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SEQUENCING THE DNA OF COMPARATIVE CONSTITUTIONALISM: A THOUGHT EXPERIMENT

GORDON SILVERSTEIN*

[W]hy do so many people in so many parts of the world entrust so much of their governance to judges?¹

Once seen as a uniquely (or quaintly) American phenomenon, judicial review is suddenly everywhere: From the European Court of Justice to South Africa; from New Zealand to Hungary; from Israel to India to Canada and even in such once believed to be unlikely locales as France, Italy, and the United Kingdom.² Why does judicial review happen? And what difference does it make?

We tend to examine judicial review not as an independent phenomenon, but as a variable in other contexts, whether in comparative

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

2. See generally CONSTITUTIONAL DIALOGUES IN COMPARATIVE PERSPECTIVE, *supra* note 1 (focusing on Europe and including specific treatment of the European Union, Hungary, France, Germany, Italy, and Spain); HASEN EBRAHIM, THE SOUL OF A NATION: CONSTITUTION-MAKING IN SOUTH AFRICA (1998); RAN HIRSCHL, TOWARDS JURISTOCRACY: THE ORIGINS AND CONSEQUENCES OF THE NEW CONSTITUTIONALISM (2004) (focusing on constitutionalization in culturally divided polities, including South Africa, Israel, Canada, and New Zealand); JUDICIAL INDEPENDENCE IN THE AGE OF DEMOCRACY (Peter H. Russell & David M. O'Brien eds., 2001) (focusing on the closely related, though distinct, topic of judicial independence in the United States, Europe, Australia, South Africa, Israel, Russia, Japan, Hong Kong, and Central America); HEINZ KLUG, CONSTITUTING DEMOCRACY: LAW, GLOBALISM AND SOUTH AFRICA'S POLITICAL RECONSTRUCTION (2000); ALEC STONE SWEET, GOVERNING WITH JUDGES: CONSTITUTIONAL POLITICS IN EUROPE (2000); THE EUROPEAN COURT AND NATIONAL COURTS—DOCTRINE AND JURISPRUDENCE (Anne-Marie Slaughter et al. eds., 1998); THE GLOBAL EXPANSION OF JUDICIAL POWER (C. Neal Tate & Torbjörn Vallinder eds., 1995) (discussing judicialization of political power in the United States, United Kingdom, Australia, Canada, Italy, France, Germany, Sweden, the Netherlands, Malta, Israel, Namibia, the Philippines, and the post-Communist states of Eastern Europe); Lee Epstein et al., *The Role of Constitutional Courts in the Establishment and Maintenance of Democratic Systems of Government*, 35 LAW & SOC'Y REV. 117 (2001) (discussing the Russian experience); Kim L. Scheppele, *The New Hungarian Constitutional Court*, 8 E. EUR. CONST. REV. 81 (1999). This is just a small sample of a burgeoning literature on the growth of judicial power and judicial review around the world.

politics,³ international relations,⁴ or political theory.⁵ Often political science seems to leave the study of judicial review as an independent phenomenon to lawyers—but lawyers tend to take it as a given, and the artificial divide between legal scholars and political science has left a significant void, a lack of a comprehensive treatment of judicial review and its role in the political and policy process.⁶

One important exception is Martin Shapiro, a founding father of the study of law and courts as political institutions.⁷ In a recent volume, Shapiro offers a compelling synthesis of these arguments, suggesting that the best way to understand why otherwise self-interested political actors might tolerate growing judicial power, why they might tolerate strong judicial review, is to think of judicial review as a junkyard dog.⁸

If you own a junkyard, Shapiro argues, and want to protect it, you might release a vicious dog at night to patrol the premises.⁹ The dog (in this case, strong courts) will do a fine job of protecting you against others if it is mean enough and unwilling to take orders from anyone. But of course, if that's true, there is a real risk that this dog might take a nip out of its master. That may just be the price you have to pay to use this method of protection. "[I]f the people choose judicial review courts[,] those courts will make constitutional law just as inevitably as dogs will bite. And courts unchained against interlopers may well bite the wrong person from time to time."¹⁰

So strong courts that delve into individual rights from time to time might be the price we have to pay if we want those same courts to deliver the things we want and need from them. Ran Hirschl argues, for example, that declining hegemony have a powerful incentive to buy one of these beasts.¹¹ From President John Adams, contemplating the horror of surrendering power to Thomas Jefferson in 1801, to

3. *E.g.*, CONSTITUTIONALISM AND DEMOCRACY (Douglas Greenberg et al. eds., 1993); HIRSCHL, *supra* note 2; AREND LIJPHART, PATTERNS OF DEMOCRACY: GOVERNMENT FORMS AND PERFORMANCE IN THIRTY-SIX COUNTRIES (1999); SWEET, *supra* note 2.

4. *E.g.*, LEGALIZATION AND WORLD POLITICS (Judith Goldstein et al. eds., 2001).

5. *E.g.*, RONALD DWORKIN, LAW'S EMPIRE (1986); JUDITH N. SHKLAR, LEGALISM (1964); MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS (1999).

6. LUCAS A. POWE JR., THE WARREN COURT AND AMERICAN POLITICS, at vii (2000); Mark A. Graber, *Constitutional Politics and Constitutional Theory: A Misunderstood and Neglected Relationship*, 27 LAW & SOC. INQUIRY 309, 317 (2002).

7. See MARTIN SHAPIRO, LAW AND POLITICS IN THE SUPREME COURT (1964).

8. MARTIN SHAPIRO & ALEC STONE SWEET, ON LAW, POLITICS, AND JUDICIALIZATION 163-64 (2002).

9. *Id.* at 163.

10. *Id.* at 164.

11. HIRSCHL, *supra* note 2, at 11-12.

the decision by South Africa's ruling white minority to insist on strong courts as the price of peaceful transition to majority rule, there are powerful incentives for those who fear political control is slipping from their grasp to vest extraordinary power in courts and judges.

Surely this is one compelling reason why otherwise rational and powerful political actors might voluntarily surrender power to judicial actors. But this is not the only incentive for the adoption (or tolerance) of strong courts. There are other reasons, other imperatives, that drive otherwise powerful politicians to buy junkyard dogs. Some of these imperatives are institutional, some economic; others might be driven by political incentives, and some might even be driven by an interest in preserving and extending underlying rights and norms.

But are these simply a set of discrete incentives, any one of which might drive a system toward strong judicial review? Or is it possible that somehow these various imperatives actually interact in a more complicated way? Are these imperatives separate and discrete building materials (like wood, steel, brick, and concrete), any one of which might drive a polity toward strong judicial review, though obviously with somewhat different characteristics? Or are these building materials present in all cases of strong court systems, though in varying amounts and varying sequences, somewhat akin to the four nucleotides that sequence together in endless combinations in human DNA?¹² The current literature has taken us a long way toward understanding the various independent building materials. But perhaps we are now at a stage where we can start to ask whether there is a more general theory that might integrate these separate parts.

This Essay, of course, ends up asking more questions than it can answer in the hopes of stimulating discussion. Is there a set of recurring imperatives that push a system toward strong judicial review? And if so, is there any sort of coherent pattern or sequence to these imperatives? What difference does it make if the explanation hinges on one imperative rather than another? Does judicial review generated by one sort of imperative differ from judicial review generated by another? Do varying strengths and sequences of these imperatives help to explain why one nation's form of judicial review is stronger than another? Why is the emergence of strong courts more problematic in some settings than others? Is judicialization or juristocracy a broad description of a number of related but distinct institutional constellations that emerge in response to separate and distinct imper-

12. In DNA, the four nucleotides are adenine (A), thymine (T), cytosine (C), and guanine (G).

atives, or can we develop a more general theory about the evolution and impact of judicial review? Should we even try?

For purposes of this thought experiment, this Essay identifies four imperatives that seem to drive systems toward strong courts and judicial review: (1) the institutional imperative; (2) the economic imperative; (3) an imperative of rights and norms; and (4) the political imperative.

I. THE INSTITUTIONAL IMPERATIVE

Scholars have long observed that strong judicial review is most often observed in political systems with separated or divided powers, particularly in federal systems.¹³ These systems need an arbitrator, a disinterested third party to resolve disputes between two levels of government, in what Shapiro refers to as a classic triadic dispute-resolution system.¹⁴ Though the division or separation of powers is indeed a powerful predictor of the emergence of strong judicial review, this institutional approach has, perhaps, been a bit too narrow. Federalism and the division of powers are institutional imperatives, but so too are the structure of these institutions, their relationships, and the very rules that establish them and their interaction. The rules for the allocation of power are important, but the rules governing when and how the meta-rules of a constitution can be changed may be even more important.¹⁵

New institutionalists might argue that institutions structure strategic choices, noting that structural constraints can help explain the acceptance or even embrace of strong judicial review. They might also note that an understanding of the historical evolution of institutions and the rules that structure those institutions, as well as the wider net of social developments that constrains that evolution, also help us understand how and when and why the institutional imperative func-

13. See generally ROBERT A. KAGAN, *ADVERSARIAL LEGALISM* (2001) (comparing legal systems of economically advanced democracies); LIJPHART, *supra* note 3 (comparing the strength of judicial review in thirty-six democracies); MARTIN SHAPIRO, *COURTS: A COMPARATIVE AND POLITICAL ANALYSIS* (1981) (comparing the role of courts in European, Chinese, and Islamic systems); KEITH E. WHITTINGTON, *CONSTITUTIONAL CONSTRUCTION: DIVIDED POWERS AND CONSTITUTIONAL MEANING* (1999) (discussing the judiciary's role in a divided system of political actors).

14. SHAPIRO, *supra* note 13.

15. See Jack Knight, *Institutionalizing Constitutional Interpretation*, in *CONSTITUTIONAL CULTURE AND DEMOCRATIC RULE* 361, 387-88 (John Ferejohn et al. eds., 2001) (arguing that strict amendment rules enhance efficacy of government action); LIJPHART, *supra* note 3, at 228-30 (arguing that strict amendment rules are necessary antecedents to effective judicial review).

tions.¹⁶ Few would have understood this better than America's first "new" institutionalist—James Madison—who insisted that institutions must be designed in such a way that the interests of the individual are intimately and inextricably linked to the institution itself.¹⁷

Institutional arrangements, particularly in the early path-setting and institution-building period of a constitutional system, certainly seem to generate imperatives for judicial review.¹⁸ Similarly, constitutional rules themselves are vitally important to building the constitutional space needed for judicial review to take root. But institutions and rules aren't enough. Motives matter, whether they be economic, normative, or political.

II. ECONOMIC AND OTHER INTERESTS

Why would rational, utility-maximizing politicians actually surrender power to judicial actors? Shapiro suggests that one answer is "because they cannot help it."¹⁹ This suggests the institutional imperative. But he acknowledges that the answer might just be "because they want to."²⁰ And this suggests that there are other imperatives to consider. While Shapiro likely was thinking in terms of normative objectives (see below), we could also argue that our rational, utility-maximizing politicians might want judicial review (or, more likely, tolerate judicial review) because it advances their own interests.²¹ And as almost any economist would be quick to remind us, economic interests are among the most powerful incentives we know.

The rule of law is an opaque concept, but one thing it seems to mean to many people is a society or system where commercial rela-

16. See generally SUPREME COURT DECISION-MAKING: NEW INSTITUTIONALIST APPROACHES (Cornell W. Clayton & Howard Gillman eds., 1999); THE SUPREME COURT IN AMERICAN POLITICS: NEW INSTITUTIONALIST INTERPRETATIONS (Howard Gillman & Cornell Clayton eds., 1999); Thomas A. Koelble, *The New Institutionalism in Political Science and Sociology*, 27 COMP. POL. 231 (1995); Rogers M. Smith, *Political Jurisprudence, the "New Institutionalism," and the Future of Public Law*, 82 AM. POL. SCI. REV. 89 (1988).

17. See THE FEDERALIST NO. 10, at 82 (James Madison) (Clinton Rossiter ed., 1961) (arguing that republican representation is more conducive to the public good than other political systems used to promote private opinions); THE FEDERALIST NO. 51 (James Madison), *supra*, at 324 (arguing that governmental distribution of power enables the pursuit of private interests to safeguard public rights).

18. See generally PAUL PIERSON, POLITICS IN TIME: HISTORY, INSTITUTIONS, AND SOCIAL ANALYSIS (2004) (considering the role of increasing returns and path dependence in politics); Paul Pierson, *Increasing Returns, Path Dependence, and the Study of Politics*, 94 AM. POL. SCI. REV. 251 (2000).

19. Shapiro, *supra* note 1, at 218.

20. *Id.*

21. See *id.* at 210 (noting the correlations between competitive party systems and enhanced judicial review).

tions are stable, predictable, transparent, and reliable; contracts are enforced and property is secure.²² If this was important in the era of mercantile trade, it may be even more important in our much faster-paced era of globalization. With investment capital so easily shifted at the push of a button, some argue that adopting a written constitution and creating independent courts that have genuine authority are among the most effective signals one nation can send to others that it is a reliable investment and trading partner.²³ This suggests that even an authoritarian nation such as China might well be willing to tolerate the junkyard dog of judicial review as the price for a place at the globalization banquet.²⁴

By accepting entrenched legal protections, “countries communicate that they are willing to sacrifice short-term advantages to obtain long-term benefits such as economic growth. Investors can infer from this that the government is less likely to pose a threat of opportunistic behavior such as expropriation.”²⁵ As Hirschl (quoting Max Weber) notes, “investors lack the incentive to invest” without a secure “predictability interest.”²⁶ And “entrenched legal rights that enhance investors’ trust” lead to “economic growth in various historical contexts.”²⁷

This sentiment is clear in a 1995 speech by Lee Kuan Yew, who served as Singapore’s Prime Minister for thirty years. Lee told his parliament that when the government is taken to court by a private individual,

the court must adjudicate upon the issues strictly on their merits and in accordance with the law. To have it otherwise is to lose . . . our standing and . . . our status as an investment and financial centre. The interpretation of documents, of contracts in accordance with the law is crucial. Our reputation for the rule of law has been and is a valuable economic asset, part of our capital, although an intangible one.²⁸

These same economic incentives, the incentives we now think of as driven by globalization, may help to explain the adoption of a re-

22. Daniel A. Farber, *Rights as Signals*, 31 J. LEGAL STUD. 83, 88-91 (2002).

23. *See id.* at 88-94 (arguing that constitutionalism increases investment security by communicating a nation’s willingness to protect investors’ rights).

24. *But see generally* Gordon Silverstein, *Globalization and the Rule of Law: “A Machine that Runs of Itself?”*, 1 INT’L J. CONST. L. 427 (2003) (arguing that there are severe limits to the economic incentives for tolerating strong courts).

25. Farber, *supra* note 22, at 98.

26. Ran Hirschl, *The Political Origins of Judicial Empowerment Through Constitutionalization: Lessons from Four Constitutional Revolutions*, 25 LAW & SOC. INQUIRY 91, 137 (2000).

27. *Id.*

28. Remarks by Lee Kuan Yew, SING. *Parl. Deb.* col. 236 (Nov. 2, 1995).

gime of strong judicial review in South Africa. On November 18, 1993, the leaders of all the participating political parties signed an agreement establishing an interim constitution, one that would bridge the nation from its apartheid past to a majoritarian future.²⁹ At the signing, these leaders “immediately seized the initiative to convince investors of the value of the new constitutional dispensation. The message was clear: the country had a constitution that it could ‘bank’ on.”³⁰ The plea hit home and “[o]ffers of financial assistance and aid poured in.”³¹

Heinz Klug echoes the argument that the economic pressures (and appeal) of globalization had a profound effect on the structure of South Africa’s new constitutional and legal system, arguing that neither of the key parties to the transition from minority to majority rule was particularly prone to embrace constitutionalism or bills of rights: The Apartheid regime because it had spent its entire history insisting on parliamentary sovereignty and claimed that equality had no place in governance;³² the majority because it had seen the damage that could be done by supposedly impartial, rule-of-law regimes and the courts that carried out their bidding.³³ Klug argues that it was international pressure, international culture, and an interest of both sides in plugging into that international world that had much to do with the adoption of strong judicial review in South Africa.³⁴ There were powerful political incentives for each to endorse a strong constitutional court, but the economic incentives similarly motivated both sides as well.³⁵ Economic incentives can also be seen starkly at work in a number of the states of Eastern Europe, in no small measure because economic stability and predictability are seen as prerequisites for any bid to join the European Union.³⁶ And the European Union itself moved toward judicial review initially to secure economic inte-

29. EBRAHIM, *supra* note 2, at 170-71.

30. *Id.* at 171.

31. *Id.*

32. See KLUG, *supra* note 2, at 37-41 (discussing parliamentary attempts to assert supremacy and entrench racial inequality).

33. See *id.* at 44-45 (discussing the judiciary’s complicity in state-sponsored racial persecution).

34. *Id.* at 67-68.

35. See EBRAHIM, *supra* note 2, at 170-71 (discussing the economic advantages of South Africa’s espousal of a constitutional system).

36. See Farber, *supra* note 22, at 95-96 (discussing constitutionalism as an economic incentive for new Eastern European regimes).

gration, only later spilling over into other arenas.³⁷ Though member states often chafed at court rulings, particularly when doctrine set in economic cases spilled over to influence decisions in social, cultural, domestic affairs, and even foreign policy, the economic advantages were significant.³⁸ When Britain's John Major proposed to severely limit the court's authority during preliminary negotiations over the Treaty of European Unity (the Maastricht Treaty), that move was soundly rejected.³⁹

Just as newly developing states seek to participate in the global economy today, so too did the nascent United States feel the need to signal the world that theirs was a country (and an economy) that could be trusted, where contracts would be honored and investments would be safe, despite the fact that it was organized as a representative democracy.⁴⁰

Economic issues lay at the heart of the American constitutional compact. As Gordon Wood notes, what James Madison found "[p]articularly alarming and unjust" as he surveyed the American political scene on the eve of the constitutional convention "were the paper money acts, stay laws, and other forms of debtor-relief legislation that hurt creditors and violated individual property rights."⁴¹ Democracy wasn't going to be the solution since "democracy was the problem."⁴² It seems the American Revolution "had unleashed acquisitive and commercial forces that no one had quite realized existed."⁴³ Madison asserted that "the most common and durable source of factions has been the various and unequal distribution of property," but that unequal distribution is the result of the "diversity in the faculties of men" and it is "[t]he protection of these faculties" that is "the first object of government."⁴⁴ Though he went on to author the Bill of Rights, Madison was ambivalent about adding them to the Constitu-

37. See Karen J. Alter, *Who Are the "Masters of the Treaty"?: European Governments and the European Court of Justice*, 52 INT'L ORG. 121, 126 (1998) (discussing the development of the European Court of Justice's oversight role).

38. *Id.* at 128-29; see also Silverstein, *supra* note 24, at 432-36 (discussing the European Court of Justice's role in the spillover effect).

39. Alter, *supra* note 37, at 140-41.

40. See Gordon S. Wood, *Interests and Disinterestedness in the Making of the Constitution*, in BEYOND CONFEDERATION: ORIGINS OF THE CONSTITUTION AND AMERICAN NATIONAL IDENTITY 69, 107-09 (Richard Beeman et al. eds., 1987) (discussing the early debate over the economic principles embedded in the U.S. Constitution).

41. *Id.* at 73.

42. *Id.* at 75.

43. *Id.* at 77.

44. THE FEDERALIST NO. 10 (James Madison), *supra* note 17, at 78-79.

tion.⁴⁵ He, like Alexander Hamilton, felt that many of the most important protections were already included in the body of the Constitution itself.⁴⁶ And consider what is present in that document: The Commerce Clause,⁴⁷ Contract Clause,⁴⁸ the ban against ex post facto laws and bills of attainder;⁴⁹ rules concerning taxation,⁵⁰ the coining of money,⁵¹ copyrights and patents;⁵² and the protection for at least some forms of property (the Fugitive Slave Clause, for example).⁵³ Whether the Federalists were more driven by pecuniary interests (as Charles Beard so explosively charged in 1913)⁵⁴ or by a genuine commitment to the ideals of disinterested patriotism, protection for property and economic interests were laced into the Constitution and provided some of the most powerful justifications for judicial review.

III. RIGHTS AND NORMS

Rights and norms constitute a third fundamental imperative driving systems toward strong judicial review. Jon Elster is quite right to say that although “self-serving arguments tend to dress themselves in public-interest garbs, the converse argument—that all impartial argument is nothing but self-interest in disguise—is invalid.”⁵⁵ This reductionist claim, he adds, “is internally incoherent. If nobody was ever moved by the public interest, nobody would have anything to gain by appealing to it. Self-serving appeals to the public interest are parasitic on genuine appeals.”⁵⁶ Reluctantly admitting that in thinking about judicial review it is “imperative” to “consider the dreaded topic of rights,” Shapiro acknowledges that in addition to his conviction that “[d]ivision of powers systems generate judicial review,” it may be un-

45. See Letter from James Madison to Thomas Jefferson (Oct. 17, 1788), in 1 THE REPUBLIC OF LETTERS: THE CORRESPONDENCE BETWEEN THOMAS JEFFERSON AND JAMES MADISON 1776-1826, at 563-66 (James Morton Smith ed., 1995).

46. *Id.* at 564; THE FEDERALIST NO. 84 (Alexander Hamilton), *supra* note 17, at 510.

47. U.S. CONST. art. I, § 8, cl. 3.

48. *Id.* § 10, cl. 1.

49. *Id.* § 9, cl. 3.

50. *Id.* § 8, cl. 1; *id.* § 9, cls. 4, 5.

51. *Id.* § 8, cl. 5; *id.* § 10, cl. 1.

52. *Id.* § 8, cl. 8.

53. *Id.* at art. IV, § 2, cl. 3.

54. CHARLES A. BEARD, AN ECONOMIC INTERPRETATION OF THE CONSTITUTION OF THE UNITED STATES 152-88 (1913).

55. Jon Elster, *Forces and Mechanisms in the Constitution-Making Process*, 45 DUKE L.J. 364, 379 (1995).

56. *Id.* at 380.

avoidable to conclude that “[i]deological commitments to individual rights generate judicial review” as well.⁵⁷

New constitutions are most often “written in the wake of a crisis or exceptional circumstance of some sort.”⁵⁸ And though such times present opportunities to pursue and lock in personal and group advantage, they also tend to trigger another core human instinct—an interest in a place in history, an other-directed moment when questions of abstract right and norms can at least temporarily trump individual avarice and power hunger. This passion can operate hand-in-hand with the understanding that such opportunities are fleeting and rare. As Thomas Paine sagely warned in *Common Sense*, “[w]hen we are planning for posterity, we ought to remember, that virtue is not hereditary.”⁵⁹ And though Beard wasn’t wrong about some of the Federalists and their own economic interests,⁶⁰ it turns out that many of the staunchest Federalists were debtors, not creditors, whose defense of “a moral and social order that had been prescribed by the Revolution and the most enlightened thinking of the eighteenth century” cannot be written off to individual economic interest.⁶¹

In the South African case, the commitment to rights is complicated. Though the notion of a bill of rights was seen by many as a means to protect the former ruling minority of whites, there was also a sense that a bill of *individual* rights might counteract the argument for “group and minority rights which were the basis of the apartheid regime’s proposals.”⁶² Albie Sachs, a member of the African National Congress’s (ANC) Executive Committee and its Constitutional Committee, said that he felt “trepidation” about arguing for “a bill of rights based on the principled reason that a future government could not always be trusted, rather than on merely tactical and strategic grounds.”⁶³ But, although he made that argument, the ANC accepted a bill of rights, and Sachs went on to become a judge on South Africa’s constitutional court where he has become one of South Africa’s most vociferous advocates for strong judicial review.⁶⁴ Not only did the ANC agree to establish a constitutional court and strong judicial re-

57. Shapiro, *supra* note 1, at 199-200.

58. Elster, *supra* note 55, at 370.

59. THOMAS PAINE, *Common Sense*, in THOMAS PAINE: COLLECTED WRITINGS 5, 44 (Eric Foner ed., 1995).

60. BEARD, *supra* note 54, at 152-88.

61. Wood, *supra* note 40, at 109.

62. KLUG, *supra* note 2, at 77.

63. *Id.* at 76-77.

64. *Id.* at 166 (noting how once on the court, Sachs took a positivist approach to the constitution).

view, but the ANC joined with the white-minority government to approve the requirement that the court would have the final say in determining whether or not the final negotiated constitutional agreement itself fulfilled the mandates and principles announced in the 1993 interim constitution.⁶⁵ Thus, in the pursuit of substantive norms which were embodied in thirty-four principles, both major parties agreed to establish a very powerful, independent, and binding institution. Principle II, for example, states that “[e]veryone shall enjoy all universally accepted fundamental rights, freedoms and civil liberties, which shall be provided for and protected by entrenched and *justiciable* provisions in the Constitution.”⁶⁶

It is certainly true that the ruling minority turned to a constitution and strong judicial review as a political prerequisite to accepting majority rule, but both the minority and majority had an acute understanding of the value of fundamental rights—in the ruling minority’s case, it was a sense of the violation of rights posed by the possibility of majority tyranny; in the majority’s case, four generations of discrimination under apartheid rule had led to more than a mere rhetoric of rights and the need for the protection of human dignity.⁶⁷

One of the few things that oppressors and oppressed share is a finely sharpened understanding of the meaning of freedom and its opposite. It is no coincidence that some of the most impassioned arguments for liberty in the American Revolution came out of the slaveholding South.⁶⁸ Whether it was Patrick Henry’s “Give me liberty or give me death,” or Thomas Jefferson’s impassioned words about liberty in the Declaration of Independence, southerners, black and white, have long shared an intimate understanding of liberty that was perhaps more visceral than that of those who had never experienced slavery—either as slaves or masters.⁶⁹

65. See *id.* at 140-44 (discussing the creation of the constitutional court and constitutional review).

66. EBRAHIM, *supra* note 2, at 619 (emphasis added). Among the thirty-four principles, a number of substantive norms and rights were inserted, including a prohibition of all “racial, gender and other forms of discrimination” and a requirement that the constitution “shall promote racial and gender equality and national unity” (Principle III); a requirement that “[t]he legal system shall ensure the equality of all before the law and an equitable legal process” (Principle V); and a guaranteed protection for, and promotion of, “[t]he diversity of language and culture” (Principle XI), among others. *Id.* at 619-20.

67. See KLUG, *supra* note 2, at 76-77 (discussing fundamental rights as both going against the Apartheid regime and preserving the privileges of the white minority).

68. WILLIAM COOPER, *LIBERTY AND SLAVERY: SOUTHERN POLITICS TO 1860*, at 30-31 (1983).

69. See generally RICHARD HILDRETH, *DESPOTISM IN AMERICA: AN INQUIRY INTO THE NATURE AND RESULTS OF THE SLAVE-HOLDING SYSTEM IN THE UNITED STATES* 92-96 (Negro Univ. Press 1968) (1854) (describing how slavery affects the liberty of slave owners and all free

The U.S. Constitution certainly enshrined rights—not only in the Bill of Rights which went virtually unenforced in the Supreme Court's formative years—but also in the body of the Constitution itself. Though the Constitution is overwhelmingly concerned with process, institutional order, and federalism, it does not lack for vital norms and even rights. The rights of property are, of course, deeply embedded in the constitutional text.⁷⁰ But rights were deeply implicated in other areas. Consider an oft-overlooked clause of the Constitution that was of intimate and vital concern to the Founders: article III, section 3—the Treason Clause.⁷¹ Not only does this clause define treason and spell out the process for trial and conviction, it embodies much of what distinguished the United States from its colonial master. “[N]o attainder of treason shall work corruption of blood, or forfeiture, except during the life of the person attainted”⁷² meant that in the United States, guilt would be individual and neither hereditary nor assigned to groups.

The primary route employed by the modern Court to discover and enforce rights (the Due Process Clause of the Fifth and Fourteenth Amendments) first came into its own as a guarantor of the rights of contract and property.⁷³ Focusing on the word *law* in the “due process of law” clause, the Justices argued that this presumed that the law in question was a rational exercise of government power.⁷⁴ No amount of process, the Court suggested, could possibly save an irrational law.⁷⁵ And laws that—in the opinion of the Justices—arbitrarily infringed on fundamental rights to property were, by definition, irrational and had to be rejected by the Court.⁷⁶ “Life, liberty and property,” Justice Joseph P. Bradley wrote in one of the first cases to test the meaning of the Fourteenth Amendment’s Due Process Clause, are “fundamental rights” that “can only be interfered with . . . by lawful regulations.”⁷⁷ And any regulation that “arbitrarily

people); THOMAS JEFFERSON, NOTES ON THE STATE OF VIRGINIA, *reprinted in* THE LIFE AND SELECTED WRITINGS OF THOMAS JEFFERSON 187, 277-79 (Adrienne Koch & William Peden eds., 1944); Letter from Thomas Jefferson to Edward Coles (Aug. 25, 1814), *in* THE LIFE AND SELECTED WRITINGS OF THOMAS JEFFERSON, *supra*, at 641, 641-42 (same).

70. U.S. CONST. amend. V.

71. *Id.* at art. III, § 3.

72. *Id.*

73. EDWARD KEYNES, LIBERTY, PROPERTY AND PRIVACY: TOWARD A JURISPRUDENCE OF SUBSTANTIVE DUE PROCESS 112-23 (1996).

74. *Id.* at 213-14.

75. *Id.*

76. *Id.*

77. The Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 116 (1872) (Bradley, J., dissenting).

assailed" the right to property could not be upheld.⁷⁸ Finding substantive fundamental rights in the procedural requirements of the Due Process Clause came to be known as the doctrine of substantive due process.

Though the Court removed itself from close scrutiny of economic regulation, the Justices did not forsake the doctrine of substantive due process. What changed was the type of government interference with liberty that would trigger the Court's scrutiny: Simple economic regulation now routinely would pass the Court's test.⁷⁹ But the same doctrines the Justices had developed (and then repudiated) on the economic front were applied in social and political arenas where the Court would apply far more exacting levels of scrutiny, striking down laws that infringed on what the Justices perceived to be fundamental rights to travel freely within the country, to procreate (or not), to live with an extended family, to marry those of a different race, to educate one's children in foreign languages, and to guarantee personal privacy.⁸⁰

Turning to the European Court of Justice (ECJ), we can argue about the intentions and objectives of the judges in Luxembourg, but there is no doubt that they have been heavily pressured to more actively enforce not just economic agreements, but a far deeper and broader basket of fundamental rights. In a series of cases, the ECJ announced that it would, indeed, enforce constitutional rights recognized and enforced by the community as a whole and by individual member states.⁸¹

78. *Id.*

79. KEYNES, *supra* note 73, at 146.

80. The right to travel was upheld under the Commerce Clause in *Edwards v. California*, 314 U.S. 160 (1941), and used to invalidate a California law that sought to keep poor people from moving to the state; the right to live with one's extended family was established in *Moore v. City of East Cleveland*, 431 U.S. 494 (1977); the right to interracial marriage was established in *Loving v. Virginia*, 388 U.S. 1 (1967); the right to educate children in a foreign language was established in *Meyer v. Nebraska*, 262 U.S. 390 (1923); the right guaranteeing personal privacy was upheld in *Griswold v. Connecticut*, 381 U.S. 479 (1965), and *Roe v. Wade*, 410 U.S. 113 (1973). See MICHAEL J. PERRY, *THE CONSTITUTION, THE COURTS AND HUMAN RIGHTS* (1982), and LUCAS A. POWE, JR., *THE WARREN COURT AND AMERICAN POLITICS* (2000), for a detailed discussion of the Court's treatment of legislation interfering with fundamental rights.

81. Case 26/69, *Strauder v. City of Ulm*, 1969 E.C.R. 419; Case 11/70, *Internationale Handelsgesellschaft v. Einfuhr-und Vorratsstelle*, 1970 E.C.R. 1125; Case 4/73, *Nold v. Comm'n of the European Communities*, 1975 E.R.C. 985. See Alec Stone Sweet, *Constitutional Dialogues in the European Community*, in *THE EUROPEAN COURT AND NATIONAL COURTS—DOCTRINE AND JURISPRUDENCE* 305, 314-16 (Anne-Marie Slaughter et al. eds., 1998) (discussing the response of different European nations to the ECJ's jurisprudence); Jason Coppel & Aidan O'Neill, *The European Court of Justice: Taking Rights Seriously?*, 12 *LEGAL STUD.* 227, 227-28 (1992) (stating that the ECJ has used fundamental rights to ex-

We even see rights as an imperative in as unlikely a setting as the authoritarian Republic of Singapore, where the High Court judges stood up to the ruling party (of which each judge was a member in good and long standing) to declare that even in the case of national security, “[i]t is inconceivable that a law which gave absolute power to arrest and detain without reasonable justification would be tolerated by a Constitution such as the present, one of the principal purposes of which is to protect fundamental rights and freedoms.”⁸²

IV. THE POLITICAL IMPERATIVE

Political imperatives comprise a fourth nucleotide of strong judicial review. Whether to avoid responsibility and shift blame, to demonstrate commitment, to secure rights or economic advantages, or to avoid system failure or secure a slipping power alignment, strong judicial review is often part of a tradeoff, part of a deal, the result of compromise: In short, the product of politics.

There are many political reasons to adopt or accept strong judicial review. Whether it is to advance power and influence, secure them, or protect against their abuse, politicians and judges alike are constantly weighing political costs and benefits. In the European case, member-state politicians had much to gain by shifting responsibility (and blame) for the costs of economic integration onto the faceless bureaucrats in Brussels and the imperious judges of Luxembourg. In South Africa, the minority rulers sought protection in judicial review as they released their control of power while the majority made a calculated tradeoff to accomplish their greater goal.⁸³ But the political imperative is not limited to the formation of a new constitutional system. Political crisis can spark a turn to the courts to break through political logjams as happened in the United States over slavery and integration among other issues.⁸⁴ But politics is more than just a trigger for the turn to strong judicial review. It may actually be a necessary precondition for it: Singapore, for example, seems nearly devoid of any political pressure that might produce stronger judicial review,

tend its jurisdiction and accelerate integration between member states); G. Federico Mancini & David T. Keeling, *Democracy and the European Court of Justice*, 57 *MOD. L. REV.* 175, 186-88 (1994) (discussing the ECJ's creation of a catalogue of fundamental rights).

82. *Chng Suan Tze v. Minister of Home Affairs*, 1988 SLR 132, 1988 LEXIS 247, at *261. Singapore soon chained its junkyard dog, limiting the court's ability to nip the government in the arena of individual rights—and did so by precisely following the rules laid out in the Singapore Constitution itself. Silverstein, *supra* note 24, at 436-40.

83. KLUG, *supra* note 2, at 76-77.

84. See MARK GRABER, *Dred Scott and the Problem of Constitutional Evil* (forthcoming 2006).

and that deficit along with the constitutional rules may help explain Singapore's lack of strong judicial review.⁸⁵

As Tom Ginsberg argues, when minority rulers prepare to adopt a majority-rule democratic system, they have a powerful political incentive to protect their interests against minority tyranny through written constitutions enforced by insulated courts exercising strong judicial review.⁸⁶ This was as true of the American Federalists as it was of the National Party in South Africa. The staunchly Federalist president who lost the 1800 election to Thomas Jefferson was determined to protect the Federalist agenda by loading the judicial branch with last-minute Federalist appointees.⁸⁷ For the Federalists, the courts would be the last line of defense against what they feared would be an abuse of power by their opponents.

Politicians have many good political reasons to turn to the courts. Some simply want an issue resolved, taken off the table; others will turn to the courts to accomplish policy goals "they privately favor but cannot openly endorse without endangering their political support."⁸⁸ The starkest example of the political turn to the courts may have been *Dred Scott v. Sandford*⁸⁹ which "epitomizes political attempts to steer a disruptive partisan fight into safer legal channels."⁹⁰

Though he had advance knowledge of the Court's pending decision in *Dred Scott*, President James Buchanan feigned ignorance and, in his inaugural address urged the nation to accept the Court's ruling as an impartial verdict on what the Constitution would—and would not—tolerate.⁹¹ The Supreme Court was hailed by many as the appropriate forum to resolve the issue, a position articulated by Sen. Stephen Douglas, popular for his famous campaign debates with Abraham Lincoln in 1858.⁹² *Dred Scott* heralded the availability of an

85. See Silverstein, *supra* note 24, at 439-40 (describing how politicians acted quickly to remove judicial review from the courts in internal security cases following a controversial judicial decision).

86. TOM GINSBERG, JUDICIAL REVIEW IN NEW DEMOCRACIES 21-22 (2003).

87. See Jennifer Nedelsky, *Confining Democratic Politics: Anti-Federalists, Federalists, and the Constitution*, 96 HARV. L. REV. 340, 352 (1982) (book review) (describing how the federal judiciary became the center of the controversy between Federalists and Republicans after Jefferson's victory). It was, of course, the appointment of William Marbury to a judicial post that generated *Marbury v. Madison* and inaugurated the Supreme Court's exercise of judicial review. 5 U.S. (1 Cranch) 137, 153-54 (1803).

88. Mark A. Graber, *The Nonmajoritarian Difficulty: Legislative Deference to the Judiciary*, 7 STUD. AM. POL. DEV. 35, 43-44 (1993); see also R. Kent Weaver, *The Politics of Blame Avoidance*, 6 J. PUB. POL'Y 4, 371 (1986).

89. 60 U.S. (19 How.) 393 (1856).

90. Graber, *supra* note 88, at 45.

91. *Id.* at 48-49.

92. *Id.* at 48.

alternative forum for the resolution of political disputes and beat a path that would be returned to with increasing frequency as the Civil War faded and America's industrial revolution took root.⁹³ The slavery dilemma impelled American politicians to turn to law to resolve what public policy seemingly could not. And it was the continuing effects of slavery that led them back to court again. Although one can debate the ultimate utility of the Court's intervention in desegregation, the Court filled a void, not only ordering the end of school segregation, but actively implementing and administering programs meant to accomplish that goal, including large-scale busing plans.⁹⁴

Blame avoidance goes a long way toward understanding the political imperative behind the grudging acceptance of strong judicial review by the political actors in the European member states.⁹⁵ The belief that an "ever closer Union" is essential for economic survival is widely shared, and parliamentarians can reap political benefits from a united Europe, but there are also significant domestic costs. Those costs dissipate, of course, if the blame for them can be shifted to European judges and bureaucrats. For the member-state chief executives, there is an additional incentive—power shifted by court order from member state to Brussels is power shifted from a domestic legislature where that chief executive has to protect his or her electoral flanks to the European Commission and Council, where member-state chief executives act with far greater autonomy and many more degrees of freedom. In a convoluted way, one might argue that member-state legislatures are *delegating power to their own chief executives*, albeit through the sieve of the European Council and Commission.⁹⁶ As with the member-state judiciaries, European mandates and European supremacy then can allow member-state chief executives to exercise executive powers that might be impossible in party-driven domestic parliaments, but entirely viable in an executive-driven central organ such as the European Council.

This, of course, then feeds back to create both institutional and political incentives for parliamentarians to accept strong judicial review from Luxembourg. As long as progress toward an ever-closer union remains asymptotic—ever-closer, but never really crossing into

93. GORDON SILVERSTEIN, *HOW LAW KILLS POLITICS* (forthcoming 2006).

94. J. ANTHONY LUKAS, *COMMON GROUND* 231-33 (1986); GERALD ROSENBERG, *THE HOLLOW HOPE* 42-46 (1991).

95. Weaver, *supra* note 88, at 371-72.

96. J.H.H. Weiler et al., *European Democracy and Its Critique: Five Uneasy Pieces* (Harvard Jean Monnet Working Paper, Paper No. 1, 1995), available at <http://www.jeanmonnetprogram.org/papers/95/9501ind.html>.

the land of supranational governance⁹⁷—the European Court’s constitutional space widens, not only as the result of institutions and rights imperatives, but the political appeal of blame avoidance intimately linked to a complex institutional structure.

Building an Explanation for Judicial Review: We know that constitutionalism is not the same as judicial review, that empowering “courts to enforce constitutional clauses is neither a necessary nor a sufficient condition for the development of a constitutional regime.”⁹⁸ While a study of each of these driving imperatives (institutional, economic, normative, political) helps us understand why particular versions of strong courts emerge in particular cases, is it possible to develop a more comprehensive theory that would help us understand not only why we see strong judicial review emerge where it does, but that might explain when it is likely to happen, and how it is likely to unfold?

The European experience helps illustrate the complex ways in which the four imperatives may interact. Economic incentives may well have persuaded the original member states to accept and even embrace an active central court. But why was that needed? The court allowed them to sidestep a difficult if not intractable political problem—they could move toward broadly agreed-upon norms without paying an extraordinary and intolerable domestic political price. As the court developed, the judges themselves played an important role, but that role was only possible because of the unique institutional structure within which they functioned. Not only was power divided between the European government and the member states along a vertical plane, but along the horizontal plane of the European government itself. With no European legislative branch with which to contend, and with a European executive branch that was strangely tied to the political and institutional concerns of the executives of the member states who were worried at least as much about their own backbenchers and domestic opposition as they were about Europe-wide issues, there was clearly a need for a European institution to assert, define, and protect European interests. The court helped fill that vacuum. As the court grew in stature and power and legitimacy, its own rulings no longer could naturally be contained within a strictly economic zone. Judicial interests in rights and pressure from member states such as Italy and Germany along with interest groups, litigators, voters, and politicians at all levels, pressed the court to expand from

97. The recent rejection of the new European Constitution by voters in France and the Netherlands suggests there may be a limit.

98. John Ferejohn et al., *Editors’ Introduction*, in *CONSTITUTIONAL CULTURE AND DEMOCRATIC RULE*, *supra* note 15, at 13.

the economic realm, and its rulings soon came to be powerfully felt in questions of rights and norms far removed from economics.⁹⁹

Interests cannot be totally disaggregated from the other strands of the DNA of judicial review. Interests are, of course, intimately tied up with institutions as they are with normative commitments and political objectives. As Robert Kagan notes, “[a] structurally fragmented state is especially open to popular and interest group demands.”¹⁰⁰ Structure, then, invites interests, and interests, in turn, powerfully shape the structure of the institutions in which they ultimately function. Similarly, economic objectives are merely about self-interest for some, while for others economic rights are just that—rights, normative or ideological commitments in themselves. In the United States, for example, though no one particular economic ideology was built into the Constitution, Russell Hardin argues that “something vaguely approaching the free market was. At the very least, the constitution enabled capitalism”¹⁰¹ This is largely embodied in the Contract and Commerce Clauses, which are “almost the doctrine of laissez-faire defanged and made operational rather than ideological, at least for the domestic economy.”¹⁰² And as much as rights were linked with interests, both explicitly were tied to institutions by James Madison who understood that the best protection for rights was not “a mere demarcation on parchment of the constitutional limits of the several departments,”¹⁰³ but rather a structure of government, a set of institutions, designed to use even negative human attributes to accomplish higher ends. “Ambition,” he famously instructed, “must be made to counteract ambition. The interest of the man must be connected with the constitutional rights of the place.”¹⁰⁴ Norms structure institutions—and institutions shape and constrain the evolution of norms, a fact that was recognized by Chief Justice John Marshall in 1810 when, in *Fletcher v. Peck*,¹⁰⁵ he argued that the State of Georgia was restrained from revoking its contracts “either by general principles which are com-

99. Silverstein, *supra* note 24, at 434-36; Gordon Silverstein, Democracy and the Law: Can Judicial Institutions Pave the Way to Legitimacy in Europe? (Sept. 3-7, 1998) (unpublished paper delivered to the annual meeting of the American Political Science Association in Boston) (on file with author).

100. KAGAN, *supra* note 13, at 15.

101. Russell Hardin, *Constitutional Economic Transition*, in CONSTITUTIONAL CULTURE AND DEMOCRATIC RULE, *supra* note 15, at 330.

102. *Id.* at 332.

103. THE FEDERALIST NO. 48 (James Madison), *supra* note 17, at 313.

104. THE FEDERALIST NO. 51 (James Madison), *supra* note 17, at 322.

105. 10 U.S. (6 Cranch) 87 (1810).

mon to our free institutions, *or* by the particular provisions of the constitution of the United States.”¹⁰⁶

Are these four imperatives necessary preconditions for the emergence of strong judicial review? Is the total absence of any one of them enough to undermine the emergence of strong courts? Is the sequence in which they emerge, or their relative strengths, the key to understanding not only why strong courts emerge (or don't), but how and when it happens?

Even if the instinct is right (that there are a number of key variables that need to sequence in particular ways) are the variables or imperatives discussed here even close to the right set? Or even close to a complete set? Is one sequence or pattern more or less likely to generate strong judicial review? Does one sequence produce predictable pathologies and another sequence predictable advantages?¹⁰⁷ These are increasingly more important questions as more and more nations adopt constitutional systems and accept strong judicial review.

106. *Id.* at 139 (emphasis added).

107. Pierson, *supra* note 18, at 251-52.