudication,” in Morris Dickstein, ed., *The Revival of Pragmatism: New Essay on Social Thought, Law, and Culture* (Durham, NC: Duke University Press, 1998); Stephen Breyer, *Active Liberty: Interpreting our Democratic Constitution* (New York: Alfred A. Knopf, 2005).

<sup>34</sup> See Cass R. Sunstein, *One Case at a Time: Judicial Minimalism on the Supreme Court* (Cambridge, Mass.: Harvard University Press, 1999).

those that address the legitimacy of judicial review by calling for its abolition or its severe curtailment.<sup>35</sup>

The American debate over the legitimacy of judicial review must be considered in its larger political context. American constitutionalism is deeply entrenched in American political culture in the sense of acceptance of the *idea* of a constitution as a limit on the power of the state. In fact, constitutionalism in the United States is considered by some to be a form of secular religion.<sup>36</sup> However, the *exercise* of judicial review as a component of constitutionalism – the power of the judiciary to strike down legislation as inconsistent with the Constitution – is not similarly entrenched. To put the matter in starker terms, the constitutional debate over the ratification of the Constitution that led Publius to pen *The Federalist Papers* is now a matter of history. There are vibrant debates on the meaning and interpretation of the U.S. Constitution but not about the validity of the document itself. This is not the case with judicial review; its legitimacy continues to be questioned and debated.

The legitimacy of the judicial role was an issue that confronted the framers and continues to define American constitutionalism. The problem of legitimacy arises because of the apparent conflict between the principle of democratic accountability and judicial review. In simple terms, the principle of democratic accountability holds that decisions relating to government policymaking which inevitably require choosing between competing values be made by persons who are accountable to the

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<sup>35</sup> See Mark V. Tushnet, *Taking the Constitution Away from the Courts* (Princeton: Princeton University Press, 1999) (calling for the abolition of judicial review); Lino A. Graglia, “Constitutional Law without the Constitution: The Supreme Court’s Remaking of America” in Robert H. Bork, ed. “*A Country I Do Not Recognize*”: *The Legal Assault on American Values* (Stanford, California: Hoover Institution Press, 2005) 1 at 52-53 (same); Robert H. Bork, *Slouching Toward Gomorrah: Modern Liberalism and American Decline* (New York: Regan Books, 1996) at 117 (proposing constitutional amendment making any federal or state court decision subject to being overruled by a majority vote in each House of Congress).

<sup>36</sup> See e.g. Sanford Levinson, *Constitutional Faith* (Princeton and Oxford: Princeton University Press, 1988).



electorate.<sup>37</sup> A person may either be *directly* or *indirectly* accountable to the electorate. As explained by Michael Perry:

. . . a person is accountable to the electorate *directly* if he holds elective office for a designated temporary period and can remain in office beyond that period only by winning reelection; accountability is indirect if he holds appointive office and can remain in office only at the discretion of his appointer (who in turn is electorally accountable) or, if his office is for a designated, temporary period, by securing reappointment after that period has expired.<sup>38</sup>

Elected representatives are directly accountable and many of their officials would be indirectly accountable. A life-tenured judiciary is not. Given the principle of democratic accountability, the question arises as to the legitimacy of judicial review.<sup>39</sup> That quest for justification has been the defining feature of 20<sup>th</sup> century American constitutional thought, set off by Alexander Bickel's characterization of judicial review as a "deviant institution" in American democracy and defining the problem in terms of the "countermajoritarian difficulty."<sup>40</sup> Cappelletti referred to the "Mighty Problem" of judicial review.<sup>41</sup> I refer to this debate around judicial review's legitimacy simply as "the Question of Legitimacy" in comparative constitutionalism.

The Question of Legitimacy in the United States is notable for its centrality, its intensity and its endurance. It is a dominating issue

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<sup>37</sup> Michael J. Perry, *The Constitution, the Courts and Human Rights* (New Haven and London: Yale University Press, 1982) at 9.

<sup>38</sup> *Ibid.*

<sup>39</sup> See Perry, *ibid.* For a leading article of this genre see Eugene V. Rostow, "The Democratic Character of Judicial Review" (1952) 66 Harv. L. Rev. 193.

<sup>40</sup> Alexander M. Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (Indianapolis: Bobbs-Merrill, 1962) at 18.

<sup>41</sup> See Mauro Cappelletti, "The 'Mighty Problem' of Judicial Review and the Contribution of Comparative Analysis" (1980) 53 Southern California Law Review 409.

jurisprudentially, academically and politically in the United States. In this sense, the Question of Legitimacy continues to be more of a concern in the United States than in many other countries which explicitly adopted what might be termed “American-style judicial review”. It has been sustained and perhaps elevated by the politicized nature of the appointment process of U.S. Supreme Court justices. There is a political element to the judicial appointment process in all countries,<sup>42</sup> however, what distinguishes the American judicial appointment process is the extent to which it is caught up in partisan politics. American judicial nominees are part of American political theatre and are used as pawns in political inter-party and sometimes intra-party political warfare. The effect has been to sustain and nurture the debate over the Question of Legitimacy in the political sphere which ensures a continued market for the academic writings on the issue.

The Question of Legitimacy should properly be considered an aspect of American exceptionalism, part of the growing discourse on the uniqueness of the United States in international relations, human rights and political theory.<sup>43</sup> In explaining the decision to exclude the United States from a book entitled *Promoting Human Rights Through Bills of Rights: Comparative Perspectives*, Philip Alston explained that “the American Bill of Rights is, in many ways, *sui generis*. Because it is in a class of its own, experience under it offers fewer insights and less guidance than is usually assumed to those who are curious about the viability and optimal shape of bills of rights elsewhere in the world.”<sup>44</sup> As I argue below, the Question of Legitimacy in the United States is also *sui generis*. It has taken on a very different tenor in other legal systems.

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<sup>42</sup> See e.g. Kate Malleson & Peter H. Russell, eds. *Appointing Judges in an Age of Judicial Power: Critical Perspectives from Around the World* (Toronto: University of Toronto Press, 2006).

<sup>43</sup> See sources cited *supra* note 19.

<sup>44</sup> Philip Alston, “A Framework for the Comparative Analysis of Bills of Rights” in Philip Alston, ed., *Promoting Human Rights Through Bills of Rights: Comparative Perspectives* (Oxford: Oxford University Press, 1999) 1 at 6.

#### **IV. THREE ALTERNATE ACCOUNTS OF JUDICIAL REVIEW AND THE QUESTION OF LEGITIMACY**

In this section I describe judicial review in three countries: Canada, Israel and South Africa. I argue that the nature of judicial review in these countries differs significantly from the United States and that the Question of Legitimacy has taken on a very different character in each of them. In Canada, Israel and South Africa judicial review operates within the rubric of a common law system very much cognizant of the American model of judicial review. Between the three countries we cover judicial review on three continents, with Europe noticeably absent.<sup>45</sup> The review is by no means intended to be exhaustive, but rather informative beyond being anecdotal about the nature of the debate on judicial review outside the United States. Together, the experiences of these three countries provide a cautionary tale about universalizing judicial review from the American experience. In each of these countries, we can identify differences of history and context, constitutional structure and legal culture that reduce the centrality of the Question of Legitimacy in comparison to the United States.

##### **A. CANADA NOTWITHSTANDING**

We might expect the characteristics of judicial review in Canada to most resemble the United States because of the geographic proximity of the two countries, shared cultural and language bonds, and strong commonalities between the two legal systems. Many Canadian lawyers, judges, public servants and public policy makers have done graduate work in the United States. However, the Canadian narrative and debate over the Question of Legitimacy differs significantly from the American experience.

To begin, historical differences between Canada and the United States are critical. Canadians never declared their independence from Great Britain but rather came together to form a union under the continued

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<sup>45</sup> On judicial review in Europe, see e.g. Cappelletti, *supra* note 41; Alec Stone Sweet, “Why Europe Rejected American Judicial Review . . . And Why It May Not Matter” (2003) 101 Michigan Law Review 201.

aegeis of the mother country and expressly sought a constitution “similar in principle” to it.<sup>46</sup> Canada’s original Constitution – the *British North America Act, 1867*<sup>47</sup> – largely set out the federal structure of the new Dominion and contained few express rights. While it is arguable that the federal Government and not the courts were envisioned as the arbiters of the boundaries of federal-provincial powers, the courts soon took on this role.<sup>48</sup> In Canada’s first century, judicial review was about federalism.<sup>49</sup> Until the enactment of a constitutionally-entrenched bill of rights in 1982, the dominant theme in constitutional debates over judicial review focused on the proper scope of power to be given to the federal and provincial governments.<sup>50</sup> In 1960, Canada adopted a statutory bill of rights<sup>51</sup> but its impact was limited: it applied only to the federal Government and not to the Provinces and it was given a very narrow interpretation by the courts.<sup>52</sup> Only once in two and a half decades did the Supreme Court of Canada exercise the power of judicial review to strike down legislation as inconsistent with the Canadian Bill of Rights.<sup>53</sup> The failure of the

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<sup>46</sup> *Constitution Act, 1867*, (U.K.), 30 & 31 Vict., c.3, reprinted in R.S.C. 1985, App. II, No. 5, preamble.

<sup>47</sup> Re-enacted and renamed the *Constitution Act, 1867*, *ibid.*

<sup>48</sup> The Judicial Committee of the Privy Council first assumed the power to review the validity of legislation enacted by provincial legislatures and the federal Parliament on federalism grounds and the Supreme Court of Canada followed suit. See Peter W. Hogg, *Constitutional Law of Canada*, 5<sup>th</sup> ed. Supp. (Scarborough: Thomson, 2007) at s. 5.5(a).

<sup>49</sup> Schor acknowledges that judicial review first developed in federal systems because of the need to arbitrate between federal and state (or provincial) powers. See Schor, *supra* note 9.

<sup>50</sup> See e.g. Frank R. Scott, *Essays on the Constitution* (Toronto: University of Toronto Press, 1977); Robert MacGregor Dawson, ed., *Constitutional Issues in Canada, 1900-1931* (London: Oxford University Press, 1933).

<sup>51</sup> *Canadian Bill of Rights*, S.C. 1960, c. 44.

<sup>52</sup> See generally Walter S. Tarnopolsky, *The Canadian Bill of Rights*, 2<sup>nd</sup> rev. ed. (Toronto: McClelland & Stewart, 1975) and Hogg, *supra* note 48 at 35.5.

<sup>53</sup> See *R. v. Drybones*, [1970] S.C.R. 282.

Supreme Court of Canada to exercise judicial review under the Bill of Rights as well as the lack of hesitation of the Warren Court to do so south of the border provided an important backdrop for Canada's enactment of a constitutional bill of rights – the *Canadian Charter of Rights and Freedoms* – in 1982. Canada's adoption of the *Charter* in 1982 “was a conscious decision to increase the scope of judicial review.”<sup>54</sup>

Key structural characteristics differentiate the Canadian constitution from its American counterpart on the Question of Legitimacy. In a critical distinction from the American Constitution which is silent on the question, Canada's *Constitution Act, 1982* expressly bestowed upon the courts the power of judicial review. Section 52(1) of that act provides that “the Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.”<sup>55</sup> Further, section 24(1) of the *Charter* provides that “[a]nyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.” The express textual authorization for judicial review in the Canadian constitution significantly distinguishes it from American constitutionalism and on its own could be seen to largely resolve the question of the legitimacy of judicial review under Canada's constitution. In the words of Canada's leading constitutional law scholar, “much of the American debate over the legitimacy of judicial review is rendered irrelevant.”<sup>56</sup> However, Canadian attempts to address this issue do not end here.

When a judicially-enforced bill of rights was being debated in Canada between 1979 and 1981, the American experience with judicial review and the countermajoritarian dilemma were very much front and

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<sup>54</sup> Hogg, *supra* note \_\_\_ at s. 5.5(b).

<sup>55</sup> *Constitution Act, 1982* at s. 52(1). See Hogg, *supra* note \_\_\_ at 5.5(a) (“[s]ection 52(1) is the current basis of judicial review in Canada”) and s. 40.1(b) (“s.52(1) provides an explicit basis for judicial review of legislation in Canada.”).

<sup>56</sup> Hogg, *supra* note 48 at s. 39.8. See also Christopher P. Manfredi, *Judicial Power and the Charter: Canada and the Paradox of Liberal Constitutionalism*, 2<sup>nd</sup> ed. (Toronto: Oxford University Press, 2001) 11-12 (“the basic legitimacy of judicial review has been less controversial in Canada for both historical and structural reasons”).

center in the discussion. Opponents of what might be termed “American-style judicial review” feared giving courts the final say – always – in the determination of important public policy issues through the process of constitutional interpretation. Their opposition to a constitutional bill of rights was tempered by the federal Government’s agreement to insert a “notwithstanding clause” into the *Charter* which would allow Provincial legislatures (as well as the Federal Parliament) to “override” certain provisions of the *Charter* (and immunize legislation from judicial review) for a limited period of time.<sup>57</sup> The attraction found adherents in provincial premiers at opposite ends of the political spectrum who generally opposed constitutional entrenchment of a bill of rights.<sup>58</sup>

For many, the existence of the notwithstanding clause can be seen as conclusively resolving any apparent countermajoritarian difficulty in the Canadian context by giving the popular representatives of the people the final say in constitutional matters.<sup>59</sup> It means that courts do not have a conclusive veto over legislatures. As Peter Hogg explains, if an equivalent to Canada’s notwithstanding clauses existed under the U.S. Constitution, Roosevelt would have likely used it during the New Deal in response to the *Lochner*-era decisions, thus averting his court-packing plan.<sup>60</sup> The conceptual success of Canada’s notwithstanding mechanism in responding to the Question of Legitimacy by providing a possible “third way” between parliamentary supremacy and judicial supremacy is perhaps demonstrated by the support that it has found among some of the strongest critics of judicial review in the United States.<sup>61</sup>

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<sup>57</sup> See *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c.11, s. 33.

<sup>58</sup> See generally Kent Roach, *The Supreme Court on Trial: Judicial Activism or Democratic Dialogue* (Toronto: Irwin Law, 2001) 56-59.

<sup>59</sup> See e.g. Manfredi, *supra* note 56 at 188-195 (arguing that the notwithstanding mechanism promotes democratic legitimacy) and Janet Hiebert, *Charter Conflicts* (Montreal & Kingston: McGill-Queen’s University Press, 2002).

<sup>60</sup> Hogg, *supra* note 48 at s. 36.4(d) n. 44 (also noting that some decisions of the Warren Court would have likely been overridden by the government of the day).

<sup>61</sup> See Robert H. Bork, *Slouching Toward Gomorrah: Modern Liberalism and American Decline* (New York: Regan Books, 1996) 117 (proposing constitutional amendment making any federal or state court decision subject to being overruled by a majority vote in

While the notwithstanding clause may address the Question of Legitimacy in theory, in practice it has become politically illegitimate<sup>62</sup> and has not been used in the last two decades.<sup>63</sup> That is to say, most of the experience under the *Charter*, enacted in 1982, has been without the operation of the notwithstanding clause. This has moved the debate around judicial review to one about judicial activism and the proper relationship between the courts and legislatures, spawning a vast literature

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each House of Congress). On Judge Bork's wavering about the idea of a legislative override see Robert H. Bork, *Coercing Virtue: The Worldwide Rule of Judges* (Toronto: Vintage Canada, 2002) 76-78. See also Mark R. Levin, *Men in Black: How the Supreme Court is Destroying America* (Washington: Regency Publications, Inc., 2005) at 202 (proposing legislative veto over court decisions with two-thirds votes of both Houses of Congress).

<sup>62</sup> The notwithstanding clause soon became caught up in the longest standing Canadian political dispute – between English and French Canada – as it was invoked by the Government of Quebec in response to a Supreme Court of Canada decision holding certain prohibitions on the use of languages other than French unconstitutional. See *Ford v. Quebec*, [1988] 2 S.C.R. 712. In addition, for a time the Quebec legislature included the notwithstanding clause in every piece of legislation that it passed as a sign of protest against the exclusion of Quebec from the 1982 constitutional deal. In quick order, the notwithstanding clause which could have given a very different character to judicial review in Canada instead became the *bête noire* of Canadian constitutional politics. The literature on the notwithstanding clause is vast. See Hogg, *supra* note 48 at s. 39.1 n.1 (listing articles). On the rise and decline of the notwithstanding clause, see Manfredi, *supra* note 56 at 181-88.

<sup>63</sup> It is arguable that a constitutional convention has developed or is developing against the use of the notwithstanding clause. In the 2006 federal election, Prime Minister Paul Martin promised that if his Government was re-elected it would introduce legislation to prohibit the federal Government from using the notwithstanding clause. See “Martin wraps campaign in constitutional pledge”, CBC News (10 January 2006), online: <http://www.cbc.ca/story/canadavotes2006/national/2006/01/09/elxn-debates-look.html>. See also Paul Wells, *Right Side Up: The Fall of Paul Martin and the Rise of Stephen Harper's New Conservatism* (Toronto: Douglas Gibson, 2006) at 220-22. Allan Hutchinson suggested to me that the lapse of time in the use of the notwithstanding clause may suffice to qualify it for desuetude along the lines of the long-lapsed constitutional powers of disallowance and reservation. For a comparable analysis on the constitutional power of disallowance which has not been invoked since 1943, see Hogg, *supra* note — at s.5.3(e).

on the subject and focusing most prominently over the last decade on the concept of “dialogue” between the courts and legislatures.<sup>64</sup>

Canadian constitutional scholarship since 1982 reflects a sustained critique over the constitutionalization of rights. The critics come from both the left<sup>65</sup> and the right<sup>66</sup> sides of the political spectrum and their criticisms focus, either explicitly or implicitly, on the constitutionalization of rights. Scholars and commentators often exaggerate the political impact of judicial review in this process.<sup>67</sup> The Canadian debate is not about the legitimacy of judicial review per se but about its proper scope

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<sup>64</sup> See Peter W. Hogg & Alison A. Bushell, “The Charter Dialogue between Courts and Legislatures” (1997) 35 Osgoode Hall L.J. 76. Hogg & Bushell’s dialogue theory spurned a cottage industry of commentary. See F.L. Morton, “Dialogue or Monologue?” (1999) 20(3) Policy Options 23; Janet L. Hiebert, “Why must a Bill of Rights be a Contest of Political and Judicial Wills?” (1999) 10 Public Law Review 22; Christopher P. Manfredi & James B. Kelly, “Six Degrees of Dialogue: A Response to Hogg and Bushell” (1999) 37 Osgoode Hall L.J. 513; Peter W. Hogg and Alison A. Thornton, “Reply to ‘Six Degrees of Dialogue’” (1999) 37 Osgoode Hall L.J. 529. To commemorate the 10<sup>th</sup> anniversary of the Hogg and Bushell article, the Osgoode Hall Law Journal dedicated a special edition to “Charter Dialogue: Ten Years Later” led off by Peter W. Hogg, Allison A. Bushell & Wade K. Wright, “Charter Dialogue Revisited – Or “Much Ado About Metaphors”” (2007) 45(1) Osgoode Hall Law Journal 1. This volume includes commentaries by Richard Haigh & Michael Sobkin, Christopher Manfredi, Carissima Mathen, Andrew Petter and Kent Roach as well as a reply from Hogg, Bushell & Wright. The Supreme Court of Canada has embraced the concept of dialogue. See e.g. *Vriend v. Alberta*, [1998] 1 S.C.R. 493 at paras. 137-39, 178; *M. v. H.*, [1999] 2 S.C.R. 3 at para. 328; *Corbiere v. Canada*, [1999] 2 S.C.R. 203 at para. 116; *R. v. Mills*, [1999] 3 S.C.R. 668 at paras. 20, 57, 125; *Little Sisters Book & Art Emporium v. Canada*, [2000] 2 S.C.R. 1120 at para. 268; *Bell ExpressVu v. Rex*, [2002] 2 S.C.R. 559 at paras. 65-66; *Harper v. Canada*, [2004] 1 S.C.R. 827 at para. 37.

<sup>65</sup> See e.g. Michael Mandel, *The Charter of Rights and Legalization of Politics in Canada*, rev. ed. (Toronto: Thomson Educational Publishing, 1994); Allan Hutchinson, *Waiting for Coraf: A Critique of Law and Rights* (Toronto: University of Toronto Press, 1995); Joel Bakan, *Just Words: Constitutional Rights and Social Wrongs* (Toronto: University of Toronto Press, 1997).

<sup>66</sup> See e.g. F.L. Morton & R. Knopf, *The Charter Revolution and the Court Party* (Toronto: Broadview Press, 2000).

<sup>67</sup> See Hogg, *supra* note 48 at 36.4(b). See also Peter W. Hogg, “The Charter Revolution: Is it Undemocratic?” (2001) 12 Constitutional Forum 1; Robin Elliot, “The Charter Revolution and the Court Party: Sound Critical Analysis or Blinkered Political Polemic” (2002) 35 U.B.C. Law Rev. 271.



and the role of the courts. In contrast to American constitutional scholarship, Canadian attempts at grand theoretical justification for judicial review are exceedingly rare.<sup>68</sup> For the *Charter's* first fifteen years, the debate was largely between a small cadre of scholars on the left who view the courts as essentially conservative power structures that are unlikely to bring about progressive social change and a similarly small group of right-wing critics who continued to fight for deference to parliamentary supremacy which was abandoned as a conscious policy choice in the adoption of the *Charter* in 1982. The large majority of constitutional scholars supported the *Charter* project. Over the last decade, the debate has changed somewhat and focused on “judicial activism” and what that means and whether or not Canadian courts are activist.<sup>69</sup> The original *Charter* critics have remained, adapting their stances somewhat. However, a growing number of *Charter* supporters have lamented the courts’ failure to exercise judicial review more aggressively and more frequently.

In sum, the debate in Canada has not been over the threshold question of the democratic legitimacy of judicial review but rather over its appropriate scope and boundaries. Moreover, this debate has largely been confined to legal and academic circles and infrequently enters the public forum in the manner that it does in the United States. Canada’s leading constitutional scholar has explained that “the controversy about the political role of the [Supreme Court of Canada] has mainly taken place in academic journals, books and conferences. The public controversy about the role of the highest court that has become the standard fare of politics in the United States is muted and sporadic in Canada. It is not clear whether this is because Canadians are more respectful of their Court, or because they are less disturbed by the anti-majoritarian outcomes. It may be a bit

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<sup>68</sup> For one early such account see Patrick Monahan, *Politics and the Constitution: The Charter, Federalism, and the Supreme Court of Canada* (Toronto: Carswell, 1987). See also David Beatty, *Constitutional Law in Theory and Practice* (Toronto: University of Toronto Press, 1995) and David Beatty, *The Ultimate Rule of Law* (Toronto: Oxford University Press, 2004).

<sup>69</sup> See e.g. “Are Judges Too Powerful?” (April 1999) 20 *Policy Options* 3-4, 6-39 (containing articles by Hon. Bertha Wilson, Peter Russell, E. Preston Manning, Peter W. Hogg & Allison A. Thornton, F.L. Morton, Lorraine Eisenstat Weinrib, Rainer Knopff, and Sébastien Lebel-Grenier).

of both.”<sup>70</sup> The legitimacy of judicial review under the Charter is generally accepted in Canada and Canadians are not particularly interested in debating the subject, one way or the other.<sup>71</sup>

## B. SOUTH AFRICA’S CONSCIOUS EMBRACE OF RIGHTS

In South Africa, the Question of Legitimacy is even more muted than in Canada. Under apartheid, judicial review was almost non-existent.<sup>72</sup> Anti-apartheid activists and legal scholars generally expressed frustration or indictment with the general failure of the judiciary to protect the rights of freedoms of apartheid’s victims.<sup>73</sup> The South African debate over the legitimacy of judicial review is largely a historical one. Attempts by the white opposition during the apartheid years to enact a bill of rights with judicial review failed. The apartheid Government used the bogeyman of *Lochner* as part of its justification for opposing judicial review. Initially, the African National Congress (ANC) opposed judicial review, preferring instead to rely on the principle of unfettered majoritarianism.

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<sup>70</sup> Hogg, *supra* note 48 at s. 36.4(b).

<sup>71</sup> The attempt by Liberal Prime Minister to inject a debate over the use of the notwithstanding clause into the 2006 Canadian election was largely considered an act of political desperation and not a subject in which the public was particularly interested. See Wells, *supra* note 53 at 221-22 (stating that Prime Minister Martin had reached out “to an incredibly narrow demographic” and the proposal “excited almost no Canadian”).

<sup>72</sup> The only exercise of judicial review occurred in the 1950s in a constitutional crisis over entrenched provisions of the *South Africa Act, 1909* which functioned as South Africa’s constitution between 1910 and 1960. On these events see generally John Dugard, “Toward Racial Justice in South Africa” in Louis Henkin & Albert J. Rosenthal, *Constitutionalism and Rights: The Influence of the United States Constitution Abroad* (New York: Columbia University Press, 1990) 349 at 357-61; Henry John May, *The South African Constitution*, 3<sup>rd</sup> ed. (Westport, CT: Greenwood Press, 1955) at 50-56; T.R.H. Davenport, *South Africa: A Modern History*, 4<sup>th</sup> ed. (Toronto and Buffalo: University of Toronto Press, 1991) at 329-43.

<sup>73</sup> See e.g. John Dugard, *Human Rights and the South African Legal Order* (Princeton: Princeton University Press, 1978); David Dyzenhaus, *Judging the Judges, Judging Ourselves: Truth, Reconciliation and the Apartheid Legal Order* (Oxford: Hart Publishing, 1998).

However, as the anti-apartheid struggle increasingly became embedded in the international human rights movement, the ANC embraced the enactment of a constitutional bill of rights enforced through the exercise of judicial review. By the time of the constitutional negotiations of the early 1990s, as Schor recognizes, both black and white South Africans supported the establishment of judicial review and the constitutionalization of rights – although for different reasons. For Black South Africans – represented to the largest degree by the ANC -- a constitutional bill of rights anchored in the power of judicial review became almost an article of faith. White South Africans became quick converts to a constitutional bill of rights backed by judicial review as a means to protect their minority rights and de facto privileges.<sup>74</sup>

The structure of the South African constitution also severely diminishes the Question of Legitimacy. The interim constitution that governed the transition from apartheid to democracy explicitly and in the clearest of language provided for the establishment of a Constitutional Court with the power to declare legislation invalid to the extent of the inconsistency with the Constitution and that any such declaration was binding on all executive, legislative and judicial organs of state.<sup>75</sup> The interim Constitution also contained a supremacy clause declaring the Constitution to be “the supreme law of the Republic and any law or act inconsistent with its provisions shall, unless otherwise provided expressly or by necessary implication in this Constitution, be of no force and effect to the extent of the inconsistency.”<sup>76</sup> Similar provisions were carried over into the final Constitution now applicable in South Africa.<sup>77</sup>

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<sup>74</sup> See African National Congress, *Constitutional Guidelines for a Democratic South Africa* (1988), reprinted in (1989) 12 *Hastings Int'l & Comp. L. Rev.* 322; Albie Sachs, *Protecting Human Rights in a New South Africa* (Cape Town: Oxford University Press, 1990).

<sup>75</sup> See S.A. Const. 1993, s. 99(4)-(5).

<sup>76</sup> S.A. Const. 1993, s. 4.

<sup>77</sup> See S.A. Const., s. 1 (Founding Values), s. 2 (Supremacy of the Constitution). S. 167 (jurisdiction of Constitution Court).

While the *Canadian Charter of Rights and Freedoms* exerted significant influence on the drafting of the South African Bill of Rights,<sup>78</sup> the framers of South Africa's constitution chose not to adopt a notwithstanding clause which is not surprising given the rarity of such provisions in constitutions around the world and the concern from the apartheid-era that unbridled parliamentary supremacy failed to protect rights and freedoms of unpopular groups. However, given the ability of the South African parliament to amend most of the Constitution with a two-thirds vote<sup>79</sup> – a figure that the ANC has effectively obtained in each of the three elections since 1994<sup>80</sup> -- no notwithstanding mechanism is required to keep the legislature in the constitutional conversation. Moreover, because of this relative ease to amend the Constitution, the

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<sup>78</sup> See D.M. Davis, "Constitutional borrowing: The influence of legal culture and local history on the reconstitution of comparative influence: the South African experience" (2003) 1 *International Journal of Constitutional Law* 181 at 186-87, 191; Jeremy Sarkin, "The Effect of Constitutional Borrowings on the Drafting of South Africa's bill of Rights and Interpretation of Human Rights Provisions" (1998) 1 *U. Pa. J. of Constitutional Law* 176 at 181, 196. See generally Adam M. Dodek, "The Protea and the Maple Leaf: The Impact of the *Charter* on South African Constitutionalism" (2004) 17 *National Journal of Constitutional Law* 353.

<sup>79</sup> See S.A. Const. of 1996, s. 74(2) and (3) (providing that most provisions of the Constitution can be amended by a vote of 2/3<sup>rd</sup> of the National Assembly and at least six (of nine) provinces). Provisions amending the founding provisions of the Constitution (chapter 1) and the amendment provision itself, require at least a 75% level of support. *Ibid.*, s. 74(1).

<sup>80</sup> In the 1994 election, the ANC alone received 252 /400 seats (63%). An additional 16 votes were required to reach the 2/3 required to amend the Constitution (268/400). This could have been achieved with the addition of either partner in the Government of National Unity: the National Party (82) or the Inkatha Freedom Party (43 seats). See Independent Electoral Commission, Results of the 1994 National Elections online: <http://www.elections.org.za/Elections94.asp>. In 1999, the ANC received 66.35% of the national vote, just short of the 2/3rds required to amend the Constitution on its own. See Independent Electoral Commission, Results of the 1999 National Elections online: <http://www.elections.org.za/results/natperparty.asp>. In 2004, the ANC did obtain the 2/3rds necessary to amend the Constitution without the support of any other parties, receiving 69.69% of the vote. See Independent Electoral Commission, Results of the 2004 National Elections, online [http://www.elections.org.za/Elections2004\\_Static.asp?radResult=45](http://www.elections.org.za/Elections2004_Static.asp?radResult=45).

problem of legitimacy of judicial review is far less acute in South Africa than in the United States.

Any lingering doubts about the legitimacy of judicial review were put to rest by President Mandela after the Constitutional Court released one of its first judgments, holding the death penalty unconstitutional under South Africa's new Constitution.<sup>81</sup> The decision was divisive and Deputy President F.W. de Klerk, expressing the wide support for the death penalty among the country's white population, denounced the Constitutional Court's decision and called for a national referendum on the subject. President Mandela responded in a characteristically shrewd yet sage fashion. Speaking directly to de Klerk and the country's population in a televised address, Mandela stated that he had no problem with a referendum on the death penalty so long as another question was added to the ballot: whether the white population should return all the land that was taken from indigenous Africans. This response effectively quelled any talk of referenda to overturn unpopular court decisions. Mandela's message was clear: we live in a constitutional democracy now where the Constitutional Court exercises the power of judicial review and we accept the legitimacy and the validity of the court's decisions.<sup>82</sup>

In its judgments, the Constitutional Court of South Africa has exercised the power of judicial review cautiously, with a distinct appreciation of the enormity of the challenges faced by the Executive and the Legislature in South Africa. A case in point is the *TAC* case<sup>83</sup> where the Constitutional Court ordered the government to provide anti-HIV drugs to pregnant women but refused the request to grant a structural order which would have maintained court supervision over the development and implementation of government health policy in this area. To some, the Constitutional Court's performance has been a source of disappointment in the Court's deference to the ANC government. To others, this simply

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<sup>81</sup> See *S v. Makwanyane* (1995) 3 SA 391, 1995 (6) BCLR 665 (CC).

<sup>82</sup> This episode is related by Ronald Dworkin in Robert Badinter & Stephen Breyer, eds., *Judges in Contemporary Democracy: An International Conversation* (New York & London: New York University Press, 2004) at 34-35.

<sup>83</sup> *MINISTER OF HEALTH AND OTHERS V TREATMENT ACTION CAMPAIGN AND OTHERS* [2002] ZACC 15; 2002 (5) SA 721; 2002 (10) BCLR 1033.

reflects the recognition that the courts have a limited ability to effect significant social change. Other see the Court as out of touch with the country's high crime rate. In sum, South Africa consciously adopted judicial review under its Constitution and created a new Constitutional Court entirely dedicated to this responsibility. Judicial review operates in a completely different context in South Africa than in the United States.

### C. ISRAEL: JUDICIAL REVIEW WITHOUT A CONSTITUTION

#### I

Israel's constitutional status has long been anomalous, deserving of its own colour on any constitutional map. Israel's constitutional history has been marked by continued debate over whether to adopt a formal written constitution. A constitution is a means both of expressing universalist and particularist values and accommodating tensions between them. In Israel's case, it has never been able to reach the necessary level of consensus on how to accommodate these competing values.<sup>84</sup> Israel's constitutional history, political and legal culture and constitutional structure has created an environment where the Question of Legitimacy operates quite differently than in the United States.

Israel is atypical in that judicial review preceded the recognition of a constitution. Consequently, the dominant issue in Israel has been the constitutional one and judicial review has been a second-order issue. Over the past ten to fifteen years, the defining issue in Israeli constitutional politics has been and continues to be judicial activism with judicial review being but one of several issues that fall under this rubric.

After achieving independence in 1948, Israel deferred the adoption of a formal constitution, electing to build its constitution chapter by chapter through a series of "Basic Laws". For the next five decades, scholars focussed on questions such as what was the status of the basic laws? What was the authority of Israel's Parliament to enact constitutional legislation? Did the Supreme Court have the power of judicial review?<sup>85</sup>

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<sup>84</sup> But see Michael Mandel, "Democracy and the New Constitutionalism in Israel" (1999) 33 *Israel Law Review* 259 at 274 (arguing that the failure to adopt a constitution in Israel was attributable to ". . . the hegemony of labour at the helm of a strong state and the relative weakness of capital. . .").

<sup>85</sup> See G. Gross, "The Constitutional Question in Israel" in D.J. Elazar, ed. *Constitutionalism: The Israeli and American Experiences* (Lanham, Md: University Press

During this time Israel's Supreme Court developed a "judicial bill of rights" in the absence of a formal bill of rights and judicial review over legislation.<sup>86</sup> The Supreme Court exercised judicial review without a constitution and under certain "entrenched" provisions of several Basic Laws but the recognition of judicial review under a constitutional document did not take root until 1995.

In a 1995 decision, the Supreme Court declared that Israel had a constitution, that the constitution was largely contained in Israel's Basic Laws and that the Supreme Court had the power of judicial review over legislation and could strike down laws inconsistent with a Basic Law.<sup>87</sup> Having assumed the power of judicial review, as of October 2007 the Supreme Court of Israel has only exercised it to strike down legislation on six occasions since 1995. This is not for want of opportunity as the Supreme Court of Israel hears thousands of cases each year.<sup>88</sup> Judicial

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of America and Jerusalem: Jerusalem Center for Public Affairs, 1990) 51 at 70. On these questions, see Amnon Rubinstein, "Israel's Piecemeal Constitution" 1966) 16 Scripta Hierosolymintana 201; and Claude Klein, "A New Era in Israel's Constitutional Law" (1971) 6 Israel Law Review 117. On the issue of judicial review see M. B. Nimmer, "The Uses of Judicial Review in Israel's Quest for a Constitution" (1970) 70 Colum. L. Rev. 1217; E. Likhovski, "The Courts and the Legislative Supremacy of the Knesset" (1968) 3 Israel Law Review 345; E.S. Likhovski, *The Knesset: Israel's Parliament* (Oxford: Clarendon Press, 1971) at 73-103; A.A. Bergman, "The Supremacy of the Knesset" (1971) 6 Israel Law Review 117. On the Knesset's authority to enact constitutional legislation see Likhovski, *The Knesset, ibid.* at 216-223 and Ruth Gavison, "The Controversy Over Israel's Bill of Rights" (1985) 15 Israel Y.B. on H.R. 113. The Supreme Court tackled these issues head on in the *Gal Law* decision, *infra* note 87. Whether they resolved them is another issue. Because a determination of the issues was not necessary to the resolution of the case, the Court's 519 page examination of these issues may be the longest example of *obiter dicta* in history.

<sup>86</sup> Gary L. Jacobsohn, *Apple of Gold: Constitutionalism in Israel and the United States* (Princeton: Princeton University Press, 1993) 9-10.

<sup>87</sup> See C.A. 6821/93 *United Mizrahi Bank Ltd. v. Migdal Co-operative Village* (1995) 49 (iv) P.D. 221 (known as "the *Gal Law* case"). A partial English translation and editorial commentary can be found at (1997) 31 Israel Law Review 764. A complete English translation is forthcoming in the Israel Law Reports which should also become available on the Supreme Court of Israel's website at <http://elyon1.court.gov.il/eng/home/index.html>.

review in Israel is always controversial but that is more a function of its rarity than its frequency.

Simply put, judicial review is not *the* question of legitimacy in Israel that it is in the United States. In Israel, the question is the Supreme Court's activism; judicial review is only one element in this larger issue. The heated debate on judicial activism and the legitimacy of the Supreme Court of Israel preceded Israel's 1995 constitutional "moment" and has continued thereafter. Far more important and controversial has been the Supreme Court of Israel's exercise of judicial review over administrative action and political decisions as well as the expansion of the Court's jurisdiction and the doctrine of standing.<sup>89</sup> The debate and the questioning of the Court's legitimacy is very much about what Michael Mandel and others would term "the legalization of politics."<sup>90</sup> In 2007, Israel's reform-minded Justice Minister, former law professor Daniel Friedmann,

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<sup>88</sup> In 2005, over 12,000 petitions were filed with the Supreme Court. See Judicial Authority, *Annual Report 2005* (Jerusalem: 2006) 11 (Hebrew) online: <http://elyon1.court.gov.il/heb/info/DochRashut2005.pdf>. The High Courts of the other countries discussed in this paper hear in the double digits of cases each year, at times breaking a hundred. On Canada, see Supreme Court of Canada, *Bulletin of Proceedings: Special Edition – Statistics 1996 to 2006* (Ottawa: Supreme Court of Canada, 2007), online: <http://www.scc-csc.gc.ca/information/statistics/download/ecourt.pdf>. On the Constitutional Court of South Africa, see Michael Bishop, "Constitutional Court Statistics for the 2005 Term" (2006) 22 SAJHR 518 at 518-29 (noting that in 2005, the Court delivered 24 judgments, 22 judgments in 2004, 25 in 2003, 34 in 2002; 25 in 2001, 28 in 1999, 19 in 1998, 21 in 1997, 20 in 1996 and 14 in 1995). On the United States Supreme Court, see SCOTUSblog StatPack, <http://www.scotusblog.com/movabletype/archives/SuperStatPack.pdf> (for the October Term (OT) 2006, the U.S. Supreme Court decided 68 cases, 71 in OT 2005, 76 in OT 2004, 74 in OT 2003, 73 in OT 2002, etc.).

<sup>89</sup> See e.g. Shimon Shetreet, "Standing and Justiciability" in Itzhak Zamir & Allen Zysblat, *Public Law in Israel* (Oxford: Clarendon Press, 1996) 265; David Kretzmer, "The Supreme Court and Parliamentary Supremacy" in Zamir & Zysblat, *ibid.* at 303; Ruth Gavison, Mordechai Kremnitzer & Yoav Dotan, *Judicial Activism: For and Against – The Role of the High Court of Justice in Israeli Society* (Jerusalem: Magnes Press, 2002) (Hebrew).

<sup>90</sup> See Mandel, *The Charter of Rights and the Legalization of Politics in Canada*, *supra* note 84.



embarked on a campaign to limit the power of the Supreme Court. In a wide-ranging interview in August 2007, Friedmann listed his targets as (1) curbing excessive prosecutorial zeal against politicians; (2) lack of oversight of certain prosecutorial decisions of the Attorney General; (3) intervention by the High Court in political appointments; (4) questions of justiciability; (5) the process for selecting justices and the composition of the Judicial Election Committee; (6) the need for a legislative override of court decisions; (7) the jurisdiction of the Supreme Court; (8) limiting the scope of the judicial doctrine of “reasonableness”; and (9) the role of the Chief Justice.<sup>91</sup> From this varied and extensive list, it is possible to get a sense of the range of the debate over judicial activism in Israel and how the exercise of judicial and reactions thereto (such as mooted the introduction of a legislative override) is simply one element in a much larger debate.

## V. CONCLUSION: THE LIMITS OF UNIVERSALIZING JUDICIAL REVIEW

In mapping comparative judicial review, we need to recognize the limits of universalizing the Question of Legitimacy from the particular American experience. If we do not, we risk replicating some of the perceptual biases from the Cold War Map of the 1980s that my High School Social Studies teacher showed us. As North American comparative constitutional law scholars, we are prone to exaggerate the significance of judicial review because of the strong influence of American doctrine on the subject. We need to understand the constitutional system “from the inside”<sup>92</sup> in order to accurately map out judicial review comparatively. We need to be able to accurately depict the phenomenon of judicial review in each system before mapping the larger phenomena comparatively. Schor is quite careful in recommending a contextual approach; he is consistently critical of polar theories – single-

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<sup>91</sup> Orit Schohat & Ze’ev Segal, “Saving the High Court from itself” *Ha’arets* (18 August 2007), online: [www.haaretz.com](http://www.haaretz.com).

<sup>92</sup> See Günter Frankenberg, “Critical Comparisons: Re-Thinking Comparative Law” (1985) 26 *Harv. Int’l L.J.* 411.

explanation theories for the rise of judicial review and other related phenomena. He rightly states that comparative constitutional law is an enterprise in which scholars seek to lay bare the foundations of constitutionalism.

In mapping judicial review, we need to distinguish between judicial review and the larger phenomena of the global expansion of judicial power. The global expansion of judicial power refers to “the infusion of judicial decision-making and of courtlike procedures into political arenas where they did not previously reside. To put it briefly, we refer to the “judicialization of politics.”<sup>93</sup> Judicial review is one element – judicialization from without. There are also other forms of judicialization from within.<sup>94</sup> As noted in the Israeli case, we need to distinguish between constitutional judicial review and administrative judicial review. One possible remedy can be found in my first map, the one that I saw in the Mapparium in Boston. In that map, ocean depths were noted by darker and lighter shades of blue. We need to use a similar conceptual shading in looking comparatively at judicial review in countries around the world.

Carl Friedrich wrote that “[c]omparative constitutionalism seeks to determine the theoretical presuppositions and institutional manifestations of constitutional systems.”<sup>95</sup> American politics is notably constitution-centred<sup>96</sup> and fixated on the Question of Legitimacy. While the United States provided the prototype for judicial review which many other countries have consciously adopted, it is a mistake to assume that the debate surrounding its legitimacy necessary migrated with it. Each system that has adopted judicial review has done so in its own manner. The American debate over the Question of Legitimacy is a useful framework

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<sup>93</sup> Torbjörn Vallinder, “When the Courts Go Marching In” in C. Neal Tate & Torbjörn Vallinder, *The Global Expansion of Judicial Power*, eds. (New York & London: New York University Press, 1995) 13 at 13.

<sup>94</sup> See *ibid.* at 16.

<sup>95</sup> Carl J. Friedrich, *Limited Government: A Comparison* (Englewood Cliffs, NJ: Prentice-Hall, 1974) 11.

<sup>96</sup> See Martin Shapiro, “The United States” in C. Neal Tate & Torbjörn Vallinder, *The Global Expansion of Judicial Power*, eds. (New York & London: New York University Press, 1995) 43 at 43.

for probing the particular narrative of judicial review in a given jurisdiction but it should not subvert that analysis. Cappelletti mused that the solution to the mighty problem is to be found in a given society's "history and traditions, the particular demands and aspirations of the society, its political structures and processes, and the kind of judges it has produced."<sup>97</sup> In the case of comparative judicial review, there is a limit to where an American map can lead us.

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<sup>97</sup> Cappelletti, *supra* note 41 at 411-12.



