THE AMERICANIZATION OF CONSTITUTIONAL LAW AND ITS PARADOXES: CONSTITUTIONAL THEORY AND CONSTITUTIONAL JURISDICTION IN THE CONTEMPORARY WORLD

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I. INTRODUCTION

Contemporary democracies—both long-standing and recently-established—follow a standard that was established in the United States over the past two hundred years. This standard is characterized by:

a) The supremacy of the Constitution;
b) Judicial review;
c) The courts as final interpreters of the constitution; and
d) Active protection of fundamental rights by the judiciary.

The U.S. Supreme Court introduced the first three of these in its most famous case: *Marbury v. Madison*,[1] decided in 1803. *Marbury* laid the cornerstone for the recognition of the Constitution as a legal document and for the recognition of the Judiciary as the branch with the power, and authority to enforce it. The fourth characteristic, judicial activism,[2] in fact refers to a relatively short period of American history. This time spanned both a twenty-year period of American history during which Chief Justice Earl Warren presided over the court (1953–1969) and a shorter period during the early years of Chief Justice Warren Burger's tenure on the court (1969–1986). After that period, a wave of conservatism enveloped the Supreme Court, marked by the appointment of judges who were severely critical of progressive judicial activism and its achievements.

The paradox alluded to in the title of this study can be described as follows: the American constitutional model has spread throughout the world in the last fifty years and has come to dominate the political systems of countries in Europe, Latin America, Asia, and Africa. Yet on the domestic level it has never been subject to such intense questioning as it is now. The attacks come from the right as well as the left. The right, with its conservative agenda, defends—but does not always practice—judicial self-restraint; and the left, with its criticism of judicial supremacy, defends popular constitutionalism. This study attempts to analyze these two historical and judicial processes. It purports to acquaint both law students and professionals educated in the common law tradition with the changes that took place in civil law countries. Moreover this paper also seeks to inform those educated in the civil law tradition of the changes that have taken place in American constitutional law, with a particular eye to

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1. 5 U.S. 137 (1803).

2. The expression 'judicial activism' is used here to identify a more proactive style of enforcing the constitution through courts. It does not bear thus, the pejorative or negative sense that has been attached to it in American constitutional theory over the years. *See, e.g.*, Randy E. Barnett, *Constitutional Clichês*, 36 CAP. U. L. REV. 493, 495 (2007); Keenan D. Kmiec, *The Origin and Current Meanings of 'Judicial Activism*,' 92 CAL. L. REV. 1441, 1463 (2004).

Supreme Court case law.[3] The attentive reader will recognize that these two paths, which should have converged, have instead sharply diverged.

II. DEMOCRATIC CONSTITUTIONALISM: THE AMERICAN AND CONTINENTAL-EUROPEAN TRADITION

Democratic constitutionalism was the prevailing political ideology of the twentieth century. Contemporary social ideology sees this institutional combination of Rule of Law and sovereignty of the people as being the best way of achieving the aspirations of modern society: limited power, human dignity, fundamental rights, social justice, and tolerance. The victorious model, therefore, places the constitution at the center of the political system, where it holds forth the promise of legitimacy, justice, and legal certainty. In order to avoid illusions, one should bear in mind that mankind's greatest conquests usually take a relatively long time to progress from the plane of victorious ideals to the real world of concrete existence. The civilization process moves slower than our longing for social progress. However, finding the right path is usually more important than speed.

It was during the twentieth century that an alternative to democratic constitutionalism arose, one that excited hearts and minds throughout the world. Scientific socialism, founded on the theories set forth in the Communist Manifest of 1848 and in the dense theoretical writings of Marx and Engels, represented a drastic change from its ideological forbears. The Russian Revolution was the historical cornerstone of this political alternative to liberal democracy—an alternative that found support with as much as a third of all humanity. From Lenin to Mao, the project to implement a socialist society placed its values and faith not in the constitution, but in the Party, the central and most irreplaceable part of functioning political, economic, and social institutions in countries that had

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3. *See, e.g.*, William E. Forbath & Lawrence Sager, *Comparative Avenues in Constitutional Law: An Introduction*, 82 TEX. L. REV. 1653, 1669 (2004).

> Traditionally, American constitutional scholarship has been deep, but not at all wide. Accompanying considerable theoretical sophistication and normative intensity has been a parochialism so broadly shared as to go largely unremarked. But the ground has shifted from under our feet. From the end of World War II onward, robust constitutionalism has become less and less exclusively identified with legal events in the United States. Today, constitutional practice flourishes throughout the world, even in former bastions of parliamentary supremacy and transnational entities, as well as tradional nation-state. This offers American commentators a chance to learn from the experience and reflections of our world neighbors; and hopefully, a chance to share the benefits of our experiences and reflections.

Id.

adopted this model.[4] Though in principle generous and seductive to the human spirit, the socialist ideal did not withstand the test of reality. The long-awaited "true revolution" never arrived, and the energy that inspired it was dissipated in authoritarianism, bureaucracy, and poverty.

On the other side of history, three revolutions—all unequivocally victorious—opened the way for liberal and modern constitutionalism: the English Revolution (1688),[5] the American Revolution (1776),[6] and the French Revolution (1789).[7] Even though these phenomena were roughly contemporaneous with one another and shared common fundamentals, their influences differed. American and French constitutionalism, for example, arose from very different sets of historical, political, and intellectual influences and, to a large degree, resulted in substantially different constitutional models. The American Constitution had its origins in Locke's "social contract"—a pact of peace and liberty among men[8]—and in the idea of a legal system based on natural law.[9] In the United States, the

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4. *See* Bruce Ackerman, *The Rise of World Constitutionalism*, 83 VA. L. REV. 771, 781 (1997).

5. In England, when William III and Mary II ascended to the throne after the affirmation of Parliament and their power limited by the *Bill of Rights*, the basis for the model of political organization that would inspire the West for centuries to come was launched. So solid was this foundation that it has permitted Britain to live for centuries without a written constitution.

6. It was left to the United States, a century later, the primacy of creating the first written and solemnly ratified Constitution. In a succinct text consisting of seven articles, to which the ten amendments known as the Bill of Rights were added and approved in 1791, a long trajectory of institutional success was established, founded on effective separation of the branches of government and a triply original model—republican, federative and presidentialist.

7. Somewhat paradoxically, it was the French Revolution, with its violence, circulating nature, and apparent failure that played a symbolic, overpowering role in the imaginations of the peoples of Europe and the world who lived under its influence at the end of the 18th Century. It was this Revolution, with its universal characteristics, that influenced the world and changed the face of the state—converting it from absolutist to liberal—and of society, which was no longer feudalistic and aristocratic, but now bourgeois. The Declaration of the Rights of Man and the Citizen of 1789, disseminated a new ideology based on separation of powers and on individual rights, and in 1791, the first in a long series of French Constitutions was promulgated. *See* HANNAH ARENDT, ON REVOLUTION 43 (1987).

8. JOHN LOCKE, OF CIVIL GOVERNMENT SECOND TREATISE 78 (1955).

> Men being by nature all free, equal, and independent, no one can be put out of this state and subjected to the political power of another without his own consent. The only way one divests himself of his natural liberty and puts on the bonds of civil society is by agreeing with other men to join and unite into a community for their comfortable, safe, and peaceable living.

Id.

9. *See* EDWARD S. CORWIN, THE CONSTITUTION AND WHAT IT MEANS TODAY 173 (1973) ("The initial source of judicial review however, is much older than the Constitution and indeed of any

Constitution was perceived from the very beginning as a legal document endowed with supremacy and legal force, capable of being applied directly and immediately by the judicial branch. In *Marbury v. Madison*, judicial review was accepted rather naturally and with little resistance.[10]

In France and—in the historical sequence—the rest of Europe, the Constitution was essentially political in nature and its interpretation was the responsibility of Parliament, not of judges and courts.[11] At the French Constitutional Assembly of 1791, the central question of political debate was that of who was the legitimate holder of the constitution-making power.[12] The revolutionary ideal of national sovereignty was anathema to the absolutist vision of the sovereignty of the Monarch.[13] Although the European legislatures did adopt the liberal formula of separation of powers and guarantee of individual rights, the European model remained centered on the primacy of the law as an act of the legislative body—rather than the constitution—and the supremacy of parliament, whose acts were not subject to judicial review. This is what some civil law scholars refer to as "legislative rule of law."[14]

In the past fifty years, however, especially after the end of World War II, the legal systems of the countries that follow this Roman-Germanic Tradition underwent a series of extensive and profound transformations. Namely, the way legal theory, positive law, and case law are perceived and practiced changed dramatically in these legal systems. At the center of these political, conceptual, and paradigmatic changes lies the constitution. This model is known in the Roman-Germanic World as "Constitutional Rule of Law." This new constitutional order, which is known as the "post-

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American constitution. It traces back to the common law, certain principles of which were earlier deemed to be 'fundamental' and to comprise a 'higher law' which even Parliament could not alter.").

10. That is to say, without detriment to the permanent debate regarding the democratic legitimacy of constitutional jurisdiction that nourishes American constitutional theory.

11. In this sense, *see* Paul W. Kahn, *Comparative Constitutionalism in a New Key*, 101 MICH. L. REV. 2677, 2700 (2003) [hereinafter Kahn] ("But the French courts did not emerge from the Revolution with the power to speak in the name of the popular sovereign. The locus of that voice was instead the French Assembly.").

12. CARL SCHMITT, CONSTITUTIONAL THEORY 127 (Jeffrey Seitzer ed. & trans., Duke Univ. Press 2008).

13. *See, e.g.*, KLAUS STERN, DERECHO DEL ESTADO DE LA REPUBLICA FEDERAL ALEMANA [LAW OF THE STATE OF THE FEDERAL REPUBLIC OF GERMANY] 311 (1987).

14. *See, e.g.*, Luigi Ferrajoli, *Pasado y Futuro del Estado de Derecho* [*Past and Future of the Rule of Law*], *in* NEO-CONSTITUCIONALISMO(S) [NEO-CONSTITUTIONALISM] 14 (Miguel Carbonell ed., 2003) [hereinafter Ferrajoli].

war paradigm"[15] or the "new constitutionalism," has spread throughout the entire world. By the end of the twentieth century, some of these paradigm's essential characteristics could be found in Europe, Latin America, and Africa, including such geographically and culturally disparate countries as Brazil, Hungary, Spain, and South Africa. The next chapter attempts to reconstitute the historical, philosophical, and theoretical background of this new constitutional model.

III. THE NEW CONSTITUTIONALISM: THE POST-WAR PARADIGM IN THE ROMAN-GERMANIC WORLD

A. *The Formation of the Constitutional Democratic State*

Constitutional rule of law began to develop after the end of World War II, particularly in the last quarter of the twentieth century. The development of constitutional rule of law is primarily characterized by subordination of legality to a rigid constitution. Today, the validity of laws does not depend merely on the way they are produced but also on the compatibility of their content with constitutional norms. Moreover, in addition to imposing limits on the lawmaker and the administrator, the constitution also forces them to act. The science of law assumes a critical and inductive role in the acts of government. Judges and courts have broad powers to invalidate legislative and administrative acts and to interpret the laws creatively, based on the constitution.[16] It is against this backdrop that the multiple transformations described herein were verified.

The first milestone in the development of European constitutional law was the Fundamental Law of Bonn (the German Constitution[17] of 1949—a document that took on new importance following the creation of the German Federal Constitutional Court in 1951). The second milestone was the Italian Constitution of 1947, which came into full force with the

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15. *See* Lorraine E. Weinrib, *The Postwar Paradigm and American Exceptionalism*, *in* THE MIGRATION OF CONSTITUTIONAL IDEAS 84 (2006).

16. *See, e.g.*, Ferrajoli, *supra* note 14, at 14. *See generally* GUSTAVO ZAGREBELSKY, EL DERECHO DÚCTIL: LEI, DEREITOS E JUSTIÇA [THE MALLEABLE LAW: LEGISLATION, RIGHTS AND JUSTICE] (2008) [hereinafter ZAGREBELSKY].

17. The German Constitution, which was promulgated in 1949, has the original title of "Fundamental Law," underscoring its provisional nature, as it was conceived for a transitional phase. The permanent Constitution would not be ratified until after that country's unification was restored. Grundgesetz für die Bundesrepublik Deutschland [Constitution] (F.R.G). On August 31, 1990, the Treaty of Unification was signed, regulating the reunification of the German Democratic Republic (R.D.A.) to the Federal Republic of Germany (R.F.A.). But after unification, a new constitution was not promulgated. The Fundamental Law has remained in effect since October 3, 1990 throughout all of Germany. Treay of Unification, R.D.A.-R.F.A., Aug. 31, 1990, Federal Law Gazette 1990, II, 889.

creation of the Italian Constitutional Court in 1956.[18] These developments marked the beginning of a contemporary era of constitutional law in the Roman-Germanic countries. During the 1970s, this emphasis on constitutional law took on new momentum, spurred on by a new wave of re-democratization and constitutionalization in countries such as Greece (1975), Portugal (1976) and Spain (1978).[19]

Similar trends took place in Latin America, where the end of Cold War-era military regimes hearkened an era of constitutionalization and democratization. In Brazil, the Constitution of 1988 played a major part in establishing a stable democratic regime—one that has been tested in successive elections. In Central and Eastern Europe, the wave of re-democratization and re-constitutionalization began after the fall of the Berlin Wall in October of 1989.[20] In South Africa, the transition from apartheid to multi-party democracy began in 1990 and culminated in the South African Constitution of February 1997.[21] Once again, one should bear in mind that while democratic constitutionalism has become the prevailing ideology, it continues to face resistance from the *status quo* and setbacks. Indeed, having been marked by authoritarian experiences and lack of a constitutional tradition, various countries in Latin America, in the former Soviet Union or in Eastern Europe have experienced many detours, advancements, and reversals. Political and institutional maturity is a historical process, not an event that takes place on a specific date.

B. *The Rise of a Post-Positivist Culture*

The philosophical milieu in which the new constitutional law blossomed can be referred to as post-positivism. The debate surrounding its characterization lies in the convergence of two major currents of thought offering opposite views of law: natural law and positivism—opposite, but sometimes uniquely complementary. Society's competing demands for legal certainty and objectivity (on the one hand), and for legitimacy and justice (on the other) have expanded beyond the confines of the 'pure' and

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18. SUPRANATIONAL AND CONSTITUTIONAL COURTS IN EUROPE: FUNCTIONS AND SOURCES 284, 289 (Igor I. Kavass, ed., William S. Hein & Co., Inc. 1992).

19. JORGE MIRANDA, 6 MANUAL DE DIREITO CONSTITUCIONAL [CONSTITUTIONAL LAW HANDBOOK] 123–24 (2008) [hereinafter MIRANDA].

20. PASCAL FONTAINE, A NEW IDEA FOR EUROPE: THE SCHUMAN DECLARATION 1950–2000 147, n.1 (2000), *available at* http://ec.europa.eu/publications/booklets/eu_documentation/04/txt_en.pdf (last visited Mar. 14, 2010).

21. Michael Chege, *Between Africa's Extremes*, *in* THE GLOBAL RESURGENCE OF DEMOCRACY 350, 351–52 (Larry Diamond & Marc F. Plattner, eds. John Hopkins Univ. Press 1996).

'encompassing models.' Instead, these demands now give rise to a broad and diffused set of ideas that are still in their 'systematization phase.'[22]

In a way, post-positivism is a third path between positivism and the natural law tradition. Post-positivist thinking does not ignore the importance of the law's demands for clarity, certainty, and objectivity, but neither does it conceive of the law as being unconnected to a moral and political philosophy. Post-positivism grapples with the positivist postulate of separation between law, morality, and politics. It does not deny the unique nature of each of these fields, but it does acknowledge the practical impossibility of treating them as distinct 'spaces' that do not affect one another. If the complementary articulation between them is undeniable, the theory of separation—which is at the core of positivism and has dominated legal thought for many decades—pays tribute to hypocrisy.[23]

Contemporary constitutional law, or neoconstitutionalism, is partially the product of this marriage of law and philosophy. Indeed, principles and fundamental rights implicitly or explicitly enshrined in the constitution are the pathways through which moral values migrate from the ethical to the legal world. Some of these values, like liberty and equality, have been present in the constitution all along, in spite of the constant evolution of

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22. *See, e.g.*, Albert Calsamiglia, *Postpositivismo [Postpositivism]*, 21 DOXA: CUADERNOS DE FILOSOFIA DEL DERECHO [DOXA: JOURNAL OF PHILOSOPHY OF LAW] 209 (1998).

> In a certain way current legal theory can be referred to as post-positivist precisely because many of the teachings of positivism have been accepted and today we are all in a certain way positivists . . . . Post-positivistic are the contemporary theories that place emphasis on the contemporary theories of indetermination of law and the relationship between law, morality and politics.

Id.

See generally ROBERT ALEXY, THEORY OF FUNDAMENTAL RIGHTS (Julian Rivers, trans., Oxford Univ. Press 2002) [hereinafter ALEXY]; PAULO BONAVIDES, CURSO DE DIREITO CONSTITUCIONAL [COURSE IN CONSTITUTIONAL LAW] (2008); RONALD DWORKIN, TAKING RIGHTS SERIOUSLY (1977); LUIGI FERRAJOLI, DIRITTO E RAGIONE [LAW AND REASON] (1989); CARLOS SANTIAGO NINO, THE ETHICS AND HUMAN RIGHTS (1991); JOHN RAWLS, A THEORY OF JUSTICE (1980); ERNESTO GARZÓN VALDÉS & FRANCISCO J. LAPORTA, EL DERECHO Y LA JUSTICIA [LAW AND JUSTICE] (2000); ZAGREBELSKY, *supra* note 16. *See also* Luís Roberto Barroso, *Fundamentos Teóricos e Filosóficos do Novo Direito Constitucional Brasileiro: Pós-modernidade, Teoria Crítica e Pós-positivismo [Theoretical and Philosophical Fundamentals of the New Brazilian Constitution: Post-Modernism, Critical Theory and Post-Positivism]*, *in* 358 REVISTA FORENSE [FORENSIC JOURNAL] 91 (Nov.–Dec. 2001).

23. *See* Antonio Carlos Diniz and Antônio Carlos Cavalcanti Maia, *Pós-positivismo [Post-positivism]*, *in* DICIONÁRIO DE FILOSOFIA DO DIREITO [DICTIONARY OF THE PHILOSOPHY OF LAW] 650–51 (Vincent Barreto, ed. 2006). *See generally* Luís Roberto Barroso, *Neoconstitucionalismo e Constitucionalização do Direito [Neo-constitutionalism and the Constitutionalization of the Law]*, *in* 4 LUÍS ROBERTO BARROSO, TEMAS DE DIREITO CONSTITUCIONAL [TOPICS ON CONSTITUTIONAL LAW] (2009).

their meaning. Others, though similarly widely accepted, have changed dramatically in their interpretation: for example, concepts such as democracy, republicanism, and separation of powers. There were also principles whose potential was not developed until recently, such as human dignity, proportionality,[24] and solidarity. In a post-positivist culture, the protection and promotion of constitutional principles and of fundamental rights are central ideas[25]. They are essential elements not only in contemporary constitutional interpretation but also in the characterization of any political society as a constitutional democracy.

C. *Aspects of Contemporary Constitutional Law*

As part of the movement toward new constitutionalism, three major transformations have subverted conventional knowledge about the application of constitutional law in the Roman-Germanic World:

a) Recognition of the constitution's legal force and justiciability;
b) Expansion of constitutional jurisdiction, especially of judicial review; and
c) Development of new ideas and new concepts in constitutional interpretation.

Below is a succinct analysis of each of these changes.

1. The Constitution as Enforceable Law

In the civil law world, one of the major changes was the recognition that the constitution is enforceable law and that the constitutional rights contained in it can be claimed before courts of justice. While this is largely a truism in the American context, the fact is that in the traditional European model of constitutionalism, the constitution was perceived as a political

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24. On the concept of proportionality, *see* DAVID M. BEATTY, THE ULTIMATE RULE OF LAW 159 (2004) [hereinafter BEATTY]; Mark Tushnet, *Comparative Constitutional Law in* THE OXFORD HANDBOOK OF COMPARATIVE LAW 1249 (Mathias Reimann & Reinhard Zimmerman, eds., 2006) [hereinafter Tushnet, *Comparative*]; Kahn, *supra* note 11, at 2698–99; Luís Roberto Barroso, *Os Princípios da Razoabilidade e da Proporcionalidade no Direito Brasileiro* [*The Principles of Reasonableness and Proportionality in Brazialian Law*], *in* 336 REVISTA FORENSE [FORENSIC JOURNAL] 128 (Oct.–Dec. 1996). *See generally* ALEXY, *supra* note 22.

25. On the development of a new world constitutionalism, based on fundamental rights, *see* Vicki C. Jackson, *Constitutional Comparisons: Convergence, Resistance, Engagement*, 119 HARV. L. REV. 109, 111 (2005) ("An era of human rights-based constitutionalism was born in the global constitutional moment that followed the defeat of Nazism, producing international human rights law and more tribunal issuing reasoned constitutional decisions.").

rather than as a legal document. As a consequence, it was thought of as an invitation for the administration and the legislature to act rather than as binding law. In the European tradition, the actual application of constitutional principles and rules would depend greatly on the discretion of the political branches. Moreover, the courts would retain no unique power to directly or immediately enforce the constitution. With the re-constitutionalization that emerged from the ruins of World War II, this picture began to change, initially in Germany[26] and later in Italy,[27] and eventually in Portugal[28] and Spain.[29] Now, recognition of the constitution as a binding document with legal force and mandatory provisions has become a premise of modern constitutional studies in most civil law countries. In other words, the constitution's norms are endowed with the imperative nature that is attributed to all laws and failure to comply with them inevitably triggers the mechanisms of coercion and forced compliance.

The debate surrounding the legal nature of the constitution did not gain significant or consistent momentum in Latin America until the 1980s. By that point, the notion of an enforceable constitution had already encountered predictable resistance there.[30] In addition to the obstacles common in the formation of any legal system, chronic pathologies linked to authoritarianism and constitutional insincerity complicated the

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26. For a seminal study on this subject, *see* Konrad Hesse, *La Fuerza Normativa de la Constitución [The Normative Force of the Constitution]* *in* ESCRITOS DE DERECHO CONSTITUCIONAL [WRITINGS OF CONSTITUTIONAL LAW] xi (1983). The text, in the original German, which corresponds to his inaugural address at the University of Freiburg, was written in 1959.

27. At first, in Italy, case law denied self-application to constitutional norms guaranteeing fundamental rights, which were dependent on the interposition of the legislator. Regarding this topic, *see* Therry Di Manno, *Code Civil et Constitution en Italie [Civil Code and Constitution in Italy]*, *in* CODE CIVIL ET CONSTITUTION(S) [CIVIL CODE AND CONSTITUTION(S)] 106 (Michel Verpeaux, ed. 2005) [hereinafter Di Manno]. *See generally* VEZIO CRISAFULLI, LA COSTITUZIONE E LE SUE DISPOSIZIONE DI PRINCIPIO [THE CONSTITUTION AND ITS DISPOSITION FROM THE BEGINNING] (1952).

28. *See* J.J.GOMES CANOTILHO & VITAL MOREIRA, FUNDAMENTOS DA CONSTITUIÇÃO [FUNDAMENTALS OF THE CONSTITUTION] 43 (1991).

29. Regarding the question in general and in the case of Spain specifically, *see generally* EDUARDO GARCIA DE ENTERRÍA, LA CONSTITUCIÓN COMO NORMA Y EL TRIBUNAL CONSTITUCIONAL [THE CONSTITUTION AS A NORM AND THE CONSTITUTIONAL COURT] (1991); Eduardo Garcia de Enterría, *La Constitución Española de 1978 como Pacto Social y como Norma Jurídica [The Spanish Constitution of 1978 as a Social Pact and as a Legal Rule]* (2003), *in* 1 REVISTA DE DIREITO DO ESTADO [STATE LAW JOURNAL] at 3 (Jan.–Mar. 2006).

30. *See generally* LUÍS ROBERTO BARROSO, O DIREITO CONSTITUCIONAL E A EFETIVIDADE DE SUAS NORMAS [CONSTITUTIONAL LAW AND THE EFFECTIVENESS OF ITS NORMS] (1990). *See generally* JOSÉ AFONSO DA SILVA, APLICABILIDADE DAS NORMAS CONSTITUCIONAIS [APPLICABILITY OF CONSTITUTIONAL NORMS] (1982).

enforceability movement in Latin American countries. Up until then, Latin American constitutions had been repositories of vague promises and exhortations by the lawmakers, with no direct or immediate applicability. In Brazil, for example, it was only after the country's re-constitutionalization in 1988 that there was requisite support for the affirmation and enforcement of constitutional norms. This change finally enabled the emergence of a truly effective constitution.

2. Expansion of Constitutional Jurisdiction

Prior to 1945, the supremacy of the legislative branch was the model that existed in most of Europe, following the British doctrine of the sovereignty of Parliament and the French concept of law as an expression of the "general will." Beginning in the late 1940s, the new constitutional wave brought not only new constitutions but also a new general constitutional model, inspired by the American experience—a model of constitutional supremacy and judicial review.[31] That model involved the constitutionalization of fundamental rights, which became immune from attacks by the political majority. The judiciary was now entrusted with the duty of protecting those rights. Numerous European countries came to adopt their own model of judicial review, associated with the creation of constitutional courts.[32] Such courts were created in Germany (1951) and

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31. *See* Stephen Gardbaum, *The New Commonwealth Model of Constitutionalism* 49 AM. J. COMP. L. 707, 714–15 (2001) [hereinafter Gardbaum]

> The obvious and catastrophic failure of the legislative supremacy model of constitutionalism to prevent totalitarian takeovers, and the sheer scale of human rights violations before and during World War II, meant that, almost without exception, when the occasion arose for a country to make a fresh start and enact a new constitution, the essentials of the polar opposite American model were adopted . . . . These included the three Axis powers, Germany (1949), Italy (1948), and Japan (1947).

Id.

In this text, Professor Gardbaum of the University of California, is studying precisely three experiences that, according to his analysis, were left out of the judicial-review wave: United Kingdom, New Zealand, and Canada.

32. Hans Kelsen was the person who inspired the introduction of judicial review in Europe in the Austrian Constitution of 1920, which was perfected by the constitutional reform of 1929. Based on a different theoretical perspective than the one that prevailed in the United States, he conceived of judicial review more as a political function (of a negative-legislative nature) and not as a judicial activity. For that purpose, he foresaw the creation of a specific body—the Constitutional Court—responsible for exercising it in a concentrated manner. *See generally* HANS KELSEN, QUIÉN DEBE SER EL DEFENSOR DE LA CONSTITUCIÓN [WHO SHOULD BE THE GUARDIAN OF THE CONSTITUTION] (1931). For comments on the structures of judicial review, *see* Tushnet, *Comparative*, *supra* note 24, at 1242–49.

Italy (1956), as already mentioned; and in time, all of the continental European states created constitutional courts.[33] Currently, in addition to the United Kingdom, only the Netherlands and Luxembourg still maintain the parliamentary supremacy standard, though these same countries already vary from that standard in several ways.

In Latin America, most countries have adopted the model of judicial review that has remained the rule in the United States since *Marbury v. Madison*.[34] Brazil followed an eclectic formula, combining the American and the European models. As a result, similar to American practice, any Brazilian court may declare a federal or a state statute unconstitutional. In line with the European style of judicial review, direct constitutional actions may be filed before the Supreme Court, challenging the law on its face, in thesis, without a case or controversy requirement.[35]

3. New Developments in Constitutional Interpretation

The consolidation of democratic and normative constitutionalism, the expansion of constitutional jurisdiction and the decisive influx of post-positivism have had a great impact on legal interpretation in general, particularly constitutional interpretation. Traditional theoretical, philosophical, and ideological premises have changed, especially with respect to the role of the text of legal norms and to the role of the

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33. *See* Lisa Hilbink, *Beyond Manicheism: Assessing the New Constitutionalism*, 65 MD. L. REV. 15, 15 (2006) ("Over the past twenty-five years, the 'judicial turn' that began in Europe in the wake of World War II has spread to almost all corners of the globe. In established and emerging democracies alike, parliamentary sovereignty is in decline and constitutional courts with broad powers have become commonplace."). The tendency spread to Cyprus (1960) and Turkey (1961). In the flow of democratization that took place in the 1970s, constitutional courts were instituted in Greece (1975), Spain (1978), Portugal (1982), and Belgium (1984). In the latter years of the 20th Century, constitutional courts were created in such Eastern European countries as Poland, (1986), Hungary (1990), Russia (1991), the Czech Republic (1992), Romania (1992), the Slovakian Republic (1992) and Slovenia (1993). The same thing occurred in such African nations as Algeria (1989) and South Africa (1996). On this topic, *see* LUÍS ROBERTO BARROSO, O CONTROLE DE CONSTITUCIONALIDADE NO DIREITO BRASILEIRO [JUDICIAL REVIEW IN BRAZILIAN CONSTITUTIONAL LAW] 43 (2004); MIRANDA, *supra* note 19, at 123–24; GUSTAVO BENINBOJM, A NOVA JURISDIÇÃO CONSTITUCIONAL BRASILEIRA [THE NEW BRAZILIAN CONSTITUTIONAL LAW] 39–40 (2004); Nathan J. Brown, *Judicial Review and the Arab World*, 9 J. OF DEMOCRACY 85, 90 (1998); Gardbaum, *supra* note 31, at 715–16.

34. For an analysis of judicial review in different countries of Latin American, *see generally* Duquesne Law Review volume forty-five with the papers presented at the "Judicial Review Symposium of the Americas . . . and Beyond, 2007." *See also* Francisco Fernández Segado, *La Jurisdicción Constitucional en America Latina* [*Constitutional Law in Latin America*], Montevideo, Uruguay (2000).

35. It is noteworthy that such direct challenges may be brought by a long set of plaintiffs, listed in Article 103 of the Constitution, which includes the President of the Republic, the State Governors, political parties represented in Congress, labor unions and nationwide class entities, among others. Constituição Federal [C.F.] [Constitution] art. 103 (Braz.).

interpreter. For a typical civil law jurist to discover a world in which the solution for legal problems could not be entirely found in the text of a constitutional or statutory provision represented a kind of "silent revolution." Suddenly, such a jurist found himself in the position of creating and constructing a concrete rule to govern the case. In this brave new world, new doctrines and new theories arose, as jurists began to deal with the normative nature of general clauses as well as with the collisions between constitutional norms. Moreover, legal thinkers came to use balancing techniques and practical reasoning more readily in legal argumentation as bases for legitimizing judicial decisions.

As this "silent revolution" progressed, the principle of reasonableness or proportionality was developed and refined by calling upon two different ideas: i) the doctrine of substantive due process of law, from United States constitutional law, where the matter was first dealt with; and ii) the principle of rule of law, from German public law, respectively. In spite of their disparate origins, these principles share the same underlying values: reason, justice, adequate measure, and the rejection of arbitrary or capricious acts. The principle of reasonableness/proportionality allows the judiciary to invalidate legislative or administrative acts whenever:

> a) There is no adequacy between the end sought and the means used to achieve that end;
> b) The measure is not required or necessary, there being an alternate means for arriving at the same results with a lesser burden upon a fundamental right (prohibition of excesses); and
> c) There is no proportionality, in the strict sense of the word, meaning that what is lost by effecting a given measure is more important than what is gained.[36]

D. *Constitutionalizing the Law*

The set of phenomena described above has given rise to both the constitutionalization of the law and the consequent judicialization of social relations. The idea of the constitutionalization of law being explored here

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36. *See, e.g.*, Bundesverfassungsgericht [BVerfG], [Federal Constitutional Court] Mar. 16, 1971, 30 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 292 (316) (F.R.G.). As for German authors, *see* ALEXY, *supra* note 22, at 77. In French law, *see generally* PHILIPPE XAVIER, LE CONTROLE DE PROPORTIONNALITÉ DANS LES JURISPRUDENCES CONSTITUTIONNELLE ET ADMINISTRATIVE FRANÇAISES [THE CONTROL OF PROPORTIONALITY IN THE FRENCH CONSTITUTIONAL AND ADMINISTRATIVE CASE LAW] (1990). In Italian law, *see generally* GINO SCACCIA, GLI "STRUMENTI" DELLA RAGIONEVOLEZZA NEL GIUDIZIO COSTITUZIONALE [THE "TOOLS" OF REASONABLENESS IN CONSTITUCIONAL JUDGEMENTS] (2000). In the English language, *see* BEATTY, *supra* note 24, at 159.

is associated with the expansive effect of constitutional norms, whose material and axiological content radiates with the force of law throughout the entire legal system.[37] The values, public interests, and behavior contemplated in the principles and rules of a constitution now tend to affect the validity and meaning of all sub-constitutional legal norms. Intuitively, constitutionalization has repercussions that are felt in the acts of all three branches of government, including (particularly) their relations with private citizens. However, constitutionalization also affects the relationships between private individuals, insofar as it may limit their autonomy for the purpose of protecting constitutional values and fundamental rights.[38]

There is a general consensus that the initial cornerstone of constitutionalization was established in Germany. Interpreting the Fundamental Law of 1949 the Federal Constitutional Court established that, in addition to their subjective function of protecting individual situations, fundamental rights also performed the objective function of creating an equitable order of values. As a result, these rights must be protected not only for the benefit it might bring to one or more individuals, but also because there is a general societal interest in the promotion of fundamental rights and values. Such constitutional norms condition the interpretation of all branches of law, public or private, and are binding on all branches of government. The first major case of this kind was the *Lüth* case[39] decided

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37. Some scholars have utilized the terms "impregnate" or "impregnation," which in some languages can have a disparaging connotation. *See* Louis Favoreu, *La Constitutionnalisation du Droit [The Constitutionalization of the Law]*, *in* LA CONSTITUTIONNALISATION DES BRANCHES DU DROIT [THE CONSTITUTIONALIZATION OF THE BRANCHES OF LAW] 191 (1998) [hereinafter Favoreu] ("This refers here mainly to the constitutionalization of rights and liberties, which leads to an impregnation of the various branches of law, while at the same time leading to its transformation."). *See also* Ricardo Guastini, *La "Constitucionalización" del Ordenamiento Jurídico: El Caso Italiano [The "Constitucionalization" of the Legal System: The Italian Case]*, *in* NEO-CONSTITUCIONALISMO(S) [NEO-CONSTITUCIONALISM(S)] 49 (Miguel Carbonnel ed., 2003) [hereinafter Guastini]:

> By 'constitutionalization of the legal system' my understanding is that it refers to a process of transformation of a system culminating in the system in question being totally impregnated with constitutional norms. A constitutionalized legal system is characterized by a Constitution that is extremely invasive, interfering (*pervasive, invading*), capable of affecting both legislation and case law and the style of doctrine, the acts of the political actors, as well as social relations.

Id.

38. DANIEL SARMENTO, DIREITOS FUNDAMENTAIS E RELAÇÕES PRIVADAS [FUNDAMENTAL RIGHTS AND PRIVATE RELATIONS] 141 (2004). In Spanish, *see generally* JUAN MARIA BILBAO UBILLO, LA EFICÁCIA DE LOS DERECHOS FUNDAMENTALES FRENTE A PARTICULARES [THE EFFICACY OF FUNDAMENTAL RIGHTS IN PRIVATE RELATIONS] (1997). In English, *see* Tushnet, *Comparative*, *supra*, note 24, at 1252–53.

39. Bundesverfassungsgericht [BVerfG], [Federal Constitutional Court] Jan. 15, 1958, 7 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 198 (F.R.G.). The underlying facts were as

on January 15, 1958. From then on, based on the catalog of fundamental rights of the German Constitution, the Constitutional Court has promoted a veritable "revolution of ideas," [40] especially in civil law. In fact, in the years to come, the Court invalidated provisions of the Bürgerliches Gesetzbuch (BGB), imposed the interpretation of its laws according to the Constitution and ordered the creation of new laws. For example, in order to comply with the principle of equality between men and women, the legislature made changes in the areas of matrimony, rights of former spouses after divorce, family rights, family names, and private international law. Similarly, the principle of equality between legitimate and natural offspring led to reforms in German inheritance laws.[41] These changes made

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follows: Erich Lüth, President of the Hamburg Press Club, incited the boycott of a film directed by Veit Harlan, a filmmaker who had been linked to the Nazi Regime in the past. The film's producer and distributor obtained a decision in the common court of jurisdiction ordering him to cease with that kind of conduct, considering it to be a violation of § 826 of the Civil Code. Bürgerliches Gesetzbuch [BGB] [Civil Code] Aug. 18, 1896, Bundesgesetzblatt [BGBl. I] 42, § 826 ("Anyone who, in a manner contrary to good custom, inflicts damage on another, is obliged to repair the damage caused."). The Federal Constitutional Court overruled the decision in the name of the fundamental right of freedom of speech, on which interpretation of the Civil Code should be based. For an edited translation of the decision, *see* JÜRGEN SCHWABE, CINCUENTA AÑOS DE JURISPRUDENCIA DEL TRIBUNAL CONSTITUCIONAL FEDERAL ALEMÁN [FIFTY YEARS OF CASE LAW OF THE FEDERAL CONSTITUCIONAL GERMAN COURT] 132–37 (2003).

> The fundamental rights are, first of all, the rights of citizens to defend themselves against the State; nevertheless, the Fundamental Law's provisions of fundamental rights also incorporate an objective system of values, which, like a fundamental constitutional decision, is valid for all spheres of law . . . . This system of values—whose central point is found in the bosom of the social community, in the free development of human personality and dignity—offers direction and impulse to the legislature, the administration and the judiciary, projecting itself also above civil law. No provision of civil law can contradict it, and all of them must be interpreted according to their spirit . . . . The expression of an opinion containing a call to boycott does not necessarily violate good custom, as defined in § 826 of the Civil Law. It can be justified constitutionally by freedom of opinion, after all the circumstances of the case have been pondered.

Id.

For a comment on this decision, *see* DONALD P. KOMMERS, THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY 368 (1989).

40. Sabine Corneloup, *Table Ronde: Le Cas de l'Alemagne* [*Round Table: The Case of Germany*] *in* CODE CIVIL ET CONSTITUTION(S) [CIVIL CODE AND CONSTITUTION] 85 (Michel Verpeaux ed., 2005) [hereinafter Corneloup].

41. *Id.* at 87–88 (providing identification of each of the laws). The case law referred to in the paragraph's sequence was located based on references contained in this text.

possible recent and important decisions on topics such as same-sex marriage[42] and contract law.[43]

In Italy, the process of constitutionalizing the law did not begin until the 1960s, and did not end until the 1970s. One must bear in mind that even though the constitution went into effect in 1948, the Constitutional Court was not created until 1956. At that point, the constitutional norms of fundamental rights became directly applicable without the legislature's intermediation. Similar to what occurred in Germany, the influence of the constitution on sub-constitutional law manifested itself in decisions of unconstitutionality, in cases involving the acts of the legislature and in the re-interpretation of ordinary laws already in effect.[44]

In France, the process of constitutionalizing the law began much later, and remains in its "affirmation phase" today. The Constitution of 1958 did not establish judicial review of either the European or American variety. Instead, the drafters of the Constitution of 1958 opted for a different

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42. BverfG, decision July 17, 2002, docket number 1 BvF 1/01, at Juris online/Rechtsprechung. At first, in the name of the principle of equality, a law passed on February 16, 2001 governed homosexual marriage, putting an end to existing discrimination. Next, that law had its constitutionality challenged on the grounds that it violated art. 6, I, of the Fundamental Law, by which "marriage and family are placed under the private protection of the State," by legitimizing another type of family-law institution parallel to heterosexual marriage. The Court did not accept the argument, deciding that the new law neither impeded traditional marriage nor granted homosexual marriage any privilege in relation to conventional marriage.

43. An agreement of guarantee given by the daughter in favor of the father, the object thereof, which was an amount many times greater than her financial capacity, was considered null and void because it was immoral. *See* Bundesverfassungsgericht [BVerfG] [Federal Consitutional Court] Nov. 21, 2001, 89 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 214 (F.R.G.); Corneloup, *supra* note 40, at 90; BverfG, decision Feb. 6, 2001, docket number 1 BvR 12/92, at Juris online/Rechtsprechung (detailing how a nuptial agreement in which the woman, who was pregnant, waived support for herself and her child, was considered null and void because it failed to allow contractual freedom to prevail when one party dominates the other party); BvergG, decision Mar. 22, 2004, docket number 1 BvR 2248/01, at Juris online/Rechtsprechung (discussing how, in an inheritance agreement that imposed on the oldest son of Emperor Guilherme II, the obligation to marry a woman who met certain conditions imposed on her was considered null and void because it violated freedom of marriage).

44. Di Manno, *supra* note 27, at 103. From 1956 to 2003, the Constitutional Court rendered 349 decisions in constitutional issues involving the Civil Code, fifty-four of which declared it to contain unconstitutional provisions. Judgments were handed down in subjects that included adultery, use of the husband's name and the inheritance rights of illegitimate children, among others. On the legislative level, under the influence of the Constitutional Court, through the years profound changes were approved in work and family law, including in relation to divorce and adoption. These changes, which were carried out by specific laws, led to the so-called "de-codification" of civil law. *See* PIETRO PERLINGIERI, PERFIS DO DIREITO CIVIL [PROFILES OF CIVIL LAW] 5 (1997); Guastini, *supra* note 37, at 63–67. *See generally* NATALINO IRTI, L'ETÀ DELLA DECODIFICAZIONE [THE AGE OF DECODIFICATION] (1999).

formula: one of prior control, exercised by the Constitutional Council in relation to some laws before they went into effect.[45] Thus, technically speaking, the French system has no real constitutional jurisdiction.[46] Nevertheless, some significant and constant advancements have been made, beginning with the decision of July 16, 1971.[47] It was followed by the Reform Act of October 29, 1974, expanding the right to solicit action by the Constitutional Council.[48] Little by little, topics such as "impregnation" of the judicial system, recognition of the legal force of the constitutional norms, and use of the technique of interpreting according to the Constitution are being incorporated into the French constitutional debate.[49]

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45. *See generally* FRANÇOIS LUCHAIRE, 3 LE CONSEIL CONSTITUTIONNEL [THE CONSTITUTIONAL COUNCIL] (1997). *See also* JOHN BELL, FRENCH CONSTITUTIONAL LAW 110 (1992); Louis Favoreu, *La Place du Conseil Constitutionnel dans la Constitution de 1958* [*The Place of the Constitutional Council in the 1958 Constitution*], *available at* http://www.conseil-constitutionnel.fr. (last visited Mar. 14, 2010).

46. A constitutional amendment approved in 2008, still depending further legislation, has introduced something closer to traditional constitutional review. It establishes that the Court of Cassation and the Council of State may forward to the Constitutional Council the decision on the constitutionality of a subconstitutional provision, when this may affect the outcome of a case being adjudicated.

47. CC decision no. 71-44DC, July 16, 1971, Rec. 29. Objectively, this decision considered that the requirement of prior administrative or judicial authorization for the constitution of an association violated freedom of association. Its importance however, was in recognizing that the fundamental rights foreseen in the Declaration of the Rights of Man and the Citizen of 1789, and in the preamble of the Constitution of 1946, were incorporated to the Constitution of 1958 by virtue of a reference contained in the latter's preamble, being therefore, a parameter for controlling the constitutionality of laws. That decision reinforced the prestige of the Constitutional Council, which began to perform the role of protector of fundamental rights and freedoms. Regarding the importance of this decision, *see* LÉO HAMON, CONTRÔLE DE CONSTITUTIONNALITÉ ET PROTECTION DES DROITS INDIVIDUELS [THE CONTROL OF CONSTITUTIONALITY AND THE PROTECTION OF INDIVIDUAL RIGHTS] 83–90 (1974). *See generally* G. Haimbowgh, *Was it France's Marbury v. Madison?*, 35 OHIO ST. L.J. 910 (1974); J.E. Beardsley, *The Constitutional Council and Constitutional Liberties in France*, 20 AM. J. COMP. L. 431 (1972). For a detailed commentary of this decision, *see generally* L. FAVOREU & L. PHILIP, LES GRANDES DÉCISIONS DU CONSEIL CONSTITUTIONNEL [THE GREATEST DECISIONS OF THE CONSTITUTIONAL COUNCIL] (2003).

48. From then on, the right to petition the Constitutional Council to act, which was formerly attributed only to the President of the Republic, to the Prime Minister, to the President of the National Assembly and to the President of the Senate, was also extended to the sixty Deputies or sixty Senators. Control of constitutionality became an important instrument for the action of opposition in parliament. Between 1959 and 1974, only nine decisions were handed down regarding ordinary laws (at the initiative of the Prime Minister and the President of the Senate) and twenty dealing with organic laws (mandatory pronouncement). From 1974 to 1998 the Constitutional Council was petitioned to act 328 times (*saisine*). Burt Neuborne, *Hommage Á Louis Favoreu* [*Tribute to Louis Favoreu*], 5 INT'L J. CONST. L. 17, 21 (2007).

49. *See* Favoreu, *supra* note 37, at 190–92.

But that process of constitutionalization of law, we should warn, is encountering vigorous resistance from more traditional sectors that see it as an usurpation of the powers of the Council of State and the Court of Cassation.[50]

In countries where democracy arrived later, such as Portugal (1976), Spain (1978), and Brazil (1988), the constitutionalization of the law is a more recent—and perhaps more intense—phenomenon.[51] In Brazil, particularly, due to its extensive and analytical Constitution, the constitutionalization of law has taken on two important dimensions: a) the inclusion in the Constitution of principles related to multiple areas of the Law, including civil, administrative, criminal, procedural, and other area, and b) the projection of fundamental constitutional principles; such as human dignity, in the different domains of sub-constitutional law, giving new meaning and scope to their norms and institutions. Associated with the constitutionalization of law, one can note the existence of an extensive and profound process of judicialization of social relations and politically controversial issues that have sparked debate regarding the role of the judiciary and the legitimacy of its decisions.

The trajectory described above can be called the "Americanization" of constitutional law in the civil law world. American constitutionalism has since its inception been characterized by the central role of the American constitution, the constitutionalization of fundamental rights, the subordination of the entire legal system to the constitutional principles, and the primacy of the judicial branch in interpreting the constitution. Its theoretical foundation can be found in *The Federalist* and concrete precedents have been established since 1803.[52] The 'model that conquered the world' however, is experiencing today a moment of domestic crisis. Described below is the American constitutional experience, with emphasis on Supreme Court case law of the past sixty years.

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50. *See generally* GUILLAUME DRAGO, BASTIEN FRANÇOIS & NICOLAS MOLFESSIS, LA LÉGITIMITÉ DE LA JURISPRUDENCE DU CONSEIL CONSTITUTIONNEL [THE LEGITIMACY OF THE CONSTITUTIONAL COUNCIL'S CASE LAW] (1999).

51. SAMUEL P. HUNTINGTON, THE THIRD WAVE: DEMOCRATIZATION IN THE LATE TWENTIETH CENTURY 57, 126 (1991); Gardbaum, *supra* note 31, at 715. Regarding the protection of human rights in Spain and Europe, *see generally* LORENZO MARTÍN-RETORTILLO BAQUER, VÍAS CONCURRENTES PARA LA PROTECCIÓN DE LOS DERECHOS HUMANOS [CONCURRENT AVENUES FOR THE PROTECTION OF HUMAN RIGHTS] (2006).

52. *See generally*, ROY P. FAIRFIELD, THE FEDERALIST PAPERS (1981) [hereinafter FAIRFIELD].

IV. THE AMERICAN CONSTITUTIONAL MODEL, THE RISE OF CONSERVATISM AND THE DECLINE OF THE ROLE OF THE SUPREME COURT

A. Marbury v. Madison: *The Foundation of Constitutional Jurisdiction*[53]

Marbury v. Madison was the first decision in which the Supreme Court asserted its power to exercise judicial review, denying the application of laws that, according to its interpretation, were unconstitutional. It should be noted that the Constitution did not explicitly give the Supreme Court or any other judicial body this kind of authority. When it decided this case, the Court tried to demonstrate that judicial review was a logical outgrowth of the existing constitutional system. The arguments presented by Chief Justice John Marshall regarding the supremacy of the Constitution, the need for judicial review, and the authority of the Judiciary in this matter are considered magnificent.[54]

Marshall enunciated the three bases for justifying judicial review. First, he pointed to the supremacy of the Constitution: "Certainly all those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation."[55] Second, and as a natural consequence of the established premise, he affirmed the nullity of any law

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53. *See generally* PAUL C. BARTHOLOMEW & JOSEPH F. MENEZ, SUMMARIES OF LEADING CASES ON THE CONSTITUTION (1983); FAIRFIELD, *supra* note 52; MICHAEL J. GLENNON, DONALD E. LIVELY, PHOEBE A. HADDON, DOROTHY ROBERTS, RUSSELL L. WEAVER, A CONSTITUTIONAL LAW ANTHOLOGY (1997); GERALD GUNTHER, CONSTITUTIONAL LAW (1985) [hereinafter GUNTHER]; W. DUANE LOCKARD & WALTER F. MURPHY, BASIC CASES IN CONSTITUTIONAL LAW (1992); WILLIAM LOCKHART, YALE KAMISAR, JESSE H. CHOPER, & STEVEN H. SHIFFIN, CONSTITUTIONAL LAW (1986); WALTER F. MURPHY, JAMES E. FLEMING, & WILLIAM F. HARRIS, AMERICAN CONSTITUTIONAL INTERPRETATION (1986); JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW (2000); THE OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES (Kermit L. Hall ed., 2005) [hereinafter OXFORD COMPANION]; THE OXFORD GUIDE TO UNITED STATES SUPREME COURT DECISIONS (Kermit L. Hall ed., 1999) [hereinafter OXFORD GUIDE]; GEOFFREY R. STONE, LOUIS M. SEIDMAN, CASS R. SUNSTEIN, & MARK V. TUSHNET, CONSTITUTIONAL LAW (2004); LAURENCE TRIBE, AMERICAN CONSTITUTIONAL LAW (1988); Susan Bloch & Maeva Marcus, *John Marshall's Selective Use of History in Marbury v. Madison*, 1986 WIS. L. REV. 301 (1986).

54. But it was neither pioneering nor original. In fact, there were precedents identifiable in various periods of history, since ancient times, and even in the United States that argument had already been used in colonial times, based on English law, or in lower federal and state courts. In addition, on the theoretical level, Alexander Hamilton, in Federalist Paper no. 78, had analytically explained the theory in 1788. Nevertheless, it was in *Marbury v. Madison* that it conquered the world and successively withstood various shades of political and doctrinal resistance. *See* MAURO CAPPELLETTI, O CONTROLE JUDICIAL DE CONSTITUCIONALIDADE DAS LEIS NO DIREITO COMPARADO [JUDICIAL CONTROL OF THE CONSTITUTIONALITY OF THE LAWS IN COMPARATIVE LAW] 57 (1984); FAIRFIELD, *supra* note 52, at 51; GUNTHER, *supra* note 53, at 21; OXFORD COMPANION, *supra* note 53, at 174.

55. *Marbury*, 5 U.S. at 177.

that goes against the Constitution: "an act of the legislature repugnant to the constitution is void."[56] And finally, in the most controversial point of all in his decision, Marshall asserted that the judicial branch is the final interpreter of the Constitution:

> It is emphatically the province and duty of the judicial department to say what the law is . . . . If two laws conflict with each other, the courts must decide on the operation of each . . . . If then the courts are to regard the constitution; and the constitution is superior to any ordinary act of the legislature; the constitution, and not such ordinary act, must govern the case to which they both apply.[57]

Marshall's opinion clearly reflects his own political circumstances. By establishing the authority of the judiciary to review the acts of the executive and legislative branches based on the Constitution, he defined his own power—power that he would exercise for the thirty-four long years as he presided over the Court.[58] However, that decision brought a touch of political sagacity that cannot be eclipsed by Marshall's personal gains from the decision. Jefferson and other Republicans would never simply accept the arguments set forth therein—rhetoric that effectively gave the judiciary a certain power over the other two branches of government. Yet, rhetoric aside, Marshall never ordered Jefferson or the Republicans to do anything—on the contrary, in reality, it was their will that prevailed—so they had no reason to disobey or challenge the decision. Later, as the turbulence of the period when the decision was rendered and the specific aspects of the actual case became more distant with the passing of time, the decision acquired greater dimensions, becoming universally celebrated as

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56. *Id.*

57. *Id.* at 177–78.

58. In the historical sequence, and based on the federal model of government adopted in the United States, the Supreme Court established its authority to also exercise judicial review over state acts, laws and decisions against the Constitution and federal laws, hearing appeals against pronouncements of the state courts. In 1819, in judging the case of *McCulloch v. Maryland*, it once again examined the constitutionality of a federal law (by which Congress instituted a national bank), which, however, was recognized as valid. 17 U.S. 316, 437 (1819). Not until 1857, more than fifty years after the decision in *Marbury v. Madison*, did the Supreme Court again declare a law unconstitutional, in the tragic decision handed down in *Dred Scott v. Sandford*, which sparked a discussion on the slavery issue and played an important role in the outbreak of the Civil War. 60 U.S. 393, 454 (1856).

the precedent that established the prevalence of the permanent values of the Constitution over the circumstantial will of legislative majorities.[59]

B. Warren's Legacy: Judicial Activism and the Protection of Fundamental Rights [60]

Earl Warren, who presided over the U.S. Supreme Court for sixteen years (1953–1969), left an indelible mark on the face of contemporary constitutional law. His affirmation of the equality of men and other individual rights inspired generations of civil rights activists, constitutionalists, and statesmen throughout the world. International enthusiasm for the Warren Court stemmed from one enticing idea: the idea that a progressive court of law could promote a humanistic revolution that the political majority was incapable of achieving. While reactionary minorities and complacent majorities are capable of retarding the historical process indefinitely, an intellectual vanguard committed to the advancement of civilization and the cause of humanity can clear the path and make way for social progress.

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59. Before going any further, it is time to make a relevant observation. Chapter III of this study is meant to present an objective analysis of constitutional interpretation and the judicial review exercised by the Supreme Court in the decisions it has made since the end of World War II. For this reason, we will not deal here with some periods in history that were important for American constitutional law, such as Reconstruction and the New Deal. Nor will we analyze conservative judicial activism based on substantive due process of law, which extends from the end of the 19th Century to the mid-1930s in the 20th Century. Known as the *Lochner Era*, it was characterized by the declaration of unconstitutionality of numerous laws that enabled the government to regulate the economy and promoted welfare rights. That period ended after Franklin Roosevelt's attack on the Supreme Court, which had continuously invalidated laws that allowed the government to intervene in economic and social systems. In 1937, in its decision in the case of *West Coast v. Parrish*, the Supreme Court gave in to the new times and the new political majorities by considering constitutional a state law that established a minimum wage for women. 300 U.S. 378, 399–400 (1937).

60. *See generally* ROBERT J. COTTROL, RAYMOND T. DIAMOND, & LELAND B. WARE, BROWN V. BOARD OF EDUCATION: CASTE, CULTURE, AND THE CONSTITUTION (2003) [hereinafter COTTROL]; PETER CHARLES HOFFER, WILLIAMJAMES HULL HOFFER & N.E.H. HULL, THE SUPREME COURT: AN ESSENTIAL HISTORY (2007) [hereinafter HOFFER]; MORTON J. HORWITZ, THE WARREN COURT AND THE PURSUIT OF JUSTICE (1998) [hereinafter HORWITZ]; EPSTEIN LEE & THOMAS G. WALKER, CONSTITUTIONAL LAW FOR A CHANGING AMERICA: INSTITUTIONAL POWERS AND CONSTRAINTS (1995); JIM NEWTON, JUSTICE FOR ALL: EARL WARREN AND THE NATION HE MADE (2006) [hereinafter NEWTON]; RICHARD H. SAYLER, BARRY B. BOYER, & ROBERT E. GOODING, JR., THE WARREN COURT: A CRITICAL ANALYSIS (1968) [hereinafter SAYLER ET AL.]; OXFORD GUIDE, *supra* note 53; Grier Stephenson Jr., *The Judicial Bookshelf*, 31 J. OF SUPREME CT. HIST. 298 (1990) [hereinafter Stephenson]; Michael E. Parrish, *Earl Warren and the American Judicial Tradition*, 1982 AM. B. FOUND. RES. J. 7. In the Portuguese Language, *see* Sergio Fernando Moro, *A Corte Exemplar: Considerações sobre a Corte de Warren* [*The Exemplary Court: Considerations about the Warren Court*], *in* 36 REVISTA DA FACULDADE DE DIREITO DA UNIVERSIDADE FEDERAL DO PARANÁ [JOURNAL OF THE FEDERAL UNIVERSITY OF PARANÁ'S LAW FACULTY] 337 (2001).

It is possible to warn of the idealist view sheltered under this belief, as well as the democratic risks involved. The truth is, however, that when Earl Warren stepped down as Chief Justice of the Supreme Court in 1969, segregation was no longer allowed in schools and other public facilities; arbitrary police action against poor and African-American populations was reduced; communists or suspected communists could no longer be exposed in a degrading manner that ruined their careers and lives; those accused of crimes could not be judged without an attorney; and the State could not invade a couple's home in search of contraceptives. All the profound changes mentioned above were made without any act of Congress or presidential decree.[61] Below is a brief summary of the emblematic case law produced by the Warren Court, responsible for overruling more than fifty precedents.[62]

The firm position in favor of racial desegregation is celebrated as the main contribution of the Warren Court to American constitutional law and to the cause of civil rights. *Brown v. Board of Education*,[63] decided in 1954, represented a legal rejection of the separate-but-equal doctrine established in *Plessy v. Ferguson*.[64] The Court in *Brown* considered the separation of white and colored children in public schools unconstitutional and demanded the adoption of an integration policy.[65] Warren succeeded in leading the Supreme Court to an unanimous decision consisting of just eleven pages, a decision that did not emphasize legal aspects—such as the meaning and scope of the Fourteenth Amendment or the overruling of *Plessy*—but rather the inherent inequality that existed in discrimination in education-related matters.[66] The Court traced this inequality to the feeling of inferiority it produced in African-American children, as demonstrated by

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61. NEWTON, *supra* note 60, at 405.

62. Stephenson, *supra* note 60, at 306.

> The Warren Court was both busy and consequential, and was one of the most remarkable in judicial history. By one count, in the approximately 150 years before President Dwight Eisenhower's appointment of the fourteenth Chief Justice in 1953, the High Court had overruled seventy-five of its own precedents. During Warren's sixteen years in the center chair, the Court added another fifty-four to the list.

Id.

The author is here refering to LEE EPSTEIN, JEFFREY A. SEGAL, HAROLD J. SPAETH, & THOMAS G. WALKER, THE SUPREME COURT COMPENDIUM: DATA, DECISIONS, & DEVELOPMENTS 129–37 (1994).

63. 347 U.S. 483, 495 (1954).

64. 163 U.S. 537, 547 (1896).

65. 347 U.S. at 487–88.

66. *Id.* at 486–97.

psychological studies expressly taken into account in the opinion.[67] The effects of that historical decision were projected over future decades.[68]

The Warren Court also succeeded in overcoming prejudice with respect to the rights of suspects facing criminal investigation or prosecution. In *Mapp v. Ohio* (1961), the Court declared that evidence obtained illegally was inadmissible in a court of law because it violated the Fourth Amendment, which prohibits unreasonable searches and seizures.[69] In *Gideon v. Wainright* (1963), it extended to the state courts the obligation to provide a defense attorney for criminal suspects that could not afford to hire one.[70] In *Miranda v. Arizona* (1966),[71] the Court ruled that the suspect must be informed of his/her right to consult an attorney, to remain silent and not to incriminate him/herself. The Supreme Court also confronted the anti-communist hysteria and witch-hunt that was inspired by the cold war.[72] In numerous cases decided in 1956 and 1957, the Court tried to prevent the shameful public persecution of communists or persons suspected of being

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67. *Id.* at 494, n.11 (citing K. B. CLARK, EFFECT OF PREJUDICE AND DISCRIMINATION ON PERSONALITY DEVELOPMENT (Midcentury White House Conference on Children and Youth) (1950); WITMER AND KOTINSKY, PERSONALITY IN THE MAKING (1952), ch. VI; Deutscher and Chein, *The Psychological Effects of Enforced Segregation: A Survey of Social Science Opinion*, 26 J. PSYCHOL. 259 (1948); Chein, *What are the Psychological Effects of Segregation Under Conditions of Equal Facilities?*, 3 INT. J. OPINION AND ATTITUDE RES. 229 (1949); Theodore Brameld, *Educational Costs*, *in* DISCRIMINATION AND NATIONAL WELFARE 44–48 (MacIver, ed., 1949); E. FRANKLIN FRAZIER, THE NEGRO IN THE UNITED STATES 674–81 (1949). *See generally* GUNNAR MYRDAL, AN AMERICAN DILEMMA (1944)).

68. The first great effect of the *Brown* decision was symbolic, serving as encouragement and motivation for the African-American community in general, which began to articulate compliance with the decision and other political and social advancements. The decision also sparked a significant reaction, especially in the southern states, with challenging statements by politicians and authorities threatening to disobey. Since the decision did not explain how it should be implemented, a new pronouncement by the Court known as *Brown II* was necessary, about a year later, reiterating the unanimous opinion of the judges and determining that integration should be carried out "as quickly as possible." 349 U.S. 294 (1955). In practice, the battle for accomplishing concrete desegregation was transferred to the district courts and would also take many years to complete. *See* COTTROL, *supra* note 60, at 187. In 1967, Thurgood Marshall, chief counsel for the National Association for the Advancement of Colored People (NAACP), that had filed the *Brown v. Board of Education* suit and, before it, numerous other suits, became the first African-American to be appointed to the Supreme Court. 347 U.S. at 484.

69. 367 U.S. 643, 659–60 (1961).

70. 372 U.S. 335, 344 (1963).

71. 384 U.S. 436, 498–99 (1966).

72. Interestingly enough, President Eisenhower had appointed four Supreme Court Justices who by this time were accused of defending communists: Warren, Brennan, Harlan and Whittaker. *See* NEWTON, *supra* note 60, at 354.

communists.[73] For this action, the Supreme Court, which had already encountered widespread resistance to its position on racial issues, found itself criticized by those who considered the Court too soft on communists.

Various historians (as well as Warren) consider the Supreme Court's most relevant action during the period to have been one of a far lower profile: the reapportionment of electoral districts.[74] In many states, electoral district divisions tended to favor traditional political oligarchies and diminished the electoral influence of African-American voters. In *Baker v. Carr* (1962),[75] the Court rejected the proposition that this was a political issue that belonged to the legislative (rather than judicial) branch.[76] In that case, the Court agreed to review and redefine the electoral districts—a decision that was later affirmed in *Reynolds v. Simms*[77] and *Lucas v. Colorado General Assembly.*[78] In so doing, the Supreme Court reiterated the core of democratic constitutionalism: that not even a majority can violate the fundamental rights of a minority.[79] Later on, the Court upheld the constitutionality of the Voting Rights Act of 1965, which prohibited measures that tended to hinder the registration of African-American voters.[80]

The Warren Court transferred the focus of the Supreme Court's decisions from property rights to personal rights. In the area of freedom of speech, such decisions as *New York Times v. Sullivan* (1964)[81] and

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73. *See* Serv. v. Dulles, 354 U.S. 363, 388–89 (1957); Yates v. United States, 354 U.S. 298, 337–38 (1957); Sweezy v. New Hampshire, 354 U.S. 234, 266–67 (1957); Watkins v. United States, 354 U.S. 178, 213–16 (1957); Jencks v. United States, 353 U.S. 657, 670–72 (1957); Pennsylvania v. Nelson, 350 U.S. 497, 508 (1956).

74. *See* NEWTON, *supra* note 60, at 388; SAYLER ET AL., *supra* note 60, at 3.

75. 369 U.S. 186, 236–37 (1962).

76. Colegrove v. Green, 328 U.S. 549, 556 (1946).

77. 377 U.S. 533, 586–87 (1964).

78. 377 U.S. 713, 739 (1964).

79. *Id.* at 736.

> An individual's constitutionally protected right to cast an equally weighted vote cannot be denied even by a vote of a majority of a State's electorate, if the apportionment scheme adopted by the voters fails to measure up to the requirements of the Equal Protection Clause . . . . A citizen's constitutional rights can hardly be infringed simply because a majority of the people choose that it be.

Id.

80. *See* Katzenbach v. Morgan, 384 U.S. 641, 658 (1966); Harper v. Va. Bd. of Elections, 383 U.S. 663, 670 (1966); South Carolina v. Katzenbach, 383 U.S. 301, 336–37 (1966).

81. 376 U.S. 254, 292 (1964). Considered a landmark decision in matters of freedom of speech, it established the actual malice requirement for obtaining reparation of damages in actions filed

Brandenburg v. Ohio (1969)[82] paved the way for a strong and free press. In *Griswold v. Connecticut* (1965),[83] the Court upheld the right of privacy by recognizing, based on the Ninth Amendment, the existence of rights not explicitly put forth in the Bill of Rights. Also in the area of racial equality, the Court unanimously declared in *Loving v. Virginia* (1967)[84] that laws prohibiting interracial marriage in Virginia and sixteen other states were unconstitutional. In *Engel v. Vitale* (1962),[85] it determined that daily prayer readings in public schools constituted violations of the First Amendment (Establishment clause).

Contrary to popular belief, the Warren Court era was not an uninterrupted succession of progressive decisions arrived at unanimously or by broad majority vote. On the contrary, in spite of the Court's unanimous decision in *Brown v. Board of Education*, the Court remained divided for many years between those who advocated judicial activism and those who advocated judicial self-restraint. Warren and the activist majority assumed effective control only after the retirement in 1962 of Justices Whittaker and Frankfurter—the latter being a leading opponent of judicial activism—and the subsequent appointments made by John Kennedy, who had taken office the year before. Warren himself retired in 1969, after a frustrated attempt to give Lyndon Johnson the chance to make his successor.[86] Although Warren's name was invariably associated with judicial activism, it is clear from a historical perspective that the Warren Court was also remarkable for

against the press for libel. Actual malice means awareness of the false nature of the accusation or total negligence as to the verification of its veracity.

82. 395 U.S. 444, 447 (1969) (holding that a speech at a public event can only be considered a crime if there is intent to incite or produce imminent illegal acts and if there is probable cause to believe they would occur).

83. 381 U.S. 479, 485–86 (1965) (holding that a state law prohibiting the use of contraceptives, as well as counseling on the use of contraceptive methods, violates the privacy of the couple).

84. 388 U.S. 1, 12 (1967).

85. 370 U.S. 421, 436 (1962).

86. In June, 1968, Warren delivered his letter communicating his intention of retiring. It is conventional knowledge that, due to the likeliehood of Richard Nixon winning the election that year, the Chief Justice wanted to give the President the opportunity to choose his successor on the Court. Lyndon Johnson indicated Abe Fortas, who had already been on the Supreme Court since 1965 as an Associate Justice. Fortas' candidacy, however, was rejected in the Senate for a number of reasons: the weakness of a President who was at the end of his term and would not run for reelection; the critical view that many Senators had of the Court's position on topics such as crime and obscenity; and circumstances associated with Fortas' personality and certain attitudes. On this subject, *see* LAURA KALMAN, ABE FORTAS 327 (1990); NEWTON, *supra* note 60, at 491; OXFORD COMPANION, *supra* note 53, at 356–57.

its construction of an inclusive democracy,[87] its humanist vision of social problems, and its role in the advancement of civil and individual rights, including those not listed in the Constitution.

C. The Swing of the Pendulum: The Rise of Conservatism and the Debate on Judicial Self-Restraint

1. The Burger Court[88]

With the election of Richard Nixon in 1968, the country's political agenda shifted to the right, generating pressure for a more conservative and less activist Supreme Court. The Chief Justice's vacancy resulting from Earl Warren's retirement was filled by Warren Burger, an attorney with political ties to the Republican Party who had sat on the U.S. Court of Appeals for the District of Columbia since 1956. Burger was opposed to the case law produced by the Warren Court, especially in criminal matters, and was a critic of judicial activism. Those were the decisive reasons for choosing him.

In addition to the Chief Justice, Nixon would also appoint three other Associate Justices during his presidency.[89] Those appointments, however, did not produce the kind of case law turnaround that was desired. Though there is no denying the fact that the Burger Court (1969–1986) represented a movement in favor of conservative principles, it did not amount to the

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87. *See* HORWITZ, *supra* note 60, at 115 ("The Warren Court's inclusive idea of democracy was built on the revival of the Equal Protection Clause in *Brown*. It then spread beyond race cases to cover other outsiders in American society: religious minorities, political radicals, aliens, ethnic minorities, prisoners and criminal defendants.").

88. *See generally* VINCENT BLASI, THE BURGER COURT: THE COUNTER-REVOLUTION THAT WASN'T (1983) [hereinafter BLASI]; HOFFER, *supra* note 60; OXFORD COMPANION, *supra* note 53; BERNARD SCHWARTZ, THE ASCENT OF PRAGMATISM: THE BURGER COURT IN ACTION (1990); Robert F. Nagel, *On Complaining about the Burger Court*, 84 COLUM. L. REV. 2068 (1984); Gene Nichol, Jr., *An Activism of Ambivalence*, 98 HARV. L. REV. 315 (1984) [hereinafter Nichol]; Mark Tushnet, *The Optimist's Tale*, 132 U. PA. L. REV. 1257 (1984) [hereinafter Tushnet, *Optimist*].

89. They were: Harry Blackmun, Lewis Powell, Jr., and William Rehnquist. Gerald Ford appointed John Paul Stevens. The Burger Court was complete with Ronald Reagan's first appointment, Sandra Day O' Connor. Regarding the role of each of these Justices, *see* HOFFER, *supra* note 60, at 369.

> Harry Blackmun moved from the right to the left on the Court. William H. Rehnquist would prove to be an able ally, but Warren Burger and Lewis Powell turned out to be conservative centrists . . . . John Paul Stevens would join the liberal wing of the Court, and . . . . Sandra Day O'Connor proved to be a liberal on a number of issues and a moderate on many more.

Id.

'counter-revolution' feared by many liberals.[90] And this Court was certainly not characterized by self-restraint. The truth is that with its comings and goings, its indecision and contradictory signals, the Burger Court cannot be considered homogenous. In some areas it undoubtedly signified a retreat from the opinions of its predecessors. In others, however, it was surprisingly progressive, despite the lack of its Chief Justice's enthusiasm—or vote.

One area in which the Court took a step backwards was in relation to the rights of suspects in criminal proceedings, a topic in which the Court's case law became aligned with the debate on law and order and increase in police discretion. The Burger Court produced a set of exceptions, limitations, and qualifications that reduced the scope of the case law produced by the Warren Court,[91] especially with regard to the characterization of illegal evidence (exclusionary rule)[92] and the Miranda rights.[93] Perhaps more important than the substantive changes that took place in this area were the procedural changes. For instance, the Court reduced the scope of *habeas corpus* and the possibility of gaining access to federal courts.[94] Regarding the death penalty, in spite of the decision in

90. Tushnet, *Optimist*, *supra* note 88, at 1257.

91. HOFFER, *supra* note 60, at 402.

92. For cases attacking the decision in *Mapp v. Ohio*, *see* United States v. Leon, 468 U.S. 897, 905–06 (1984); Illinois v. Gates, 462 U.S. 213, 224 (1983); Washington v. Chrisman, 455 U.S. 1, 9–10 (1982); Stone v. Powell, 428 U.S. 465, 486 (1976); Schnekloth v. Bustamonte, 412 U.S. 218, 270–71 (1973).

93. As indicated above, in *Miranda v. Arizona*, the Court decided that suspects in criminal cases must be informed of their right to consult an attorney and the right to remain silent and not to incriminate themselves. *See* N.Y. v. Quarles, 467 U.S. 649, 673–74 (1984); R.I. v. Innis, 446 U.S. 291, 302 (1980); Mich. v. Tucker, 417 U.S. 433, 451–52 (1974); Harris v. New York, 401 U.S. 222, 224 (1971). *See also* Cyril D. Robinson, *The Criminal Procedure Political Connection:* Miranda *Before and After*, 10 LAW & SOC. INQUIRY 427 (1985).

94. Nichol, *supra* note 88, at 319–20.

> The Burger Court has reversed these (the Warren Court) procedural trends. The Court has firmly closed the doors to broad habeas corpus review . . . . The Court has managed, however, to narrow much of the supervisory authority of the federal judiciary. As a result of access limitations, state criminal and federal administrative decision-making has become increasingly insulated from direct federal judicial review. The Burger Court has indirectly narrowed constitutional protections by limiting the procedures available to vindicate them.

Id.

Furman v. Georgia (1972),[95] the Supreme Court later validated most of the state laws that were re-written after that decision.[96]

Another field in which the Burger Court did not achieve the same level of unity and clarity of purpose as the Warren Court was racial equality. In *Griggs v. Duke Power Co.* (1971),[97] for example, the Burger Court followed in the footsteps of the Warren Court in dealing with employment discrimination. In *Fullilove v. Klutznick* (1980), it declared to be constitutional a law enacted by Congress earmarking ten percent of the revenue budgeted for public works for the hiring of companies owned by members of minority groups.[98] However, in *Regents of the University of California v. Bakke* (1978),[99] it considered the quota system for admission to the University invalid, even though it upheld the constitutionality of affirmative action programs in favor of minorities.[100]

The Burger Court rendered a particularly significant decision in *United States v. Nixon* (1974).[101] As a result of unfolding events in the Watergate Case, the Court rejected the allegation of executive immunity and privilege and ordered the President's Cabinet to hand over tape recordings to the special prosecutor who was investigating the case. The tapes were incriminating and three weeks after the decision, the President resigned. However, other than the circumstances and passions of Watergate, in decisions such as *Dames & Moore v. Reagan* (1981)[102] and *Nixon v.*

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95. 408 U.S. 238, 239–40 (1972) (holding that the death penalty as established in Georgia and Texas legislation was unconstitutional due to violation of the Eighth Amendment's prohibition against "cruel and unusual punishment").

96. Mark A. Graber, *Constructing Judicial Review*, 8 ANN. REV. OF POL. SCI. 425, 442 (2005) [hereinafter Graber].

> The death penalty seemed moribund when conservatives came to judicial power. The Supreme Court in 1972 declared unconstitutionally arbitrary all state laws imposing capital punishment (*Furman v. Georgia* 1972). The Burger and Rehnquist Courts then sustained most rewritten state statutes, despite evidence that substantial arbitrariness remains in the death sentencing process.

Id.

97. 401 U.S. 424, 436 (1971) (holding, by a vote of eight to zero (Brennan did not participate), unconstitutional, for purposes of hiring and promoting employees, tests and requirements that produced a disparate impact on African-American candidates).

98. 448 U.S. 448, 458, 492 (1980).

99. 438 U.S. 265, 320 (1978). The decision was made by a four-to-four divided Court. The decisive vote was that of Justice Lewis Powell.

100. HOFFER, *supra* note 60, at 380; OXFORD COMPANION *supra* note 53, at 124.

101. 418 U.S. 683, 713 (1974).

102. 453 U.S. 654, 662–63, 688 (1981). Here, the Court considered valid Executive Order 12170 which, implementing the agreement with Iran, extinguished judicial actions, nullified attachments and transferred existing claims to a recently created arbitral tribunal.

Fitzgerald (1982),[103] the Court established a pattern of deference to the executive branch.[104] In *Immigration and Naturalization Service v. Chadha* (1983), the Court considered the "congressional veto" unconstitutional—that is, Congress' annulment of an act performed by an administrative agency—on the grounds that it violated the principle of separation of powers.[105]

The Burger Court's decisions in the area of women's rights were particularly celebrated. The Court issued a continuous series of decisions declaring laws that discriminated on the basis of gender unconstitutional. In *Reed v. Reed* (1971), the Supreme Court declared unconstitutional an Idaho state law that established that males had preference over females to be appointed administrators of estates.[106] In *Frontiero v. Richardson* (1973), the Court deemed unconstitutional rules allowing male members of the armed forces to declare their wives as dependents while female military personnel could not do the same with respect to their husbands.[107] Particularly significant in this area was the decision made in *Craig v. Boren* (1976), less for the peculiarities of the case than for the fact that it led to the requirement that classifications based on gender had to be submitted to a heightened scrutiny, known as intermediate level scrutiny.[108]

The Burger Court also decided a case relating to women's rights that can be considered one of the most impactful in American history: *Roe v. Wade* (1973).[109] In deciding the case, the Court recognized the existence of a constitutional right to have an abortion.[110] In so doing, the Court invalidated most of the state laws that had prohibited abortion up to that point. *Roe* triggered a national debate that is still ongoing, with political, religious, and moral components that are dividing American society between those who favor abortion (*pro-choice*) and those who oppose it

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103. 457 U.S. 731, 757–58 (1982) (deciding that the President enjoys absolute immunity from liability for damages resulting from his official acts).

104. *See* Vincent Blasi, *The Rootless Activism of the Burger Court*, *in* BLASI, *supra* note 88, at 202 (1983).

105. 462 U.S. 919, 959 (1983).

106. 404 U.S.71, 77 (1971).

107. 411 U.S. 677, 690–91 (1973).

108. 429 U.S. 190, 210 (1976). The Court considered that an Oklahoma law prohibiting the sale of beer to men younger than twenty-one but permitting its acquisition by women age eighteen and older violated the equal protection clause. Justice William Brennan wrote the decision that developed the stricter scrutiny idea by which inequality based on gender "must serve important governmental objectives and must be substantially related to those objectives." *Id.* at 197. Rehnquist and Burger dissented.

109. 410 U.S. 113, 166 (1973).

110. *Id.* at 153.

(*pro-life*). The fundamental principle involved in the decision was right of privacy, which is derived from the due process of law clause in the Fourteenth Amendment.[111] It is undeniable, however, that *Roe v. Wade* could be reclassified as a case involving sexual equality, insofar as it is women who suffer the consequences of an unwanted pregnancy. The case, therefore, represents an imporant step forward for women's liberation. The Burger Court, however, did not dare take this a step further; the Court refused to extend the right of privacy to same-sex relationships.[112]

The Court also handed down important decisions related to freedom of speech. In *New York Times v. United States* (1971), also known as the "Pentagon Papers Case," the Supreme Court ruled that the Nixon Administration failed to justify the need for prior restraint in the name of national security to prevent the publication of a report on the Vietnam War that was leaked to the press. [113] In deciding cases such as *Bigelow v. Virginia* (1975)[114] and *Virginia Bd. of Pharmacy v. Virginia Consumer Council* (1976),[115] the Court extended First Amendment protections to commercial speech. Less praiseworthy was the Court's decision in *Branzburg v. Hayes* (1972), which denied a journalist's right to protect the confidentiality of his source.[116] Even more controversial was the stance adopted in *Buckley v. Valeo* (1976).[117] In that decision, the Court considered the legal imposition of limitations on individual election campaign contributions valid but struck down provisions restricting campaign spending, on the grounds that the limits imposed interfered with freedom of political speech, thus violating the First Amendment.[118]

Critics of the Burger Court often emphasize its activism in favor of the prerogatives of private property and indifference towards the poor in general.[119] In spite of its decision in *Roe v. Wade*, the Court declined to

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111. U.S. CONST. amend. XIV; *Roe*, 410 U.S. at 152–53.

112. Bowers v. Hardwick, 478 U.S. 186, 192 (1986).

113. 403 U.S. 713, 714 (1971).

114. 421 U.S. 809, 829 (1975).

115. 425 U.S. 748, 773 (1976).

116. 408 U.S. 665, 709 (1972).

117. 424 U.S. 1, 143–44 (1976).

118. *Id.* at 143.

119. Tushnet, *Optimist*, *supra* note 88, at 1270.

> With this insight it is indeed possible to find the roots of the Burger Court's activism. They lie in the philosophy that the government as a whole has the duty to protect the prerogatives of property and that no part of the government has the duty to minimize the harms that lack of property inflicts on those so unfortunate not to have enough.

recognize an obligation on the government's part to make the exercise of that right accessible to those who could not afford it.[120] Moreover, the Court introduced property as a "new variable"[121] in the set of values protected by the First Amendment, in such decisions as *Buckley v. Valeo* (1976),[122] dealing with election campaign financing, and *Central Hudson Gas & Electric Corp. v. Public Service Commission* (1980),[123] on the subject of commercial speech. Finally, as noted above, the Burger Court restricted access by the very poor to the federal courts, thus diminishing the protection of constitutional rights.[124]

2. The Rehnquist Court[125]

The liberal wave that began in the late 1950s had ended by the time Ronald Reagan replaced Jimmy Carter as president in 1981. The Republican Party then remained in the White House for three consecutive terms of office. While in power, Reagan and the Republicans promoted a conservative political agenda, an economic view based on *laissez-faire,* and

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Id.

120. In *Maher v. Roe*, the Court considered constitutional the Connecticut legislation that granted medicaid only for abortions that were medically necessary. 432 U.S. at 464, 469–80 (1977) ("The Equal Protection Clause does not require a state participating in the Medicaid program to pay the expenses incident to non-therapeutic abortions for indigent women simply because it has made a policy choice to pay expenses incident to childbirth."). Later, in *Harris v. McRae*, the Court considered constitutional a federal law that prohibited the use of federal funds for the performance of abortions, whether medically necessary or not. 448 U.S. at 297, 326–27 (1980).

121. Norman Dorsen & Joel M. Gora, *The Burger Court and Freedom of Speech, in* BLASI, *supra* note 88, at 30 (1983).

122. 424 U.S. at 143.

123. 447 U.S. 557, 571–72 (1980).

124. Robert W. Bennett, *The Burger Court and the Poor, in* BLASI, *supra* note 88, at 57–61 (1983).

125. *See generally* HOFFER, *supra* note 60; THOMAS TANDY LEWIS, U.S. SUPREME COURT (2007); OXFORD COMPANION, *supra* note 53; THE OXFORD COMPANION TO AMERICAN LAW (Kermit Hall ed., 2002); MARK TUSHNET, A COURT DIVIDED: THE REHNQUIST COURT AND THE FUTURE OF CONSTITUTIONAL LAW (2005); THE REHNQUIST LEGACY (Craig M. Bradley ed., 2005); Erwin Chemerinsky, *Assessing Chief Justice William Rehnquist*, 154 U. PA. L. REV. 1334 (2006); Lyle Denniston, *Rehnquist to Roberts: The "Reagan Revolution" Fulfilled?*, 6 U. PA. L. REV. 63 (2006) [hereinafter Denniston]; Henry F. Fradella, *Legal, Moral, and Social Reasons for Decriminalizing Sodomy*, 18 J. OF CONTEMP. CRIM. JUST. 289 (2002); Graber, *supra* note 96; Daniel M. Katz, *Institutional Rules, Strategic Behavior and the Legacy of Chief Justice William Rehnquist: Setting the Record Straight on Dickerson v. United States*, 22 J. L. & POL. 28 (2006); Thomas Merrill, *The Making of the Second Rehnquist Court*, 47 ST. LOUIS U. L.J. 569 (2003) [hereinafter Merrill]; John M. Nannes, *The Lone Dissenter*, 31 J. OF SUPREME CT. HIST. 12 (2006); Wendy E. Parmet, *The Supreme Court Confronts HIV: Reflections on Bragdon v. Abbott*, 26 J.L. MED. & ETHICS 227 (1998).

a morally-themed drive based on religion. The name of William Rehnquist, who was appointed to the Supreme Court as an Associate Justice by Richard Nixon in 1972, emerged as the natural successor to Warren Burger.[126] Rehnquist was the most conservative judge on the Burger Court. While on the Court, Rehnquist's opinions represented the ideal of self-restraint, deference to the executive branch, strict constructivism (particularly with respect to overruling the decision in *Roe v. Wade*, which had become a Republican obsession).[127] Rehnquist remained on the Court for a total of thirty-three years, nineteen of those years as Chief Justice, from 1986 to 2005.

The Rehnquist Court passed through various phases,[128] as a consequence of its composition and the ability of its Chief Justice to rally majorities behind his opinions. The initial purpose of Rehnquist's appointment to the Court—to review decisions considered liberal and collaborate in implementing a conservative political project—was only partially realized. The Rehnquist Court made major changes in such areas as federalism, religion, and property rights. At the same time, the Court never overturned the *Roe v. Wade* or *Miranda v. Arizona* decisions. Even in the area of affirmative action, the door was not entirely closed,[129] in spite of the multiple demands and qualifications introduced by the Court's case law. Notwithstanding the Chief Justice's dissenting vote, advancements were even achieved in some matters, such as extending the right of privacy to same-sex relationships. Below is a brief analysis of the Court's performance in some relevant areas.

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126. Warren Burger retired as Chief Justice in 1986, having assumed the position of chairman of the Commission on the Bicentennial of the U.S. Constitution. OXFORD COMPANION, *supra* note 53, at 124.

127. Denniston, *supra* note 125, at 63 ("More than anything else in its domestic aspirations, the Reagan Administration wanted a more conservative Court, especially to raise the chances for overruling Roe v. Wade—that despised legacy of the Burger Court.").

128. *See* Merrill, *supra* note 125, at 569. In a lecture given in 2002, the author divided the Rehnquist Court period into two phases. The first, from 1986 to 1995, a period when many appointments were made to the Court, whose agenda included controversial social issues such as abortion and school prayer. In that phase, the Court was not able to advance the conservative agenda significantly. The second phase began in 1994, when the Court moved from social issues to structural issues, especially involving federalism. The conservative majority under the leadership of the Chief Justice, obtained significant success. *See also* Linda Greenhouse, *Foreword: The Third Rehnquist Court*, *in* THE REHNQUIST LEGACY xiv (Craig Bradley ed., 2005). The author here identified a third phase corresponding to the last two years of the Rehnquist Court, between 2002 and 2005, when social issues like gay rights and affirmative action were being discussed once again and there was a reflux in the "federalist revolution." In this period, Rehnquist already no longer succeeded in leading the Court in various decisions, voting with the minority.

129. HOFFER, *supra* note 60, at 419.

The Rehnquist Court was undeniably capable of achieving the project promoted by President Reagan and the conservatives with respect to states' rights. Under the influence of the Chief Justice, the balance between the federal and state governments was altered, placing limitations on the power of both the Congress and the Federal Judiciary. The "federalist revolution"—or the "new federalism"—was put into effect, especially via three lines of case law:[130]

a) Restriction of the power of Congress based on its constitutional authority to regulate interstate commerce (Art. I, Clause 3, Section 8);[131]
b) Rediscovery of the doctrine of the states' sovereign immunity, based on Amendments ten and eleven;[132] and
c) Resurrection of the state action doctrine in acts based on the Fourteenth Amendment.[133]

In conflicts between the government and individuals, the tendency of the Rehnquist Court was to side with the government. On the other hand, in

130. *Id.* at 436.

131. U.S. CONST. art. I, § 8, cl. 3 ("The Congress shall have Power . . . [T]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."). The question of the Commerce Clause, due to its relevance and impact on current Law, deserves a specific reference. Based on the authority to regulate interstate commerce, during the Franklin Roosevelt Administration, protectionist legislation was created that triggered a conflict between the President and the Supreme Court. From then on, for at least more than fifty years after the New Deal era, Congress expanded its powers. That situation of comfortable stability was confronted by the Rehnquist Court in a series of decisions made by a five-to-four vote. The first of these was *United States v. Lopez*, when the Supreme Court considered the Gun-Free School Zones Act, which typified the possession of firearms nears schools as being a federal crime, unconstitutional. The majority of the judges felt that there was no sufficient connection between possession of firearms and interstate commerce that could legitimize a federal law. 514 U.S. 549, 567–68 (1995).

132. The doctrine of sovereign immunity of the states restricts the possibility of Congress passing laws subjecting the states to judicial actions. In *Seminole Tribe of Florida v. Florida* and in *Alden v. Maine*, the Supreme Court felt that the federal laws abolishing the jurisdictional immunity of the states violated the Eleventh Amendment. As a consequence, the states cannot be sued without their consent, either in federal courts (*Seminole*) or state courts (*Alden*). 517 U.S. 44, 76 (1996); 527 U.S. 706, 759–60 (1999).

133. In *DeShaney v. Winnebago County*, the Court decided that the Fourteenth Amendment did not authorize holding a state liable for a private act of violence against an individual (in this case, a child), even if it could have been avoided. 489 U.S. 189, 202–03 (1989). In *United States v. Morrison*, it argued that the Fourteenth Amendment did not provide a basis for enacting the Violence Against Women Act of 1994 [sic] because the law did not redress harm caused by the state but, rather, by private parties. 529 U.S. 598, 627 (2000).

disputes between the federal and state governments, the Court was inclined to favor the states, consequently invalidating federal legislation.[134]

Another central theme for the Rehnquist Court involved the rights of persons accused of crimes. During his time as Chief Justice, Rehnquist tried to restrict the effects of *Mapp v. Ohio* and *Miranda v. Arizona*.[135] In fact, the Court did limit the scope of those precedents in decisions like *Whren v. United States* (1996)[136] and *Atwater v. Lago Vista* (2001).[137] The Court ultimately (and to the surprise of many) upheld *Miranda* in *Dickerson v. United States* (2000),[138] where it gave *Miranda* express constitutional basis.[139] In more recent precedents related to the war on terror—*Hamdi v. Rumsfeld*[140] and *Rasul v. Bush*,[141]—the Court decided that detaineees—U.S. citizens or otherwise—could question their arrest in the United States courts. In *Padilla v. Rumsfeld* (2004),[142] however, it invalidated for procedural reasons the decision of the Court of Appeals that

134. OXFORD COMPANION, *supra* note 53, at 835.

135. HOFFER, *supra* note 60, at 436.

136. 517 U.S. 806, 818–19 (1996) (ruling that the police authority can conduct search and seizure on a car that was stopped for a traffic violation).

137. 532 U.S. 318, 354 (2001) (holding that the Fourth Amendment does not forbid a warrantless arrest for a minor criminal offense, such as a misdemeanor seatbelt violation punishable only by a fine).

138. 530 U.S. 428, 444 (2000). A federal law (18 USC § 3501 (2000)) established that "[A] confession . . . shall be admissible in evidence if it is voluntarily given." In the final analysis, that provision eliminated the requirement for prior warnings imposed in *Miranda*. The Court, in a seven to two decision, with Rehnquist—Scalia and Thomas dissenting—ruled that "Miranda announced a constitutional rule that Congress may not supersede legislatively . . . . We [therefore] decline to overrule Miranda ourselves."

139. Rehnquist had a harsh view in criminal matters, which was manifested, and noticeably so, in his opinions in relation to the death penalty, which he felt should be applied more frequently. In *McCleskey v. Kemp*, with his support, the Court considered irrelevant the fact that the statistics demonstrated the existence of racial discrimination against Negroes in the application of capital punishment. 481 U.S. 279, 290–91 (1987). In addition, he aligned himself to the majority on the Court in affirming the constitutionality of the execution of sixteen and seventeen year old adolescents, and cast a dissenting vote when the majority was against the execution of fifteen year olds and younger and "mentally retarded" persons. Atkins v. Virginia, 536 U.S. 304, 320–21 (2002); Thompson v. Oklahoma, 487 U.S. 815, 838 (1988); Stanford v. Kentucky, 492 U.S. 361, 380 (1989). In *United States v. Verdugo-Urquidez*, the Supreme Court ruled that the Fourth Amendment did not apply to search and seizure by American agents on non-American property abroad. 494 U.S. 259, 278 (1990). *See* HOFFER, *supra* note 60, at 434 ("From 2003 to 2005, the chief justice was in the majority in all eleven 5-to-4 criminal justice decisions expanding exceptions to the exclusionary rule and dissented in all nine of the 5-to-4 cases that reversed or remanded cases in which police or prosecutorial misconduct was alleged.").

140. 542 U.S. 507, 538–39 (2004).

141. 542 U.S. 466, 484–85 (2004).

142. 542 U.S. 426, 450–51 (2004).

had denied the President powers to arrest a U.S. citizen under the allegation that he was an enemy combatant.

In spite of the efforts of its Chief Justice and other Justices, the Rehnquist Court did not succeed in overruling *Roe v. Wade* and abolishing the right to abortion.[143] In three cases, however, the Court came very close to doing so, achieving a change in the law that was sought by conservative factions, religious groups, and by Presidents Reagan and Bush. In both cases, the Supreme Court produced sharply divided decisions, rife with confusion, and characterized by numerous dissents. The first of these was *Webster v. Reproductive Health Service* (1989),[144] whose objective was the constitutionality of a Missouri law that imposed a number of restrictions on the performance of abortions, including a prohibition against abortions in public hospitals or when involving a fetus more than twenty weeks old and considered viable.[145] The Court had already declared valid the impositions contained in the state legislation and had eliminated some of the premises established in this matter. Nevertheless, the Court in *Webster* emphasized that it was upholding the essence of the decision in *Roe v. Wade*.[146]

The second major decision came in the case of *Planned Parenthood v. Casey* (1992).[147] A law in Pennsylvania had imposed a series of requirements for allowing the performance of abortions, including informed consent, spouse notification, parental consent, and a twenty-four hour

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143. Bear in mind that Rehnquist had participated in the *Roe v. Wade* decision in 1973, having cast one of the two dissenting votes, next to Byron White. *Roe*, 410 U.S. at 115.

144. 492 U.S. 490, 492–93 (1989).

145. The state law declared in its preamble that "the life of each human being begins at conception" and imposed the following restrictions: public employees and public establishments could not be utilized to perform abortions, except if necessary to save the life of the mother; public funds, employees, or facilities could not be utilized to encourage or counsel a woman to have an abortion, except if necessary to save her life; and doctors must perform viability tests as of the twentieth week of pregnancy and could not perform an abortion on a viable fetus. *Id.* at 504, n.4; MO. REV. STAT. § 1.205 (1986).

146. By ruling valid the restriction against abortion after the twentieth week, the Court overturned one of the pillars of *Roe v. Wade*: that, during the first three months of pregnancy, the decision whether or not to have an abortion was the woman's right. However, the vote cast by the Chief Justice contained an exception: that the decision did not affect that precedent. *Webster*, 492 U.S. at 495.

> This case affords no occasion to disturb *Roe*'s holding that a Texas statute which criminalized all non-therapeutic abortions unconstitutionally infringed on the right to an abortion derived from the Due Process Clause. *Roe* is distinguishable on its facts, since Missouri has determined that viability is the point at which its interest in potential human life must be safeguarded.

Id.

147. 505 U.S. 833, 901 (1992).

waiting period.[148] Once again, by a five-to-four vote, the Court reaffirmed *Roe v. Wade*, although it upheld almost all the impositions in the law except spousal notification.[149] Finally, in *Stenberg v. Carhart* (2000), the Court examined the prohibition against a specific procedure known as "partial-birth abortion," striking down a Nebraska law.[150]

It has already been noted that it was very difficult for the Rehnquist Court to reach a consensus or even achieve a majority in many of its decisions. This also occurred in issues involving equal protection and affirmative action. Generally speaking, the Court tightened the criteria for allowing favorable treatment to certain groups due to past discrimination. As a result, it became more difficult to win lawsuits based on employment discrimination, with reversal of the burden of disparate impact.[151] The Court applied a rigorous constitutional test to the preferential treatment given to businesses owned by members of racial minorities in government programs and contracts.[152] In relation to the use of race as a criterion for college admission, the Supreme Court handed down two decisions on the same day that appeared to contradict one another. In *Grits v. Ballinger* (2003), it considered unconstitutional the criterion that gave a twenty-point bonus (one fifth of the points necessary for approval) to African-American, Hispanic, and Native American candidates.[153] However, in *Grutter v. Bollinger* (2003), in line with the precedent established in *Bakke*, the Court upheld the proposition that race and pursuit of diversity are legitimate factors—provided they are not the only factors—to be considered in the college admissions process.[154]

Two more social issues deserve mention. The first is the constitutional treatment of religion. With respect to this subject, Rehnquist was able to

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148. Abortions Control Act, 18 PA. CONS. STAT. § 3214 (1990).

149. *Planned Parenthood*, 505 U.S. at 901. The judgment was extremely divided, with no opinion gaining the endorsement of the majority. However, a plurality decision written by Justices Souter, O'Connor and Kennedy prevailed because different parts of its text were approved by at least two other justices. The majority decision revised the *Roe* rule of prevalence of the woman's interest during the first three months and replaced the criterion of heightened scrutiny, which was the standard in matters of fundamental rights, with a less rigorous one identified as "undue burden."

150. 530 U.S. 914, 945–46 (2000).

151. Ward's Cove Packing Co. v. Antonio, 490 U.S. 642, 660 (1989).

152. In *Richmond v. J.A. Croson Co.*, the Court considered unconstitutional the city's determination that 30 percent of its contracting work should go to minority owned businesses and established that special treatment based on racial criteria must pass a strict scrutiny review. 488 U.S. 469, 510–11 (1989). This line of orientation was reiterated in *Adarand Constructors v. Pena*. 515 U.S. 200, 221–22 (1995).

153. 539 U.S. 244, 275–76 (2003).

154. 539 U.S. 306, 343 (2003).

rally the Court behind his own views. Even before becoming Chief Justice, he had led the Court—by a slim majority—to affirm that public subsidies for religious schools did not violate the First Amendment's Establishment Clause.[155] Later on, Chief Justice Rehnquist wrote the decision in *Zelman v. Simmons-Harris* (2002), which upheld school vouchers and allowed children of low-income families to enroll in religious schools.[156] In *Van Orden v. Perry* (2005), he considered the constitutionality of a monument erected to the Ten Commandments that was placed at the entrance of the Texas State Capitol Building.[157] With respect to the rights of homosexuals, Rehnquist's opinion was victorious in *Boy Scouts of America v. Dale* (2000).[158] In that case, the Court permitted the exclusion of a member of a not for profit organization as a result of that member's assumed homosexuality.[159] However, the Chief Justice's opinion did not prevail in *Romer v. Evans* (1996), a case in which the Court declared unconstitutional an amendment to a state constitution that forbade any legislative, administrative or judicial acts meant to protect homosexuals.[160] Rehnquist also dissented in *Lawrence v. Texas* (2003),[161] a decision in which the Court overruled *Bowers v. Hardwick* (1986)[162] and held that the constitutional right to privacy protected homosexual relations between consenting adults.

With the Chief Justice's death in 2005, the Rehnquist Court, one of the most influential in American history, came to an end. The Court had at many points acted as a protagonist for the advancement of conservative thought. Many liberal goals were adversely affected, especially after Antonin Scalia and Clarence Thomas were appointed. Affirmative action

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155. Mueller v. Allen, 463 U.S. 388, 402–03 (1983) (allowing the income tax deduction of amounts paid to religious schools). Under Rehnquist's leadership, the Court extended constitutional protection to other situations. *See, e.g.*, HOFFER, *supra* note 60, at 423.

> The majority extended protection to religious films and public money spent for religious purposes, so long as the public authority had opened the space to all or allowed religious groups to use the funding, in *Lamb's Chapel v. Center Moriches Union Free Schools District* (1993), *Capitol Square Review Board v. Pinette* (1995), *Rosenberger v. Tolerable and Visitors* (195) [sic], *Bowens v. Kendrick* (1988), and *Zobrest v. Catalina Foothills School District* (1993).

Id.

156. 536 U.S. 639, 662–63 (2002).

157. 545 U.S. 677, 691–92 (2005).

158. 530 U.S. 640, 661 (2000).

159. *Id.*

160. 517 U.S. 620, 622 (1996).

161. 539 U.S. 558, 561 (2003).

162. 478 U.S. 186, 196 (1986) (declining to extend the right of privacy to homosexual relations, upholding a Georgia law that made such relations a crime).

became more difficult to implement. The guarantees of criminal suspects were now interpreted more strictly. Separation of church and state became more tenuous. The Court's conservative activism led to the invalidation of numerous laws that favored civil rights, in the name of a new federalism.[163] Finally, it is impossible not to note the greater importance that party concepts and interests began to have in the formation of the Court's beliefs. In *Clinton v. Jones* (1997), the Court affirmed that an acting President—who happened to be a Democrat—could be sued in Court for acts unrelated to the exercise of his office (and those that took place prior to his time as President).[164] But, in *Cheney v. USDC for District of Columbia* (2004), the Court recognized executive privilege on behalf of Republican Vice President Dick Cheney.[165] More dramatic was the Supreme Court's interference in the results of the *Bush v. Gore* presidential election of 2000, an example of blatant exercise of political power and poor law.[166]

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163. In a roundtable debate about the Rehnquist court, Professor Larry Krammer observed that

> From 1994 to 2004 the Rehnquist Court struck down 30 federal statutes. That's more than the Warren Court did during its most activist decade and more than the Lochner Court did as well. If the Renhquist Court struck down 11 statutes on federalism grounds, that's compared with none for the six decades prior to that. Striking down that many laws in so short a period has a tremendous effect throughout the political system—in terms of how Congress reacts, how the states react, how politicians campaign, and so forth. That's where the real effect is.

The Rehnquist Court, STANFORD LAWYER, Spring 2005, at 30.

164. 520 U.S. 681, 709–10 (1997).

165. 542 U.S. 367, 391–92 (2004).

166. 531 U.S. 98, 110–11 (2000). To briefly summarize, the Court decided in record time, by a vote of five-to-four, to invalidate the recounting of votes in Florida cities, as the Florida Supreme Court had determined. Bush had won the election in the State by a small margin of votes and the legislation called for a recount in this case. In practice, the Supreme Court's decision signified Bush's victory. In his stern dissenting opinion, Justice Stevens wrote: "Although we may never know with complete certainty the identity of the winner of this year's Presidential election, the identity of the loser is perfectly clear. It is the Nation's confidence in the judge as an impartial guardian of the rule of law." *Id.* at 128–29 (Stevens, J. dissenting).

3. The Roberts Court[167]

In July 2005, President George W. Bush appointed John Glover Roberts Jr. to the vacancy that would become available upon the announced retirement of Justice Sandra Day O'Connor.[168] Prior to Roberts' confirmation by the Senate, however, Chief Justice William Rehnquist passed away in September 2005.[169] The President then revoked his appointment of Roberts to O'Connor's vacancy and appointed Roberts to the position of Chief Justice instead.[170] The Senate approved Roberts' nomination on September 29, 2005, and he became successor to William Rehnquist, whom he had served as law clerk in 1980 and 1981.[171] Throughout his career, the new Chief Justice had occupied positions in public administration under Republican administrations, such as that of President Reagan. In addition, Roberts had worked as a private attorney and, beginning in 2001, as a judge in the Court of Appeals for the District of Columbia.[172] Roberts was widely known as a conservative thinker, both in politics[173] and in law.[174]

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167. *See generally* Denniston, *supra* note 125; Mark Tushnet, *The First (and Last) Term of the Rehnquist Court*, 42 TULSA L. REV. 495 (2007) [hereinafter Tushnet, *First*]; James E. Ryan, *The Supreme Court and Voluntary Integration*, 121 HARV. L. REV. 131 (2007) [hereinafter Ryan]; Frederick Schauer, *The Supreme Court, 2005 Term—Foreword: the Court's Agenda—and the Nation's*, 120 HARV. L. REV. 4 (2007); Ronald Dworkin, *Judge Roberts on Trial*, 52 THE N.Y. REV. OF BOOKS 16, Oct. 20, 2005, *available at* http://www.nybooks.com/articles/article-preview?article_id=18330 (last visited Mar. 14, 2010) [hereinafter Dworkin, *Roberts*]; Ronald Dworkin, *The Supreme Court Phalanx*, 54 THE N.Y. REV. OF BOOKS 14, Sept. 27, 2007, *available at* http://www.nybooks.com/articles/20570 (last visited Mar. 14, 2010) [hereinafter Dworkin, *Phalanx*].

168. Rick Klein, *Bush Picks Roberts for Chief Justice O'Connor is Likely to Ramin* [sic] *For Now*, BOSTON GLOBE, Sept. 6, 2005, at A1 [hereinafter Klein].

169. HOFFER, *supra* note 60, at 441.

170. Klein, *supra* note 168.

171. HOFFER, *supra* note 60, at 449.

172. *Id.*

173. Politically, the new Chief Justice belonged to a group of so-called "sons of the Reagan Revolution." *See* Denniston, *supra* note 125, at 65. Regarding the conservative change in direction caused by the "Reagan Revolution," *see* Mark Silverstein & Benjamin Ginsberg, *The Supreme Court and the New Politics of Judicial Power*, 102 POL. SCI. Q. 371, 387 (1987).

174. Dworkin, *Roberts*, *supra* note 167, at 14.

> In his public career Roberts has opposed improving protection for the voting rights of minorities; held that it would be constitutional for Congress to strip the federal courts of the power to supervise racial integration; denigrated efforts by a group of women legislators to reduce gender inequality; referred to the right of privacy as "so-called"; signed a brief advising the Supreme Court to overrule *Roe v. Wade*; and described a Supreme Court decision outlawing a moment of silence that might be used for prayer in schools as "indefensible."

President Bush then appointed Samuel Alito to the vacancy left by Sandra Day O'Connor.[175] Alito was a lawyer who had also occupied positions in Republican administrations and served as a judge on the U.S. Court of Appeals for the Third Circuit, a position to which he had been appointed by President George Bush.[176] With Justice O'Connor's departure and Alito's arrival, the Court's conservative bloc was reinforced,[177] and its liberal bloc lost even more ground.[178] Justice Anthony Kennedy, widely thought of as a moderate conservative, now had a decisive vote on numerous controversial cases. Roberts took on the task of increasing consensus and producing more unanimous decisions. At first, he was successful in this. Over time, however, the schism within the Court widened, with a succession of five-to-four decisions. By the end of the Court's term in June 2007, one third of all Supreme Court decisions resulted in five-to-four votes.[179] In all twenty-four cases that were decided by a five-to-four vote, Justice Kennedy voted with the majority, performing a central role in the direction the constitutional case law of the Roberts Court would take.[180] Kennedy's opposition to abortion and affirmative action, for example, contributed to the Court's shift to the right.

For obvious reasons, it is not yet possible to analyze the Roberts Court in a broader historical perspective or to measure the impact of the political changes that occurred in Congress in 2006 and in the Presidency in 2008.[181] But it is already possible to highlight some decisions confirming that it was this Court that conservatives yearned for and liberals feared.[182] By June

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Id.

175. HOFFER, *supra* note 60, at 450.

176. *Id.*

177. With the appointment of Alito, the prediction of analysts came true, namely, that the so-called "split-the-difference jurisprudence" characterized precisely by decisions that, instead of siding peremptorily to one of the extreme currents of constitutional debate, ended up adapting to a middle-of-the-road constitutionalism, would come to an end. *See* J. Harvie Wilkinson III, *The Rehnquist Court at Twilight: The Lures and Perils of Split-the-Difference Jurisprudence*, 58 STAN. L. REV. 1969, 1972 (2006). The principal representative of this middle-of-the-road constitutionalism was precisely Justice Sandra Day O'Connor, who was replaced by Alito.

178. Those Justices on the Supreme Court that are considered more conservative are Clarence Thomas, Antonin Scalia, John Roberts and Samuel Alito. Anthony Kennedy sides with the conservative wing in most of his votes. The liberal bloc is made up of Justices John Paul Stevens, David H. Souter, Ruth Bader Ginsburg and Stephen G. Breyer. *See* Dworkin, *Phalanx*, *supra* note 167, at 92.

179. *Id.*

180. *Id.*

181. Tushnet, *First*, *supra* note 167, at 500.

182. Linda Greenhouse, *In Steps Big and Small, the Supreme Court Moved Right*, N.Y. TIMES, July 1, 2007, at A1.

2007, the Court had decided cases in which it deemed constitutional a law that restricted abortion, upheld the conviction of the defendants in almost all the cases it heard, made it more difficult for investors to sue companies and their executives for securities fraud, invalidated racial integration programs in schools, restricted the freedom of speech of public school students, and hindered access to the Court by enforcing more rigorous procedural restrictions.

In issues involving criminal law and criminal procedure, the Roberts Court made decisions similar to that of the Rehnquist Court. Regarding the death penalty, in *Kansas v. Marsh* (2006)[183] the Court upheld a Kansas law that allowed the defendant to be executed even when mitigating and aggravating factors are in equipoise, *i.e.*, are of equal weight. In *Uttecht v. Brown* (2007), the Supreme Court made it easier for prosecutors to excuse jurors for cause on the ground that they could not be impartial on deciding whether to impose a death sentence.[184] Both cases were decided by a five-to-four vote.[185] The Court also made determinations regarding evidence obtained in violation of the Fourth Amendment, in the case of *Hudson v. Michigan* (2006).[186] There, the Court evaluated the "knock and announce" rule—by which police officers were obliged to knock on a suspect's door, announce their presence and wait a reasonable amount of time before entering a suspect's domicile—and determined that the rule did not necessarily mandate the exclusion of evidence obtained in violation of this rule.[187] In *Carey v. Musladin* (2006), the Court determined that the fact that the alleged victim's parents sat in the court room during the trial wearing buttons displaying the image of the victim did not violate the suspect's right to a fair trial.[188]

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183. In his dissent, Justice Souter, joined by Justices Stevens, Ginsburg and Breyer, referred to the Kansas law as morally absurd. 548 U.S. 163, 207 (2006) (Souter, J., dissenting). On this topic, *see* George H. Kendall, *The High Court Remains as Divided as Ever over the Death Penalty*, 105 MICH. L. REV. FIRST IMPRESSIONS 79, 79 (2006) ("If the outcome in *Marsh* is any indication of how the Court will deal with capital punishment in the future, it appears that the Roberts Court will divide as often and as sharply as did the Burger and Rehnquist Courts."). In another case involving the death penalty, *Panetti v. Quarterman*, the Court followed previous case law that said a person mentally incapable of understanding why he/she was being executed cannot suffer that penalty. 551 U.S. 930, 960 (2007). *See also* Stewart v. Martinez-Villareal, 523 U.S. 637, 644–45 (1998); Ford v. Wainright, 477 U.S. 399, 417 (1986).

184. 551 U.S. 1, 19 (2007).

185. *Id.* at 3; *Kansas*, 548 U.S. at 165.

186. 547 U.S. 586, 601–02 (2006).

187. *Id.*

188. 549 U.S. 70, 77 (2006).

With respect to freedom of speech, the Supreme Court has recently upheld certain important restrictions. In *Rumsfeld v. Forum for Academic and Institutional Rights* (2006),[189] the Court unanimously declined to recognize the possibility that law schools could deny access to their campuses to military recruiters (a measure that had been adopted by educational institutions to protest the Armed Forces' adoption of policies that discriminated against homosexuals). In *Garcetti v. Ceballos* (2006),[190] a divided Court decided by a five-to-four vote that public employees were not protected by the First Amendment in the exercise of their duties, and determined that a public employee's comments could be submitted to the disciplinary power of his or her employer.[191] In *Morse v. Frederick* (2007), another five-to-four vote, the Court held that the decision of a school director to punish a student who displayed a banner supposedly defending the use of marijuana did not violate the First Amendment.[192]

Regarding abortion rights, the Roberts Court followed the trend established by its predecessor, but without overruling the *Roe v. Wade* decision. In *Gonzalez v. Carhart* (2007),[193] the Supreme Court upheld the constitutionality of the Partial-Birth Abortion Ban Act of 2003,[194] which prohibited a specific kind of abortion. By a five-to-four majority vote, the

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189. 10 U.S.C. § 654 (2000). The rule—known as "don't ask, don't tell"—prohibited the Armed Forces from recruiting or maintaining homosexuals in their ranks. For this reason, several law schools denied military recruiters access to their campuses. Congress responded with the Solomon Amendment by which any Universities that received federal funds were obliged to grant access to military personnel. 10 U.S.C. § 983 (2000). When the issue went to the Judiciary, the Supreme Court felt that the Solomon Amendment did not violate the schools' right of freedom of speech and association and upheld the possibility of the Government withholding federal funds from colleges that did not grant access to military personnel for recruiting purposes but did allow access by other potential employers. Roberts wrote the majority opinion, which was endorsed by all the other members except Alito, who had his own considerations. 547 U.S. 47, 70 (2006).

190. 547 U.S. 410, 426 (2006).

191. On this topic, *see* Charles W. Rhodes, *Public Employee Speech Rights Fall Prey to an Emerging Doctrinal Formalism*, 15 WM. & MARY BILL OF RTS. J. 1 (2007); Robert Roberts, *The Supreme Court and the De-Constitutionalization of the Freedom of Speech Rights of Public Employees*, 27 REV. OF PUB. PERS. ADMIN. 171 (2007).

192. 551 U.S. 393, 410 (2007). The opinion that was endorsed by the majority was written by Chief Justice Roberts, who concluded that the school administration did not violate the First Amendment by repressing pro-drug demonstrations. To support his opinion, he mentioned such precedents as *Bethel School District v. Fraser* and *Hazelwood v. Kuhlmeier*. *See* Melinda Cupps Dickler, *The Morse Quartet: Student Speech and the First Amendment*, 53 LOY. L. REV. 355, 363–68 (2007).

193. 550 U.S. 124 (2007).

194. 18 U.S.C. § 1531 (2003).

Court determined that the law did not impose an undue burden on a woman's right to terminate her pregnancy.[195]

In the areas of equal protection and affirmative action, the Court invalidated voluntary racial integration plans in schools in Seattle and Louisville, where those plans relied on race as a "tiebreaker."[196] Namely, these integration plans relied on racial data to break 'ties' when a high school received more candidates than it could accept.[197] By a five-to-four vote, the Court decided that such policies did not pass strict scrutiny (to which racially-based distinctions should be subjected when segregation did not exist in the past).[198] In that case, the Court declined to recognize racial balancing as a "compelling state interest."[199] On the whole, the case illustrated the increasing difficulty of implementing new affirmative action policies.[200]

In matters of voting rights, the Roberts Court has been accused of promoting the deregulation of election campaigns and of failing to protect

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195. *Gonzales*, 550 U.S. at 168. Nevertheless, the possibility it creates for the states to limit the rights recognized in *Roe* have been seen as quite troubling. *See, e.g.*, George J. Annas, *The Supreme Court and Abortion Rights*, 356 NEW ENG. J. OF MED.: HEALTH L., ETHICS, & HUMAN RTS. 2206 (2007).

> Some physicians will surely be tempted to view the decision as a narrow victory for antiabortion forces that is unlikely to have more than a marginal effect on medical practice. This view is understandable but misses the potential broader impact of the opinion on the regulation of medical practice and the doctor-patient relationship generally. Until this opinion, the Court recognized the importance of not interfering with medical judgments made by physicians to protect a patient's interest. For the first time, the Court permits congressional judgment to replace medical judgment.

Id.

196. Parents Involved in Community Schools v. Seattle School Dist. No. 1, 551 U.S. 701, 711 (2007).

197. *Id.*

198. *Id.* at 707.

199. *Id.* at 730.

200. The decision has been severely criticized. *See, e.g.*, Ryan, *supra* note 167, at 156:

> The danger and significance of *Parents Involved* is that it will make that already remarkably difficult struggle even harder, if not impossible. The legitimate fear is that school districts will interpret this opinion as a signal that they should not bother with school integration. Some districts might conclude that there is now something vaguely illicit about the whole enterprise, that pursuing integration requires indirection and duplicity rather than the overt use of race. Other districts might reason that pursuing integration will only lead to litigation. Clearly, not many districts now seem interested in racial integration, but this decision increases the odds that fewer of them will be interested in the future.

Id.

minority groups in cases involving the redistribution of voting districts. In *Randall v. Sorrell,* the Supreme Court decided that limiting campaign spending is unconstitutional because it violates freedom of speech.[201] In *Federal Election Commission v. Wisconsin Right to Life* (2007), the Court deemed unconstitutional federal legislation prohibiting the use of corporate treasury funds for political advertising in the six days preceding an election when the ads dealt with controversial issues (and not with support of or opposition to a certain candidate).[202] In *League of United Latin American Citizens v. Perry,* the Court considered the question of whether a Texas redistricting plan violated the Constitution and other laws for partisan advantage.[203] In that case, the format of the new districts was defined to benefit the Republicans.[204] With the exception of one district,[205] the Court refused to declare the redistricting null and void, primarily on the grounds that the allegedly "obscure" party interests had not been sufficiently proven.[206]

In the judicial term that ended June 2008, the number of decisions arrived at by a five-to-four vote had diminished.[207] In the most significant

201. 548 U.S. 230, 235 (2006). The majority consisted of the votes of Breyer, Roberts, Alito, Kennedy, Thomas and Scalia, upholding the precedent established in *Buckley v. Valeo*, in which the Supreme Court had decided that spending money to influence voters was protected under freedom of speech. 424 U.S. at 143–44.

202. 551 U.S. 449, 457 (2007). The law in question was the Bipartisan Campaign Reform Act of 2002 ("McCain-Feingold"). 2 U.S.C. § 441b(b)(2) (2000). For a severe criticism of this decision, *see* Dworkin, *Phalanx*, *supra* note 167, at 96.

203. 548 U.S. 399, 414 (2006).

204. *Id.* at 417.

205. Specifically, in the case of one of the re-drawn districts, number twenty-three, the new borders diluted the vote (vote dilution violative), violating section two of the Voting Rights Act of 1965, which has to do with protection of the rights of minorities. 42 U.S.C. § 1973 (2006). This is because 100,000 Latinos were transferred from the old district to an oddly defined new district, for which reason those who opposed the plan labeled that maneuver gerrymanderring. Thus, the Supreme Court felt that, in fact, the change could lead to a problem it referred to as protection of the majority–minority ratio, since the old district was divided into three communities (Anglos, Blacks, Latinos) and had not been modified in twenty-two years. *League of United Latin American Citizens*, 548 U.S. at 410–46.

206. *League of United Latin American Citizens*, 548 U.S. at 447. Kennedy, Alito and, Roberts felt that the redistribution of districts did not violate Section Two of the Voting Rights Act. But Scalia and Thomas understood that the allegation that gerrymanderring was unconstitutional did not present justifiable controversy. Justices Scalia, Roberts, Thomas, and Alito concluded that the District Court was not wrong in rejecting the appeal argument that removing the Latinos from district twenty-three constituted intentional vote dilution. Justices Scalia, Roberts, Thomas, and Alito, in turn, argued that the creation of district twenty-five complied with the Voting Rights Act of 1965.

207. Of the sixty-three cases decided by the Supreme Court between October 2007 and June 2008, eleven were decided by a single vote, as compared to twenty-four cases in the previous term. *See*

case of that period, the Court held that the Second Amendment to the Constitution protects the right of individuals to bear arms for personal use.[208] In so doing, the Court struck down a prohibition previously contained in a District of Columbia law.[209] The conservative bloc of the Court also prevailed in decisions such as the one that allowed lethal injection as a method of carrying out the death penalty[210] and in the requirement for voters to present a photo identification when voting.[211] The more liberal Justices, however, won some important victories, such as the decision that guaranteed detainees at Guantanamo Bay access to the federal courts,[212] the decision that invalidated a state law establishing the death penalty for the rape of a minor (limiting that type of punishment to crimes resulting in the victim's death),[213] and a series of decisions in which the Court recognized the rights of workers in lawsuits involving discrimination in the workplace.[214]

As already mentioned, it is too early to provide a broad evaluation of the Roberts Court. Nor is it possible to foresee the middle- and long-term political impact of changes occurring in Congress' composition and the election of the new president. Nevertheless, it cannot be denied that the the Court has shifted to the right, displayed a greater ideological affinity for big business and political interests and proven its lack of sympathy for the expansion of civil rights. In its early years, the Court received strong criticism from academia[215] and the media.[216] These groups accused the

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Linda Greenhouse, *On Court that Defied Labeling, Kennedy Made the Boldest Mark*, N.Y. TIMES, Jun. 29, 2008.

208. District of Columbia v. Heller, 128 S. Ct. 2783, 2822 (2008).

209. D.C. CODE §§ 7-2501.01–02 (2001).

210. Baze v. Rees., 128 S. Ct. 1520, 1538 (2008).

211. Crawford v. Marion County Election Board, 128 S. Ct. 1610, 1624 (2008).

212. Boumediene v. Bush, 553 U.S. 723, 128 S. Ct. 2229, 2277 (2008).

213. Kennedy v. Louisiana, 128 S. Ct. 2641, 2664–65 (2008).

214. *See, e.g.*, Meacham v. Knolls Atomic Power Laboratory, 128 S. Ct. 2395, 2406–07 (2008).

215. Dworkin, *Phalanx*, *supra* note 167, at 14.

> It would be a mistake to suppose that this right-wing phalanx is guided in its zeal by some very conservative judicial or political ideology of principle. It seems guided by no judicial or political principle at all, but only by partisan, cultural, and perhaps religious allegiance. It urges judicial restraint and deference to legislatures when these bodies pass measures that political conservatives favor, like bans on particular medical techniques in abortion. But the right-wing coalition abandons restraint when it strikes down legislation that conservatives oppose, like regulations on political advertising and modest school district programs to further racial integration in public education. It claims to celebrate free speech when it declares that Congress cannot prevent rich corporations and unions from evading restrictions on political contributions. But it subordinates

Court of partisan conservatism aligned with the interests of the Republican Party and religious groups.

V. CONCLUSION

The decades following World War II were marked by the Americanization of life in many domains. Constitutional law is certainly one of them. Indeed, the model of judicial review and constitutionalism put forth in *Marbury v. Madison* has spread to culturally and geographically distant countries, from one end of the globe to the other. This philosophy reached its high point during the Warren Court era, characterized by supremacy of the constitution, judicial review, establishment of the judiciary as the final interpreter of the constitution and judicial activism in favor of fundamental rights.

In order to incorporate this model of constitutionalism, the countries of the Roman-Germanic tradition underwent extensive and profound changes. These changes included direct and immediate application of the constitution (without requiring any previously enacted legislation), implementation of judicial review, and interpretation of sub-constitutional law based on constitutional rules and principles. Moreover, judges, courts, and especially the constitutional courts of such countries became more active and activist, fueling the development of new concepts and doctrines in interpretation.

In recent years, however, American constitutional practice has reversed itself. Discourse from the right and left has begun to restrict the role of constitutional jurisdiction and give greater importance to the role of the legislative branch. Surprisingly, representative voices have openly preached in favor of the supremacy of the legislative branch and of acts of Congress—rather than constitutional interpretation by courts—which, in the final analysis, corresponds to the European model prior to World War II. As a result, contemporary American legal discourse tends to favor strict

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> free speech to other policies when it holds that schools can punish students for displaying ambiguous but not disruptive slogans at school events. Lawyers have long been fond of saying, quoting Mr. Dooley, that the Supreme Court follows the election returns. These four justices seem to follow Fox News instead.

Id.

216. *The Roberts Court Returns*, N.Y. TIMES, Sept. 30, 2007, at 4.

> The Roberts bloc has not adhered to any principled theory of judging. Its members are not reluctant to strike down laws passed by Congress, as critics of "judicial activism" are supposed to be, or reluctant to overturn the court's precedents. The best predictor of how they will vote is to ask: What outcome would a conservative Republican favor as a matter of policy?

Id.

constructivism of the constitution, as opposed to judicial activism.[217] Indeed, an outside observer might remark that a mode of activism contrary to civil rights has developed. In addition, partisan behavior (as well as the return of religion to the public sphere) seems to be pushing American constitutional law further away from the model that originally captured the imagination of the entire world.

It is certain, however, that those countries that are late-comers to democracy (or those that have been recently re-democratized) need the model that was celebrated and exported throughout the world, idealized though it may be. In these countries, as a general rule, the majoritarian political process has not succeeded in fully satisfying demands for democratic legitimacy due to historical distortions in the distribution of power and wealth. In such cases, the balanced and independent role of the constitutional courts is preferred over the authoritarian tradition of the executive branch or the issues of representation of the legislative branch. Insofar as they are able to avoid being caught up in ordinary politics, these courts have tremendous potential to guarantee the stability of institutions and of social advancements.

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217. It is not possible here to explore the rich and complex debate present in American constitutional theory in the past several years involving subjects as the scope and the democratic legitimacy of judicial review, interpretivism and non-interpretivism, judicial supremacy and popular constitutionalism. *See* RONALD DWORKIN, LAW'S EMPIRE 378 (1986); Jeremy Waldron, *The Core of the Case against Judicial Review*, 115 YALE L.J. 1346, 1406 (2006) (for the debate on the democratic legitimacy of judicial review). *See also* LARRY D. KRAMER, THE PEOPLE THEMSELVES 93 (2004) (in favor of popular constitutionalism); MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS 154–76 (1999). In defense of judicial review, *see* CRISTOPHER L. EISGRUBER, CONSTITUTIONAL SELF-GOVERNMENT 47 (2001); Owen Fiss, *Between Supremacy and Exclusivity, in* RICHARD W. BAUMAN & TSVI KAHANA, THE LEAST EXAMINED BRANCH 452–67 (2006); Erwin Chemerinsky, *In Defense of Judicial Review: A Reply to Professor Kramer*, 92 CAL. L. REV. 1013, 1014 (2004); Robert Post & Reva Siegel, *Roe Rage: Democratic Constitutionalism and Backlash* 42 HARV. C. R.-C.L. L. REV. 373, 375 (2007).