

1. The New Constitutionalism

1.1 THE EMERGENCE OF THE NEW ORTHODOXY

1.1.1 The Orthodox Model of Parliamentary Supremacy

In 1688 seven English peers sent a letter of invitation to William of Orange, the Protestant king of Holland, and indicated to him that the country wanted political change. After William had landed in England and the reigning King, James II, had fled the country, the Convention of Lords and Commons declared that the throne was vacant and officially offered it to William and his wife, Mary. However, the Crown the Parliament offered to them was not the same as before: by adopting the Bill of Rights 1689, the Parliament imposed strong limits on the prerogative powers of the Crown. The conflict between the Crown and Parliament, which was at the centre of the political controversies in the seventeenth century, ended with the victory of the Parliament. The settlement between William and the Parliament transformed England into a limited constitutional monarchy.¹ Although the English (and later the British) constitution has undergone many changes since then, the 1688 settlement has laid down the foundations of a new, distinctive constitutional arrangement with the principle of parliamentary supremacy at its heart.

The doctrine of parliamentary supremacy received its most influential exposition in AV Dicey's treaty on constitutional law in the nineteenth century.² The Orthodox Model of Parliamentary Supremacy can be characterized by three main tenets:

1.1.1.1 Monistic constitutional architecture

Although in functional terms one can speak about constitutional laws, in legal terms there is no formal distinction between 'constitutional statutes'

¹ Elizabeth Wicks, *The Evolution of a Constitution: Eight Key Moments in British Constitutional History* (Hart Publishing 2006) 16.

² Albert Venn Dicey, *Introduction to the Study of the Law of the Constitution* (Liberty Classics 1982) 39–85.

and ‘ordinary statutes’; all Acts of Parliament have equal legal status. In addition, the lack of formal hierarchy between constitutional statutes and ordinary statutes is also reflected in the legislative process: according to the orthodox model, all laws can be amended or repealed by the normal law-making process and the Parliament cannot bind its successors.

1.1.1.2 The lack of substantive constraints on legislation

Parliamentary supremacy also implies that the legislative power of the Parliament does not have legal limits. As Lord Reid summarized the core idea in *British Railways Board v Pickin*:

In earlier times many learned lawyers seem to have believed that an Act of Parliament could be disregarded in so far as it was contrary to the law of God or the law of nature or natural justice, but since the supremacy of Parliament was finally demonstrated by the Revolution of 1688 any such idea has been obsolete.³

One might be tempted to think that the second thesis is entailed in the first one, but this is not the case. The European Communities Act 1972 (hereinafter ECA) or the Human Rights Act 1998 (hereinafter HRA) illustrate my point. Although the Parliament can repeal both acts by the ordinary process of legislation, and therefore their operation is consistent with the first thesis, until they are in force, they clearly impose substantive limits on the legislature and are incompatible with the orthodox view. The fact that a substantive limit on legislation is revocable does not make that constraint non-existent.

1.1.1.3 The lack of constitutional judicial review

Since the legislative power of Parliament is unlimited, there are no other institutions that may scrutinize the content of legislation or strike down the Acts of Parliament. Although the second thesis about the lack of substantive limits on legislative power entails the third one, it is worth analytically distinguishing these two claims: as we shall see very soon, one can imagine a system where legislation does have substantive limits, but no other institution can enforce those limits. The ECA and the HRA, which violate the second tenet of the orthodox model, are also inconsistent with the third thesis, since both acts authorize judges to scrutinize the content of legislation and the ECA also authorizes them to set aside an Act of Parliament if it violates the law of the European Union.

³ [1974] AC 765, 782.

A couple of qualifications are needed to clarify the nature of my claims about the orthodox model. First, I do not claim that the orthodox view of parliamentary supremacy has remained unchallenged in British public law. In fact, all three tenets have been subjected to fierce criticism. The idea that certain laws cannot be repealed by mere implication is incompatible with the monistic structure of the constitution.⁴ The proponents of the 'new view' of sovereignty have also challenged the first tenet of the orthodox approach and argued that supremacy only implies that the legislature has the power to make any laws *in the manner* required by the law. If supremacy were construed this way, it would also imply the power to change the manner and form of legislation.⁵ Parliament could, in principle, entrench any laws and require, for instance, a two-thirds majority or a referendum for the enactment of valid laws. Common law constitutionalists have also challenged the second and third tenets of the orthodox view and argued that in exceptional circumstances judges may consider declaring an Act of Parliament legally void.⁶ My claim is that notwithstanding these challenges, the orthodox view represented the dominant interpretation of the doctrine of parliamentary supremacy in the UK.

Second, I do not claim that the orthodox model is the most accurate representation of Dicey's authentic position.⁷ Rather, my claim is that the orthodox position reflects accurately how the doctrine was generally understood by generations of public lawyers in the United Kingdom.

Finally, what I am claiming is that the orthodox model gives a fairly accurate picture of British public law prior to the enactment of the ECA. Although it is hotly debated among British public lawyers whether the present institutional set-up of the UK is still compatible with a broader understanding of parliamentary supremacy, I want to remain agnostic in this debate.⁸ At this point suffice it to say that regardless whether the

⁴ *Thoburn v Sunderland City Council* [2002] 4 All ER 15, QBD DC [60]–[67] (Laws LJ).

⁵ William Ivor Jennings, *The Law and the Constitution* (5th edition, University of London Press 1960) 153.

⁶ Lord Woolf, 'Droit Public: English Style' [1995] *Public Law* 57, 69; *Jackson v Attorney General* [2006] 1 AC 262, 302–3 (Lord Steyn).

⁷ For the view that the model sketched here does not reflect Dicey's authentic position, see TRS Allan, *Constitutional Justice* (Oxford University Press 2003) 13–21.

⁸ TRS Allan, 'Parliamentary Sovereignty: Lord Denning's Dexterous Revolution' (1983) 3 *Oxford Journal of Legal Studies* 22; Aileen Kavanagh, *Constitutional Review under the UK Human Rights Act* (Cambridge University Press 2009); HWR Wade, 'Sovereignty: Revolution or Evolution?' (1996) 112 *Law*

present institutional arrangement satisfies a more permissive definition of parliamentary supremacy, it certainly does not satisfy the demanding criteria of the orthodox model for the reasons given above.

1.1.2 The Birth of Strong Judicial Review in the USA

The revolutionary constitutions of the late eighteenth century, and especially the American political experience, opened up the possibility of a new constitutional arrangement that breaks with the fundamental tenets of the Orthodox Model of Parliamentary Supremacy. For the purposes of my analysis, four features of this constitutional arrangement are of special significance. In this section I will sketch how the essential features of the new model emerged in the United States, and in the next section I will show how the new model has spread all over the world and become the dominant paradigm of constitutional law.

1.1.2.1 Dualist constitutional architecture

The revolutionary constitutions of the late eighteenth century, to borrow Dieter Grimm's useful distinction, have been *foundational* and not *modifying* constitutions: they did not simply impose limits on existing institutions, like the settlement of 1688 in England, but created new political communities from scratch or fundamentally reconfigured the existing ones.⁹ According to the logic of foundational constitutions, all institutions exercising public function derive their authority from the constitution. In this framework, there is no logical space for institutions whose authority is prior to or independent of the newly enacted constitution. Although in the UK the constitutional developments of more than three centuries have shrunk the power of the monarch considerably, the very idea of the royal prerogative as *residual power* reminds us that the constitutional settlement of 1688 was not meant to be the source of all public authority, since the power of the monarch was prior to and independent of the 1688 settlement.

One implication of this foundational character was the dualist architecture of these constitutions. The American constitution exemplifies this

Quarterly Review 568; Alison L Young, *Parliamentary Sovereignty and the Human Rights Act* (Hart Publishing 2009).

⁹ Dieter Grimm, 'Types of Constitutions' in Michel Rosenfeld and András Sajó (eds), *The Oxford Handbook of Comparative Constitutional Law* (Oxford University Press 2012) 103–4, 108.

dualist structure very clearly.¹⁰ To start with, the constitution distinguishes the constituent power of the people and the constituted powers of the legislative, executive and judicial bodies.¹¹ While the powers of the latter derive from the constitution, the legitimacy of the constitution itself derives from the constituent power, that is, ‘We the People’ (*popular sovereignty*). Second, since every public body derives its powers from the constitution, they are all bound by the very same law that confers authority on them. The constitution is therefore rightly considered more fundamental than ordinary laws created by the legislative body, and rightly stands above them (*constitutional supremacy*). Third, if the constitution has higher status than ordinary laws, it is also natural to separate the constitutional amendment process from ordinary legislation and make it more burdensome (*entrenchment*). To sum up, the dualist architecture of the American constitution is manifested in distinctions between institutions (constituent power – constituted powers), processes (constitutional amendment – ordinary legislative process) and in the hierarchy between legal rules (the constitution – ordinary statutes) and it is also reflected in the doctrines of popular sovereignty, constitutional supremacy and entrenchment.

1.1.2.2 A codified Bill of Rights

Unlike the power of the UK Parliament before 1972, the legislative power of the US Congress is constitutionally limited. Some of these limits originate from the organizational provisions of the constitution, most notably from the federal structure of the state. The limited nature of legislative power, however, is further accentuated by the Bill of Rights.

1.1.2.3 Judicial supremacy

In the landmark case of *Marbury v Madison*, the US Supreme Court vindicated the right to review and to strike down legislation contrary to the constitution. At the heart of John Marshall’s argument for judicial review lay the dualist structure of the constitution. The argument suggests that judicial review is almost a necessary corollary of constitutional

¹⁰ Bruce Ackerman, *We the People: Volume 1 – Foundations* (Belknap Press 1993) 3–33.

¹¹ For the conceptual history of the distinction, see Martin Loughlin, ‘Constituent Power Subverted: From English Constitutional Argument to British Constitutional Practice’ in Martin Loughlin and Neil Walker (eds), *The Paradox of Constitutionalism: Constituent Power and Constitutional Form* (Oxford University Press 2007).

supremacy, and under a dualist constitution judges do not have another possibility but to strike down unconstitutional legislation:

Certainly all those who have framed written Constitutions contemplate them as forming the fundamental and paramount law of the nation, and consequently the theory of every such government must be, that an act of the Legislature repugnant to the Constitution is void. This theory is essentially attached to a written Constitution ...¹²

According to the conventional interpretation, *Marbury* established not only judicial review, but also judicial supremacy. *Cooper v Aaron*, a case decided in 1958, already reflects this view by claiming that judicial supremacy ‘has ever since [since *Marbury*] been respected by this Court and the Country as a permanent and indispensable feature of our constitutional system’.¹³ Judicial supremacy means that the judiciary is not simply one of the three branches of the government that is authorized to interpret the constitution, but also that its interpretation is authoritative and legally binding on the other branches.

This interpretation of *Marbury*, however, has not been unchallenged. The advocates of *departmentalism* claim that since the three branches of government are coordinated, all of them have an equal right to interpret the constitution, and judicial interpretation is not binding upon the other branches. John Marshall’s famous argument in *Marbury*, which emphasizes the supremacy of the constitution and the necessarily limited power of the constituted legislature, is as applicable to the legislature as to the other two branches.¹⁴ Giving supreme and binding status to the unconstitutional interpretation of the judiciary would violate the supremacy of the constitution just as much and for the very same reason as giving binding and supreme status to the unconstitutional legislation of the Congress.¹⁵ If the departmentalist interpretation of *Marbury* is correct, *Marbury*

¹² 5 U.S. 137, 177 (1803).

¹³ 358 U.S. 1, 18 (1958).

¹⁴ Michael Stokes Paulsen, ‘The Irrepressible Myth of *Marbury*’ (2003) 101 *Michigan Law Review* 2706, 2712–22.

¹⁵ However, departmentalists disagree about the implications of this position. Michael Stokes Paulsen would go so far as permitting the president to decline to enforce judicial decrees. Michael Stokes Paulsen, ‘The Most Dangerous Branch: Executive Power to Say What the Law Is’ (1994) 83 *Georgetown Law Journal* 217, 276–84. Others claim that the president is required to enforce judicial decrees, but neither of the other branches is bound by the courts’ constitutional interpretation in the future.

supports coordinated constitutional review (including judicial review), but not judicial supremacy.

But even if *Marbury* had claimed judicial supremacy, the court exercised its power of setting aside unconstitutional legislation rather sparingly in the nineteenth century and it was far from clear that the other branches will consider the court's interpretation of the law as binding.¹⁶ The court therefore built up its power gradually and cautiously during the nineteenth century.¹⁷ Although the twentieth century still witnessed some backlashes, the idea of judicial supremacy has slowly taken root in American constitutional thought and has become part of the constitutional orthodoxy. As Mark Tushnet remarks: 'I am unaware of a definitive history identifying with any precision the period when departmentalism substantially disappeared. The possibilities range, I think, from the late nineteenth century to the middle of the twentieth.'¹⁸

Even if the *Cooper* court in 1958 was wrong to claim that *Marbury* established judicial supremacy, it was right to claim that judicial supremacy became a generally respected principle by the middle of the twentieth century.

1.1.2.4 The robust exercise of judicial review

In comparing the Orthodox Model of Parliamentary Supremacy with the emerging new model, I have followed a narrative that is fairly common in comparative constitutional law.¹⁹ However, I want to add an additional element to the defining features of the emerging model that is usually not considered crucial by the comparative accounts of judicial review: the robust exercise of the power of judicial review.

Scholars would be much less interested in constitutional adjudication, if courts usually deferred to the constitutional interpretation of other branches. The mere possibility of judicial review or even judicial supremacy would not have made courts major players in the political

¹⁶ For examples of executive noncompliance, see Frank H Easterbrook, 'Presidential Review' (1989) 40 *Case Western Reserve Law Review* 905; Paulsen (n 14).

¹⁷ Tom Ginsburg, *Judicial Review in New Democracies: Constitutional Courts in Asian Cases* (Cambridge University Press 2003) 91–6.

¹⁸ Mark Tushnet, 'Alternative Forms of Judicial Review' (2003) 101 *Michigan Law Review* 2781, 2783, footnote 9.

¹⁹ For a similar narrative, see Allan R Brewer-Carías, *Judicial Review in Comparative Law* (Cambridge University Press 1989); Stephen Gardbaum, 'The New Commonwealth Model of Constitutionalism' (2001) 49 *American Journal of Comparative Law* 707, 711–18.

arena, and without the robust exercise of judicial review no one would speak about the ‘government of judges’ or the ‘judicialization of politics’. If we want to understand the distinctive features of the new model, we cannot ignore altogether how the power of judicial review is exercised.

Later in the book I will subject the idea of robust interpretation to more sustained analysis. At this stage, however, I do not want to overburden my historical narrative with a heavy analytical machinery. I will therefore only flag up and sketch the main idea here.

In a celebrated essay, James B Thayer has demonstrated that, in the early history of the court, judges were reluctant to declare a statute void, unless the violation of the constitution was manifest.²⁰ To put it otherwise, the early jurisprudence of the court was highly deferential. The Supreme Court did not invalidate a single federal law between 1803 and 1857.

The general acceptance of the Supreme Court as the final authority on constitutional meaning was only one aspect of the court’s growing reputation and confidence. As the court gradually built up its power during the nineteenth century, it also began to exercise the power of judicial review more robustly. The number of unconstitutional federal laws was growing slightly, but remained under ten in each decade until the 1920s.²¹ The number of unconstitutional state laws was under ten in each decade before the 1860s, it was between 30 and 50 per decade between the 1870s and 1910s and rose above 100 both in the 1910s and 1920s.²²

Very roughly, by robust exercise of judicial review I mean that even where the language of the constitution allows many interpretations, and the legislature’s reading remains within the boundaries of reasonable interpretations, judges are ready to override the legislature’s view and substitute it with what they believe to be the best reading of the constitution. This reflected a subtle, but strikingly important change of emphasis in the self-understanding of the court. As Thayer explains, the early court did not conceive itself as the primary decision-maker for defining what the constitution really means; rather the court’s role was to check whether the interpretation of the legislature remained within reasonable limits.

²⁰ James B Thayer, ‘The Origin and Scope of the American Doctrine of Constitutional Law’ (1893) 7 *Harvard Law Review* 129, 138–43.

²¹ Lee Epstein, Jeffrey A Segal and Harold Spaeth, *The Supreme Court Compendium: Data, Decisions & Developments* (5th edition, Sage – CQ Press 2012) 188–92.

²² *ibid* 193–223.

Although the frequency with which a court invalidates legislation does not necessarily reflect the robustness of the court's review, I will assume that it can be used as a rather reliable proxy. (The low number of invalidated statutes can be influenced by other factors, like the low caseload of the court, or the high quality of legislation.)

1.1.3 Judicial Review on the Global Stage

As Claude Klein and András Sajó note, 'making constitutions appears as a process that follows certain rules (and) or rites which have been progressively established'.²³ Perhaps no other constitutions have influenced 'the rules and rites' of constitution-making so thoroughly as the American and the French ones. These revolutionary constitutions from the late eighteenth century have shaped considerably what we mean by constitution and constitution-making. From 1787 to 1945, the period on which I am focusing first, many countries around the world, even countries that enacted only modifying constitutions usually copied the dualist structure of the American and the French constitutions.

Similarly, a written bill of rights was already a commonplace in this period. From the Venezuelan constitution of 1811 to the Irish constitution of 1937, many constitutions from these long historical periods included a codified bill of rights. Article 16 of the extremely influential French Declaration of the Rights of Man and Citizen from 1789 even declared that the safeguarding of rights is an indispensable hallmark of a proper constitution.

However, the primary function of the incorporation of those rights into the constitution was to orient rather than to bind the legislature. Without the effective judicial enforcement of substantive constitutional limits, the actual operation of these dualist political systems resembled much more the Orthodox Model of Parliamentary Supremacy than the American version of constitutionalism.

Although constitutional rights were meant primarily to orient the legislature, this does not mean that judicial review did not exist before 1945. Many Latin American countries were influenced by the American constitution and were aware of the practice of judicial review. As a matter of fact, most countries in Latin America had some forms of judicial review well before the twentieth century. Judicial review existed in the Dominican Republic (1844), Colombia (1850), Mexico (1857), Argentina

²³ Claude Klein and András Sajó, 'Constitution-Making: Process and Substance' in Michel Rosenfeld and András Sajó (eds), *The Oxford Handbook of Comparative Constitutional Law* (Oxford University Press 2012) 421.

(1860), Brazil (1890) and Venezuela (1897).²⁴ It was also introduced in some European countries, like Greece (1847), Norway,²⁵ Switzerland (1875) and Crete (1906) before the First World War. However, the way the courts of these countries exercised their power could not be compared to the robustness of American judicial review.

This short historical overview would be incomplete without mentioning the Austrian Constitutional Court, the archetype of the now utterly influential centralized or European model of judicial review. The main architects of the Austrian constitution, most notably, Karl Renner and Hans Kelsen, envisaged a form of judicial review that differed from the American model where each court can scrutinize the constitutionality of legal norms. They created a specialized constitutional court with the monopoly of constitutional judicial review. Even though the differences between the older decentralized or American model and the newer centralized model are not insignificant, and are discussed extensively by comparative constitutional lawyers, for the purposes of my book their similarities are far more important. I will therefore generally ignore the differences between the two models.²⁶ Although the establishment of a centralized form of review was a major institutional innovation, even the Austrian court operated rather differently from its present day descendants. The judicial review of legislation had only a subsidiary role in the jurisprudence of the Austrian Constitutional Court, since its activity focused mainly on the review of administrative actions and on resolving conflicts of competence. In addition, according to the dominant doctrinal approach, if a fundamental right was limited by an Act of Parliament, the limitation was automatically considered to be justified. In line with this doctrinal view, Kelsen emphasized that constitutional courts should not rely on very abstract, value-laden concepts, like justice, liberty, equality and fairness, and held that the content of these concepts should be

²⁴ Allan R Brewer-Carías, *Constitutional Protection of Human Rights in Latin America* (Cambridge University Press 2009) 89.

²⁵ According to Sand, the Supreme Court of Norway had already exercised the power of judicial review in the 1840s, and the idea was well established in doctrinal writings by 1866. Inger-Johanne Sand, 'Judicial Review in Norway under Recent Conditions of European Law and International Human Rights Law: A Comment' (2009) 27 *Nordic Journal of Human Rights* 160, 160–61.

²⁶ For the differences between the two models and the explanation of why new democracies preferred the centralized model, see Brewer-Carías (n 19); Mauro Cappelletti, *The Judicial Process in Comparative Perspective* (Clarendon Press 1989); Alec Stone Sweet, 'Why Europe Rejected American Judicial Review: And Why It May Not Matter' (2003) 101 *Michigan Law Review* 2744.

determined by the legislature and not the court.²⁷ In summary, before the Second World War, robust rights-based judicial review of legislation was foreign even to the most full-fledged European constitutional court.

This constitutional landscape, however, has changed dramatically since the end of the Second World War. The horrors of the war discredited the idea of unlimited parliamentary supremacy and the majoritarian conception of democracy. Samuel Huntington, an eminent American political theorist, called this post-war development the 'second wave of democratization'.²⁸ Although democratization does not necessarily imply the stronger protection or the judicial enforcement of human rights, there was a strong correlation between these two developments. The post-war intellectual climate gave strong impetus to the human rights movement both at the international and the national levels. International law witnessed a major paradigm shift: the way a government treated its own citizens was no longer considered exclusively a matter of domestic jurisdiction and sovereignty could be no longer used as a shield against any external criticism or legal interference. The Universal Declaration of Human Rights, adopted by the UN General Assembly in 1948, was followed by a considerable number of human rights instruments, including two covenants, five additional core human rights treaties, and many regional human rights instruments, including the European Convention on Human Rights (hereinafter ECHR or the Convention). By the same token, the incorporation of binding human rights into new national constitutions has become the general practice since the end of the Second World War.

Equally importantly for our purposes, during the second wave of democratization judicial review was re-established in Austria (1945) and introduced in Japan (1946), Italy (1948), India (1949) and Germany (1951). Of these institutions, the Federal Constitutional Court of Germany (hereinafter FCC) is of special significance for my narrative. Since the drafters of the German Basic Law of 1949 wanted to prevent the recurrence of a Nazi-type totalitarian regime, they conferred sweeping powers on the FCC. Due to these sweeping powers, the FCC has become a major player in German politics and is arguably the most influential

²⁷ Heinrich Triepel, Hans Kelsen, Max Layer and Ernst von Hippel, 'Wesen Und Entwicklung Der Staatsgerichtsbarkeit. Überprüfung von Verwaltungsakten Durch Die Ordentlichen Gerichte. Verhandlungen Der Tagung Der Deutschen Staatsrechtslehrer Zu Wien Am 23. Und 24. April 1928: Mit Einem Auszug Aus Der Aussprache' (de Gruyter 1929) 70.

²⁸ Samuel P Huntington, 'Democracy's Third Wave' (1991) 2 *Journal of Democracy* 12.

court after the US Supreme Court worldwide, serving as a role model for many constitutional courts established later.²⁹

The ‘third wave of democratization’, beginning in Portugal in 1974, saw judicial review spread to the new democracies of Southern Europe, Central and Eastern Europe,³⁰ Latin America,³¹ Asia³² and Africa.³³ Based on the analysis of the constitutional systems of 72 ‘third wave democracies’, Tom Ginsburg could conclude already in 2004 that ‘providing for a system of constitutional review is now a norm among democratic constitution drafters’.³⁴

Although the constitutional courts of new democracies had to build up their reputation and earn respect, as a general rule, they, unlike the American Supreme Court, did not have to fight for judicial supremacy. In most cases, the constitution itself, or the Act that established the court, made it clear that the court’s interpretation of the constitution is binding on everyone, including the other branches of the government.³⁵ To put it another way, in these jurisdictions, judicial supremacy was coeval with judicial review, and departmentalism, which dominated arguably the first century of American constitutionalism, has never been a real contender.

Similarly, unlike the American Supreme Court that built up its judicial power gradually and exercised its powers rather cautiously for the most part of the nineteenth century, the constitutional courts established after the Second World War usually did not go through such a long gestation period of deferential judicial review. The Warren and Burger courts (1953–69 and 1969–86 respectively) are usually considered as the paradigmatic examples of the robust exercise of judicial review in the United States. During these 33 years the US Supreme Court declared 42 federal laws and 291 state laws (out of 5,008 cases) unconstitutional.³⁶ Between 1951 and 1990, the German Constitutional Court declared 198

²⁹ For details, see subsection 1.2.7.

³⁰ Wojciech Sadurski, *Rights before Courts: A Study of Constitutional Courts in Postcommunist States of Central and Eastern Europe* (Springer 2007).

³¹ Rachel Sieder, Line Schjolden and Alan Angell, *The Judicialization of Politics in Latin America* (Palgrave Macmillan 2011).

³² Ginsburg (n 17).

³³ H Kwasi Prempeh, ‘Africa’s “Constitutionalism Revival”: False Start or New Dawn?’ (2007) 5 *International Journal of Constitutional Law* 469.

³⁴ Ginsburg (n 17) 6.

³⁵ Brewer-Carías (n 24) 64.

³⁶ Harold J Spaeth, Lee Epstein, Andrew D Martin, Jeffrey A Segal, Theodore J Ruger and Sara C Benesh, ‘Supreme Court Database, Version 2015 Release 01’ (2015) <<http://Supremecourtdatabase.org>> accessed 1 December 2015.

federal laws invalid or incompatible with the constitution.³⁷ In its first 12 years of existence, the Constitutional Court of South Korea has found 451 cases (out of 3,126) unconstitutional in whole, in part, or in the application.³⁸ The general perception about many of the newly established courts has been that they have become formidable institutions very soon after their creation. As a commentator notes about Costa Rica's constitutional court: 'Immediately after its creation in 1989, the new constitutional court became a major actor in Costa Rican politics and one of the most influential and activist courts in Latin America.'³⁹ The Hungarian Constitutional Court delivered landmark decisions on the death penalty, abortion, hate speech, and the conditions of democratic transition in the first three years of its existence.⁴⁰ This evidence suggests that many of the new constitutional courts, from very different regions of the world and with very different constitutional traditions, started to exercise the power of judicial review quite robustly from the outset.

I will conclude my historical sketch with two 'side-effects' of the third wave of democratization. First, roughly simultaneously with the third wave of democratization, the jurisprudence of the European Court of Human Rights (hereinafter ECtHR) also took a more activist turn. This change exerted institutional pressure on domestic courts to pay more attention to the jurisprudence of the ECtHR, and as a consequence, this jurisprudence has, through various channels, infiltrated into virtually all European legal systems.⁴¹ Some constitutional courts, like the Czech one, decided to interpret their own domestic constitutions in light of the jurisprudence of the ECtHR. In other cases, the constitution itself prescribed the method of Convention-friendly interpretation. Still other countries, like Finland, have reformed their domestic bill of rights to

³⁷ Christine Landfried, 'The Judicialization of Politics in Germany' (1994) 15 *International Political Science Review* 113, 113.

³⁸ Ginsburg (n 17) 223.

³⁹ Bruce M Wilson, 'Changing Dynamics: The Political Impact of Costa Rica's Constitutional Court' in Rachel Sieder, Line Schjolden and Alan Angell (eds), *The Judicialization of Politics in Latin America* (Palgrave Macmillan 2011) 47.

⁴⁰ László Sólyom and Georg Brunner, *Constitutional Judiciary in a New Democracy: The Hungarian Constitutional Court* (The University of Michigan Press 2000).

⁴¹ For a detailed analysis of the relationship between the jurisprudence of the ECtHR and domestic law, see Catherine Van de Heyning, 'Constitutional Courts as Guardians of Fundamental Rights: The Constitutionalisation of the Convention through Domestic Constitutional Adjudication' in Patricia Popelier, Armen Mazmanyan and Wouter Vandenbruwaene (eds), *The Role of Constitutional Courts in Multilevel Governance* (Intersentia 2013).

accommodate the changes required by the ECHR. Finally, the United Kingdom has incorporated the ECHR into domestic law in the absence of a domestic bill of rights.

These developments have proved crucial in the process in which mature 'first wave democracies' also started to experiment with the judicial review of legislation. The very purpose of the UK Human Rights Act 1998 was 'to give further effect to rights and freedoms guaranteed under the European Convention on Human Rights.' The European context has also been a major factor in the creation of judicial review in Luxembourg. The influence of the ECHR has transformed the Scandinavian constitutional landscape, making judicial review more robust than before.⁴² Finland, the only Nordic country that dismissed judicial review out of hand previously, also joined the global trend in 2000.

Second, with the third wave of democratization, democracy has become an almost irresistible normative ideal. The number of old-fashioned authoritarian systems, that, as a general rule, reject judicial review, like one-party systems, personal dictatorships and military regimes, is steadily decreasing in the world.⁴³ Ever more political regimes adopt at least the forms of democracy, hold elections and mimic the institutional set-up of mature democracies. Since there has been a close historical link between the spread of constitutional review and democratization, the very success of constitutional review paradoxically has given incentives to authoritarian regimes to incorporate judicial review to their democratic mimicry.

Political scientists hotly debate how these political regimes should be conceptualized and distinguished from full-fledged democracies. They also make a lot of effort to further classify those regimes that occupy the conceptual space between proper democracies and old-fashioned dictatorships.⁴⁴ To use one possible classification, ever more illiberal (electoral) democracies, competitive authoritarian regimes and even hegemonic systems tend to accommodate judicial review in their constitutions. By today more than 170 countries have established some form of judicial review. Although political scientists disagree on the proper definition of

⁴² Veli-Pekka Hautamäki, 'The Question of Constitutional Court: On Its Relevance in the Nordic Context' in Jaakko Husa, Kimmo Nuotio and Heikki Pihlajamäki (eds), *Nordic Law: Between Tradition and Dynamism* (Intersentia 2007).

⁴³ Larry Jay Diamond, 'Thinking about Hybrid Regimes' (2002) 13 *Journal of Democracy* 21, 25–7.

⁴⁴ Diamond (n 43); Lucan Way and Steven Levitsky, 'The Rise of Competitive Authoritarianism' (2002) 13 *Journal of Democracy* 51.

democracy, every plausible account suggests that the number of real democracies is much lower than that. According to the democracy index of the Economist Intelligence Unit that analyses 165 independent countries, the number of full-fledged and flawed democracies is 25 and 50, respectively. This shows that we can no longer assume the strong correlation between the spread of judicial review and democratization. This fact also underlies my previous claim that the theoretical possibility of judicial review, without knowing how judicial review actually operates in a particular legal system, is rather uninformative of a political system. Although I will argue that in full-fledged democracies judges should most often defer to the views of political branches, this is perfectly compatible with the empirical claim that in other electoral regimes robust judicial review is a much more reliable indicator of a relatively well-functioning democracy than the mere existence of the institution.

To sum up the story so far, after the Second World War, the constitutional set-up of new democracies has increasingly relied upon the combination of four institutional features: dualist constitutional architecture, a codified bill of rights, judicial supremacy and the robust exercise of judicial review.

As of today, the United Nations has 193 member states. Setting aside some transitional political regimes, of these 193 countries, there are only three, Israel, New Zealand and the United Kingdom, whose constitutions deviate in some respects from the standard dualist constitutional architecture.⁴⁵ There are very few constitutions that do not have an entrenched bill of rights.⁴⁶ In addition, even New Zealand and the United Kingdom have introduced a parliamentary bill of rights, subscribing to the second, if not the first tenet of the new constitutional paradigm. As of 2015, the World Conference on Constitutional Justice unites 97 constitutional courts and supreme courts in Africa, the Americas, Asia and Europe. Based on my own calculations, at least 177 of the 193 UN member states

⁴⁵ None of the above countries has a codified constitution. Although New Zealand has a 'big-C' constitution, it does not include all the constitutional documents. Most provisions of the Israeli Basic Laws are not entrenched, and even the entrenched one can be relatively easily changed. However, since 1992 the Israeli Supreme Court uses the Basic Laws to scrutinize ordinary legislation. Suzie Navot, *Constitution of Israel: A Contextual Analysis* (Hart Publishing 2014) 25–46.

⁴⁶ I could find only two such constitutions on the website of the Comparative Constitutions Project: Australia and Brunei. <<https://www.constituteproject.org>> accessed 1 December 2015.

institutionalized some form of constitutional review.⁴⁷ Although the robust exercise of judicial review is a matter of degree and therefore it is quite difficult to measure how many constitutional courts satisfy this criterion, it seems safe to claim that in consolidated democracies the great majority of constitutional courts are closer to the robust than to the deferential pole of the continuum. Due to the similarity of the reasoning process employed by constitutional courts, one could convincingly argue that there exists a global model for constitutionalism that entails not only common institutions, but also common reasoning techniques, with a relatively robust proportionality review at its heart.⁴⁸

The result of the historical development I sketched above was the rise of a distinctive constitutional model that comprises a set of ideas, institutions and institutional practices. If one focuses on the content of this model, it can be defined by the combination of the four tenets I identified above. Focusing on the origins of the model, one would be tempted to coin it as the American model, since all the ingredients of it were already available in the United States. However, following a fairly well-established usage,⁴⁹ I prefer to use the term New Constitutionalism, for two reasons.

First, although the model was inspired by American constitutionalism, it would be a mistake to claim that post-war democracies simply copied the USA. The fact that the USA has become the strongest and most influential democratic country certainly left its mark on this development, and in many cases the direct American influence can be unmistakably identified (eg Japan), in other cases the development of constitutional ideas and practices was inspired by indigenous sources. At the same time, American judicial review itself was also influenced and shaped by the intellectual climate of the post-war years that gave pre-eminence to

⁴⁷ Tom Ginsburg and Mila Versteeg, 'Why Do Countries Adopt Constitutional Review?' (2014) 30 *Journal of Law, Economics, and Organization* 587. The data can be downloaded from the website of the Comparative Constitutions Project. <<http://comparativeconstitutionsproject.org/download-data/>> accessed 1 December 2015. However, this study does not include jurisdictions where judicial review was developed by courts. In addition, it also disregards some countries with weak judicial review.

⁴⁸ Kai Möller, *The Global Model of Constitutional Rights* (Oxford University Press 2012); Anne-Marie Slaughter, 'A Global Community of Courts' (2003) 44 *Harvard International Law Journal* 191.

⁴⁹ Ran Hirschl, *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism* (Harvard University Press 2004); Alec Stone Sweet, *Governing with Judges: Constitutional Politics in Europe* (Oxford University Press 2000) 37.

human rights and institutionalized the judicial protection thereof. As the *Cooper* case testifies, judicial supremacy was still occasionally challenged and therefore it was in need of further solidification. In addition, the activism of the Warren and Burger courts raised the robustness of judicial review to new levels in the 1960s and 1970s.

Second, and more importantly, the term New Constitutionalism emphasizes not the origins of a set of ideas and institutional practices, but rather, their current intellectual prominence. It reflects that these ideas decisively shape how constitutionalism is generally understood and what it is generally thought to require today. Since the second wave of democratization, the new understanding of constitutionalism has proved to be more dynamic and attractive than its rival, the Orthodox Model of Parliamentary Supremacy, and the latter, which was characterized by Woodrow Wilson as ‘the world’s fashion’ in 1884,⁵⁰ has gradually lost its appeal. With the third wave of democratization, the new paradigm has changed from the dominant model of constitutionalism to the new orthodoxy. As Stone Sweet aptly puts it: ‘As an overarching political ideology, or theory of the state, the new constitutionalism faces no serious rival today.’⁵¹ Or what is just the flip side of the same coin: by today, the Orthodox Model of Parliamentary Supremacy has become an abstract ideal-type to which no existing constitution corresponds completely. As Mark Tushnet sarcastically states, ‘[f]or all practical purposes, the Westminster model has been withdrawn from sale’.⁵² What is really new is not the combination of the four ingredients, but the claim that this combination defines the very meaning of constitutionalism. Alec Stone Sweet and Mark Tushnet just accurately describe the current state of affairs. By contrast, the Statute of the World Conference on Constitutional Justice (hereinafter WCCJ), adopted in 2011, not only describes the current situation but also prescribes how constitutionalism should be understood when it proclaims: ‘[The WCCJ] promotes constitutional justice – understood as constitutional review including human rights case law – as a key element for democracy, the protection of human rights and the rule of law.’⁵³ That is, they claim that rights-based constitutional

⁵⁰ Arend Lijphart, *Patterns of Democracy: Government Forms and Performance in Thirty-Six Countries* (2nd Revised Edition, Yale University Press 2012) 10.

⁵¹ Stone Sweet (n 49) 37.

⁵² Mark Tushnet, ‘New Forms of Judicial Review and the Persistence of Rights – and Democracy-Based Worries’ (2003) 38 *Wake Forest Law Review* 813, 814.

⁵³ Article 1.1.

review is not one of the rival institutional implementations of democracy and the rule of law, but it is a defining feature of those political ideals.

1.2 THE APPEAL OF THE NEW CONSTITUTIONALISM: 6 HYPOTHESES

1.2.1 Explaining the Success of the New Constitutionalism

The previous section (1.1) has defined *what* the New Constitutionalism means and has documented *how* it has emerged. The purpose of my book is to subject the underlying principles of the New Constitutionalism to critical scrutiny and challenge them. This exercise is fundamentally normative: the central questions my book addresses are about the justification of certain institutional choices and practices. Therefore, it is beyond the scope of my book to give a detailed explanation of *why* the New Constitutionalism has become the dominant paradigm in constitutional law. However, I cannot ignore this question altogether: if there are strong arguments against the New Constitutionalism, as I will suggest, the overwhelming dominance and almost orthodox intellectual status of the new paradigm is in need of some explanation. I will therefore sketch a couple of hypotheses that provide at least a plausible explanation for the intellectual prominence of the New Constitutionalism.

Even if my enterprise focuses on justificatory questions, a survey of the plausible explanations for the rise of the New Constitutionalism is not entirely unrelated to my project, since the wall between these two enterprises is not impenetrable. It is true that in many cases people act upon their own self-interest and self-interest is normally incapable of serving as justification for others. However, on other occasions, we are motivated by the very same reasons that we use to justify our choices and actions to others. Therefore it is no wonder that some reasons that serve as plausible *explanations* for the rise of the New Constitutionalism will also surface in our normative discussions about the *justification* of judicial review.

Before sketching the possible explanations, let me make first my question more precise by distinguishing it from two closely related issues. There is a growing body of literature on the question of why self-interested politicians choose to establish judicial review in the first place, or strengthen judicial review at a particular time.⁵⁴ Although the

⁵⁴ See, for instance, Ginsburg and Versteeg (n 47); Hirschl (n 49); Stone Sweet (n 49).

question I raise here is related to the aforementioned one, they are not identical. The fact that it is in the interest of politicians to introduce judicial review does not necessarily explain the intellectual prominence of the new paradigm: self-interested politicians can often get away with decisions that are not backed by the almost unanimous support of the broader intellectual elite. Similarly, the fact that constitutional courts are generally considered highly credible institutions by the whole population does not fully explain the intellectual success of the New Constitutionalism. There can be a discrepancy between what is supported by the intellectual elite and what is popular within the citizenry at large. What interests me here is primarily the positive attitude of opinion leaders rather than that of the whole population, because it is the former that had a decisive role in securing the intellectual prominence of the New Constitutionalism.

As a final preliminary point, I want to make clear that I do not assume that the rise of the New Constitutionalism can be explained by a single factor. On the contrary, it was probably the result of a combination of many causes. As Jon Elster reminds us, constitution-making tends to occur in waves: constitutions belonging to different waves were made under significantly different circumstances.⁵⁵ That makes it very likely that the combination of causes that contributed to the spread of judicial review varied greatly during the different waves of constitution-making.

1.2.2 Aversive Constitutionalism

In the first section, I tried to document how judicial review has spread all over the world. However, even describing these events means that one tells a story, and a story is in need of some organizing principles. The story I sketched above was organized around the process of democratization. The first hypothesis just makes the explanation, already implicit in the narrative of the previous section, more explicit.

As Kim Lane Scheppele has explained, the drafters of a constitution very often do not have a clear vision about what they exactly want to achieve, but they know very precisely what they want to avoid.⁵⁶ The spread of constitutional review, as the previous section suggests, was closely related to the transition from authoritarian regimes to democratic

⁵⁵ Jon Elster, 'Forces and Mechanisms in the Constitution-Making Process' (1995) 45 *Duke Law Journal* 364.

⁵⁶ Kim Lane Scheppele, 'Aspirational and Aversive Constitutionalism: The Case for Studying Cross-Constitutional Influence through Negative Models' (2003) 1 *International Journal of Constitutional Law* 296.

ones. The engineers of these new constitutions most often wanted to break with the past, create a new political regime and prevent the recurrence of authoritarianism. The desire for a 'new beginning', to use Bruce Ackerman's term,⁵⁷ is not conducive to the nuanced analysis of the fallen political regime and to incremental reforms. The reformers tend to reject the principles of the past as a package, and favour a radical change, since the symbolic dimension of the transition is as important as the practical one. My contention here is that the desire for a fresh start explains not only why politicians created constitutional courts, but also goes a long way to explain the intellectual prominence of the New Constitutionalism. I will illustrate my general point with two examples where aversive constitutionalism seems to provide a particularly convincing explanation for the success of the new paradigm: the German Basic Law, and the constitutions of post-communist states.

Democratic constitutions empower people by creating representative institutions (and making other institutions accountable to them), but they also impose limits on those who exercise power. Under the shadow of a totalitarian regime, it is understandable that the framers of the German Basic Law were afraid, most of all, of the abuse of power. As Martin Borowski says:

The institutions of the Weimar Republic reflected what proved to be an undue optimism about things democratic; indeed these institutions facilitated the National Socialists' seizure of power early in 1933. In the wake of Hitler's so-called *Third Reich*, it was clear to the post-War Constitutional Assembly's members that another lawless regime (*Unrechtsregime*) should be prevented at all costs.⁵⁸

Poor constitutional engineering certainly contributed to the failure of the Weimar Republic, and the framers of the Basic Law wanted to correct the mistakes made by their predecessors. But it is important to see that the failure of constitutional engineering did not consist of giving too much power to the legislature, but rather of undermining parliamentarism. The Weimar Constitution of 1919, by using an almost perfectly proportional electoral system without an electoral threshold, contributed to the fragmentation of the parliament and to the instability of the government. In addition, the weakness of the parliament and the government not only made it possible, but to a certain extent invited a strong

⁵⁷ Bruce Ackerman, 'The Rise of World Constitutionalism' (1997) 83 *Virginia Law Review* 771, 778.

⁵⁸ Martin Borowski, 'The Beginnings of Germany's Federal Constitutional Court' (2003) 16 *Ratio Juris* 155, 159.

and decisive president. Cindy Skach convincingly points out that 'Weimar's divided minority government did lead to a circular pattern of presidential emergency rule, on the one hand, and Reichstag abdication of responsibility, on the other.'⁵⁹

The Basic Law put heavy emphasis on power-sharing by strengthening federalism; it made the fragmentation of parliament less likely by changing electoral law; it cleverly stabilized the government by the introduction of the constructive vote of no confidence; and it also reduced significantly the power and legitimacy of the president. These institutional innovations, taken together with the changes in the broader society and in the international context, might have been sufficient to prevent the future abuse of power. But the framers wanted to err on the side of the limiting, and not the democratic-empowering principle.

Most of the innovations mentioned above are related to the *input* of democratic decision-making. They reduce the chance of abusing power, but cannot guarantee the proper output, that is, that the decisions will satisfy the substantive principles of justice. It was a fundamental experience for many Germans that statutes enacted in an impeccable procedure can be still blatantly unjust. 'Statutory lawlessness', to use Gustav Radbruch's famous expression, could still happen.⁶⁰

Therefore, they also wanted to impose limits on the outcome of the legislative process. This mindset, the lack of trust in the political process, is reflected primarily in the sweeping eternity clause of the Basic Law⁶¹ and the abolishment of referendums,⁶² but the creation of a strong constitutional court was also the brainchild of this mindset. The FCC was meant to guard against unjust outcomes.

Aversive constitutionalism also goes a long way in explaining the success of judicial review in post-communist Central and Eastern Europe. After the collapse of communism, the new democracies of the region wanted to break with the doctrines of the Marxist-Leninist theory of state. This theory explicitly rejected the principle of separation of powers

⁵⁹ Cindy Skach, *Borrowing Constitutional Designs: Constitutional Law in Weimar Germany and the French Fifth Republic* (Princeton University Press 2009) 61.

⁶⁰ Gustav Radbruch, 'Statutory Lawlessness and Supra-Statutory Law (1946)' (2006) 26 *Oxford Journal of Legal Studies* 1.

⁶¹ Article 79(3).

⁶² Cristoph Möllers, 'We Are (Afraid of) the People: Constituent Power in German Constitutionalism' in Martin Loughlin and Neil Walker (eds), *The Paradox of Constitutionalism: Constituent Power and Constitutional Form* (Oxford University Press 2007).

and was based instead on the unity of power. Writing on the separation of powers, Marx said: 'Here we have the old constitutional folly. The condition of a "free government" is not the division but the unity of power. The machinery of government cannot be too simple. It is always the craft of knaves to make it complicated and mysterious.'⁶³

This view had important implications for the position of the parliament within the communist state structure. Although the legislatures of these countries did not have real power and only rubber-stamped the decisions made by party leaders, according to the official constitutional doctrine, the legislative body had primacy over the executive and the judiciary.

After the collapse of communism, therefore, the doctrine of parliamentary supremacy had a bad reputation in those countries. Similarly to Germany, they might have been able to create a competitive political system, and prevent the abuse of power without the creation of strong constitutional courts. However, they wanted to get rid of the whole package of principles that were associated with the old regime, and parliamentary supremacy was part and parcel of this package. Parliaments could not remain the highest state organs, but had to become one of the coordinated branches. Constitutional courts have been considered the institutional manifestations and symbols of a new conception of democracy, not only by the politicians, but by the whole intellectual elite.

1.2.3 The Insurance Theory

The first hypothesis linked the spread of judicial review and the rise of the New Constitutionalism to the process of democratization. For many people, the assumed link between democracy and judicial review justifies the creation of this institution. The same reason, however, can also serve as an explanation of why the framers of new constitutions chose to introduce judicial review into their legal systems. However, there is a growing literature that suggests that it is not self-evident that politicians as rational actors would choose to create judicial review, even if it was considered to be justified, if this institution were against their own self-interest. There must also be less lofty and more realistic motives that explain why self-interested politicians introduced judicial review in so many new democracies.

⁶³ Hal Draper, *Karl Marx's Theory of Revolution, Volume I: The State and Bureaucracy*, vol 2 (Monthly Review Press 1977) 316.

One of the most compelling explanations is provided by the so-called insurance theory of judicial review. Tom Ginsburg's summary of the core idea runs as follows:

By serving as an alternative forum in which to challenge government action, judicial review provides a form of insurance to prospective electoral losers during the constitutional bargain. Just as the presence of insurance markets lowers the risks of contracting, and therefore allows contracts to be concluded that otherwise would be too risky, so the possibility of judicial review lowers the risks of constitution making to those drafters who believe they may not win power. Judicial review thus helps to conclude constitutional bargains that might otherwise fail.⁶⁴

Ginsburg also makes a compelling argument to the effect that there is a strong correlation between the creation and the strength of judicial review and the competitiveness of the political system. In such a political system where a party can reasonably expect to dominate politics after the constitutional bargain is closed, the party in question has no strong incentives to create a constitutional court in general, or to create a strong constitutional court in particular.⁶⁵

However, as I have emphasized, I am more interested in the question of why the New Constitutionalism has become intellectually so dominant than in the question of why self-interested politicians have a reason to introduce judicial review. Although the insurance theory gives a compelling answer to the latter question, it seems to be less pertinent to the former. Nevertheless, it is not entirely irrelevant for our purposes, for a couple of reasons.

First, politicians are part of the opinion leader elite whose general belief in the desirability of judicial review greatly contributes to the intellectual prominence of the New Constitutionalism. Since their opinion is internalized and widely shared by political think tanks, NGOs, politically committed press organs and intellectuals, the strategic interest of politicians in the creation of judicial review can induce a large scale acceptance of the institution among the members of the broader elite.

Second, by creating constitutional courts worldwide, politicians have made the institution familiar and the choice of judicial review salient. I will argue below (subsections 1.2.6 and 1.2.7) that our constitutional choices are shaped and limited to a great extent by what models are available and familiar to us. Thus the logic of insurance has indirectly contributed to the intellectual prominence of the New Constitutionalism.

⁶⁴ Ginsburg (n 17) 25.

⁶⁵ *ibid* 34–64.

Third, and most importantly, I will argue that the logic of the insurance theory can be extended beyond self-interested politicians: combining it with the policy maximizing hypothesis, it also provides a plausible explanation of why, under certain circumstances, the members of the intellectual elite will support judicial review.

1.2.4 Maximizing Policy Preferences

Modern societies are usually characterized by deep moral disagreement. Most of us hold strong views on abortion, the just allocation of resources, the role of religion, or the proper balance between personal liberty and national security. However, since we disagree on those issues, we need procedures and institutions that adjudicate between our conflicting policy preferences. In a political system that is based on the Orthodox Model of Parliamentary Supremacy, most of these policy decisions are made by the legislature. By creating a constitutional court, we remove many of those decisions from the parliament and confer them on courts.

The third hypothesis suggests that when we make such institutional choices, our choice is informed and determined by our expectations about how a certain institution will promote our own policy preferences. Let us suppose that Amy believes that abortion should be relatively free from state interference, religion should not play an important role in public life, and she strikes a balance between personal liberty and national security that prioritizes the former.⁶⁶ If she expects that a constitutional court is more supportive of her policy preferences than the legislature, she will probably prefer the institutional arrangement of the New Constitutionalism to that of the Orthodox Model of Parliamentary Supremacy.

Once we have identified the mechanism that creates the link between the individual's policy preferences and her institutional choices, we need to add only an empirical premise in order to complete the explanation. This empirical claim is that the intellectual elite supports the New Constitutionalism because courts are more likely to agree with their policy preferences than legislatures. Jeffrey Goldsworthy is one of the leading critics of judicial review who subscribes to this explanation:

⁶⁶ Occasionally, I find it easier to articulate a thought or provide an example by using proper nouns instead of pronouns or logical symbols. The names I use come from a children's book, called *Sleepovers* by Jacqueline Wilson (Doubleday 2001).

If I am right, the main attraction of judicial enforcement of constitutional rights in these countries is that it shifts power to people (judges) who are representative members of the highly educated, professional, upper-middle class, and whose superior education, intelligence, habits of thought, and professional ethos are thought more likely to produce enlightened decisions.⁶⁷

Ran Hirschl's more elaborated 'hegemonic preservation thesis' is compatible with Goldsworthy's explanation, but makes stronger assumptions than that. While Goldsworthy's explanation suggests only that the members of the elite want to maximize the policy choices that they consider morally right, Hirschl's explanation also assumes that: (1) the members of the elite are in a hegemonic position; (2) this position is threatened by other groups; (3) the elite is motivated by its own self-interest.⁶⁸ Although I believe that the hegemonic preservation thesis provides a highly convincing explanation in some cases, Hirschl's strong assumptions are unnecessary for my purposes. (To be fair to Hirschl, he is more interested in what motivates the actions of the politicians than in what explains the beliefs of the broader elite.) I will not assume that the views of the elite are always influenced by their self-interests, but leave open the possibility that in many cases they simply want the collective decision of the community to reflect what they sincerely believe to be the correct policy.

The policy maximizing hypothesis seems to be the most plausible in those countries where the main dividing line in politics is related to social status (class affiliation or income). In these countries, the members of the elite have good reasons to think that judges, as representatives of their own socio-economic group, will share their policy preferences. The same logic applies to countries where the main political cleavage is not class affiliation, but the latter maps onto the dominant cleavage. Ran Hirschl convincingly points out that this was the case in Israel, Egypt and Turkey, where the main dividing line was the secular/religious cleavage, but the members of the secular group were over-represented among the elite in general and among judges in particular.⁶⁹

However, the policy maximizing hypothesis, in itself, seems less plausible in cases where the main political cleavages cut across the elite. In many Western democracies the main cleavage in politics is related to identity issues: the religious/secular, nationalist/cosmopolitan,

⁶⁷ Jeffrey Goldsworthy, *Parliamentary Sovereignty: Contemporary Debates* (Cambridge University Press 2010) 10–11.

⁶⁸ Hirschl (n 49).

⁶⁹ Ran Hirschl, 'Constitutional Courts vs. Religious Fundamentalism: Three Middle Eastern Tales' (2004) 82 *Texas Law Review* 1819.

conservative/liberal divides or simply national affiliations determine the policy preferences of the elite to a greater degree than social status. Conservative members of the elite, for instance, do not seem to have a priori reason to expect that their policy preferences will be realized to a greater extent by a constitutional court than by the legislature. If I am right on this issue, the policy maximizing hypothesis alone cannot explain the intellectual dominance of the New Constitutionalism. Its explanatory power under those circumstances when the elite is divided will hinge to a great extent on the same considerations that are emphasized by the insurance theory. In a competitive political system a risk averse policy maximizer has good reasons to prefer the court to the legislature, even if her preferred political party is currently in power and, therefore, in the short run the legislature would be her first choice. By contrast, where there is a dominant political party that is likely to stay in power for a long period, the supporters of the dominant party have good reasons to prefer the legislature as the main policy-making institution.

Hungary gives a fairly good illustration of the general thesis. The Hungarian elite is deeply divided, but the main cleavages have been identity- rather than income-related. Under these circumstances, it is implausible to claim that all members of the elite support the constitutional court primarily because judges come from the same social strata as they do. After the political transitions in 1989–90, conservatives, for instance, had every reason to think that their policy preferences about abortion, gay marriage, or transitional justice will be better promoted by the right-wing legislature than by the Constitutional Court. However, since the political system was fairly competitive between 1990 and 2010, and the governing party could stay in power only once, the members of the elite generally respected the court as an institution and, apart from a couple of highly sensitive issues, did not criticize the decisions of the court openly. However, since 2010, when right-wing nationalists won a landslide victory, this situation has been changing and the respect for the Constitutional Court has been declining among right-wing intellectuals. The prospect that a single party can dominate the political arena for a long time makes it irrational for right-wing intellectuals to expect the maximization of their policy preferences from the court. It is not a coincidence that the idea of political constitutionalism was discovered and popularized by right-leaning intellectuals only after 2010, the landslide victory of their preferred party, Viktor Orbán's Fidesz.⁷⁰

⁷⁰ Ágnes Kovács, 'Fényevők? A Hazai Alkotmányelmélet Esete a Politikai Konstitucionalizmussal' (2015) 19 *Fundamentum* 2–3.

1.2.5 The Declaratory Theory of Adjudication

The policy maximizing hypothesis acknowledges, or even presupposes, that constitutional provisions are, to a great extent, indeterminate. According to this view, judges should be authorized to make important policy decisions because they are more likely to choose policy decisions that the members of the elite prefer. The fourth explanation is based on an assumption that is diametrically opposed to the one behind the policy maximizing hypothesis. It says that we should confer the authority to make important policy decisions on judges, not because they are better moral reasoners than legislators, but because constitutional interpretation requires first and foremost legal expertise.

I do not claim that those people, and especially those lawyers, who subscribe to this idea hold an utterly naive, mechanical view of legal interpretation; nothing would be further from the truth. They are well aware that constitutional interpretation gives certain discretionary power to judges and, therefore, have developed highly sophisticated theories of constitutional interpretation to tame this power. However, they insist that their preferred theory imposes sufficiently strong constraints on judicial discretion to make constitutional interpretation a predominantly legal activity.

The fact that judges invalidate an Act of the legislature as unconstitutional is considered legitimate because what makes the Act unconstitutional is not the view of judges, but the constitution itself. As Justice Scalia said, 'To hold a governmental Act to be unconstitutional is not to announce that we forbid it, but that the *Constitution* forbids it.'⁷¹ According to the declaratory theory, constitutional interpretation as a predominantly legal activity can be distinguished from or juxtaposed with open-ended moral or political reasoning. As a consequence, a theory of constitutional interpretation that openly acknowledges that moral reasoning plays a decisive role not only at the periphery of constitutional interpretation, but at the very core of it, is considered by most lawyers illegitimate.

As Ronald Dworkin notes in relation to the American tradition, there is a mismatch between the actual role and the reputation of the moral reading of the constitution:

There is therefore a striking mismatch between the role the moral reading actually plays in American constitutional life and its reputation. It has inspired all the greatest constitutional decisions of the Supreme Court, and also some

⁷¹ *American Trucking Associations v Smith*, 496 U.S. 167, 201 (1990).

of the worst. But it is almost never acknowledged as influential even by constitutional experts, and it is almost never openly endorsed even by judges whose arguments are incomprehensible on any other understanding of their responsibilities.⁷²

I believe that the attitude Dworkin refers to is shared by many, if not most, lawyers, and its influence is not limited to the United States. Judges recurrently claim that what they are doing is fundamentally different from the policy-making activity of legislatures.

Although the fourth hypothesis makes a claim about the nature of legal reasoning, its explanatory power is not limited to lawyers. If this is the general view of legal decision-making among lawyers, it is very difficult to challenge this view from outside the legal profession. Relatively few non-lawyers have sophisticated views about the nature of legal reasoning. This would presuppose that the challenger is at least broadly familiar with the main theories of constitutional interpretation that claim to tame the discretionary power of judges.

Once a constitutional court is created, this challenge becomes even more difficult. Since constitutions are highly abstract documents, they require courts to erect a complex doctrinal edifice to bridge the abstract norms of the constitution with day-to-day constitutional controversies. This complex doctrinal edifice, comprised of fine conceptual distinctions and tests, is not easily accessible to non-lawyers. Those who are not familiar with constitutional case law, the repository of all this wisdom, often do not feel competent enough to contribute to the debate about human rights or challenge the court's interpretation. Constitutional courts raise the entry level of the competent contribution to human rights discourse considerably.

1.2.6 Conventionalism

Finally, the spread and the increasing popularity of constitutional review is, to some extent, the result of a self-generating process. I will briefly touch upon two explanations that account for this self-generating process and discuss the two mechanisms in turn: the first one is conventionalism and the second is constitutional borrowing.

The policy maximizing hypothesis assumes that, when an abstract human right has to be specified, citizens, legislators and judges already have a more or less clear idea how the right in question should be

⁷² Ronald Dworkin, *Freedom's Law: The Moral Reading of the American Constitution* (Oxford University Press 1996) 3.

interpreted. However, this is not necessarily the case. When a society and its political and legal system faces a new challenge, it takes time for people to give serious consideration to the issue and develop their own position in the debate. However, if the authority to determine the meaning of the constitution has already been conferred on a particular institution, in our case a constitutional court, it gives people an incentive to epistemic free riding, that is, an incentive not to give serious consideration to the issue and not to develop their own position. This will be particularly true if, in retrospect, they will usually find the court's interpretation broadly reasonable. Mark Tushnet has emphasized for a long time that the introduction of constitutional review can debilitate the other branches, since they will not feel responsibility for the interpretation of human rights.⁷³ My hypothesis builds on this insight, but couples the phenomenon of epistemic free riding with conventionalism.

Following David Strauss, by conventionalism I mean the generalization of the idea that very often it is more important to have a decision (or a rule) than to have an optimal decision (or rule).⁷⁴ Applying conventionalism to constitutional adjudication suggests that, when people do not have a strong and considered position on a certain issue, they will accept the court's interpretation, even if it does not correspond to what they would personally prefer, if the court's interpretation remains within the range of reasonable interpretations.

In addition, conventionalism applies not only to the acceptance of individual decisions, but also to the institution of constitutional review as a whole. The advocates and opponents of judicial review are in symmetrical positions if a society has to make an institutional decision on the issue afresh. However, when an institution is firmly established in a society, institutional conservatism favours the status quo. Wherever judicial review has become part of the institutional set-up for a certain reason, and it operates acceptably, the positions of the two camps become hugely asymmetrical. Even if the institution was not widely accepted when it was first introduced, its acceptance can grow considerably over time. The original rationale for introducing an institution is not necessarily the same that explains the contemporary attitudes towards it.

⁷³ Mark Tushnet, 'Policy Distortion and Democratic Debilitation: Comparative Illumination of the Countermajoritarian Difficulty' (1995) 94 *Michigan Law Review* 246.

⁷⁴ David A Strauss, 'Common Law Constitutional Interpretation' (1996) 63 *University of Chicago Law Review* 877, 879–80.

1.2.7 The Limits of Constitutional Imagination

The explanations I have sketched so far all envisage a self-contained political community. However, the institutional choices that the framers of a constitution make take place in an increasingly globalized world. It is well known to every scholar of comparative law that one of the primary vehicles of legal development is using legal transplants. Constitutional framers rarely innovate; more often they choose from a range of available alternatives and follow some blueprints. It is a commonplace, for instance, that most post-colonial constitutions were heavily influenced by the constitutional tradition of the empire they previously belonged to.⁷⁵ Sometimes the genealogical link is less predictable, but nonetheless well documented. The Japanese constitution of 1883, for example, was modelled on the Prussian constitution of 1852, to give only one cursory example. We have no reason to assume that the establishment of constitutional courts is an exception to this general rule.

The spread of constitutional courts in Europe can serve as a good illustration. We know that the framers of the German Basic Law were familiar with the experience of the Austrian Constitutional Court and the latter obviously informed how the FCC was conceived.⁷⁶ It is also well known that the framers of the Spanish constitution were heavily influenced by the German experience. There is a privileged relationship between the Spanish Constitutional Tribunal and the FCC, since the former was modelled on the latter. Roman Herzog, a former president of the FCC and Bundespräsident of Germany, portrayed this genealogical link between European constitutional courts quite vividly by calling the Spanish and the Portuguese constitutional courts the daughters and the Polish and Hungarian ones the granddaughters of the FCC.⁷⁷ We also know that the influence of the FCC is not limited to Europe: its imprint can be easily detected both on the Korean, and the South African constitutional courts.⁷⁸ However, my purpose here is not to catalogue the

⁷⁵ Julian Go, 'A Globalizing Constitutionalism? Views from the Postcolony, 1945–2000' (2003) 18 *International Sociology* 71.

⁷⁶ Borowski (n 58).

⁷⁷ László Sólyom, 'The Role of Constitutional Courts in the Transition to Democracy with Special Reference to Hungary' (2003) 18 *International Sociology* 133, 153 footnote 4.

⁷⁸ James M West and Dae-Kyu Yoon, 'The Constitutional Court of the Republic of Korea: Transforming the Jurisprudence of the Vortex?' (1992) 40 *The American Journal of Comparative Law* 73, 77.

evidence for the genealogical relationship between particular constitutional courts. Rather, I want to emphasize the general point that the more legal systems have adopted judicial review, the more obvious the choice of judicial review has become.

When analysing constitutional borrowing, following David Law and Mila Versteeg, it is useful to distinguish between (1) constitutional learning, when country *A* imitates country *B* because it thinks that copying country *B* is a recipe for success; (2) constitutional competition, when adopting a certain institution will help country *A* to attract valuable resources, like capital and skilled labour; (3) constitutional conformity, when country *A* wants to secure the recognition of the international community and/or country *B* that *A* considers as an important point of reference, regardless whether *A* is convinced of the merits of the institution or practice that is transplanted; (4) constitutional network effects, when country *A*'s choice of an institution will in itself make the same choice more attractive to country *B*, because in this way it can belong to a more extensive community.⁷⁹

Not all the four mechanisms are equally important for explaining the widespread endorsement of the New Constitutionalism. Adopting judicial review in order to secure a better position in the international competition for scarce resources, or in order to be recognized by other states, does not necessarily amount to the endorsement of constitutional review. However, these four mechanisms are so closely intertwined in real life instances of constitutional borrowing that it is very difficult to dissect them.

Let me use a couple of examples to illustrate my point. I have argued above that the activist turn of the ECtHR gave strong institutional incentives to many European countries to introduce judicial review. In the case of Central and Eastern Europe, this institutional salience was accompanied by political pressure. As László Sólyom summarizes the process:

Membership in the Council of Europe counted as recognition as a democratic state. For that reason, all new democracies applied for it at the earliest possible time. In the admission process the existence of a constitutional court has been a particularly important point and the Council scrutinized the conditions of the constitutional review. The more the democratic functioning of a given state was uncertain, the more the Council of Europe prescribed

⁷⁹ David S Law and Mila Versteeg, 'The Evolution and Ideology of Global Constitutionalism' (2011) 99 *California Law Review* 1163, 1171–87.

measures for strengthening the powers of the constitutional court, as in the cases of Belarus and Azerbaijan, for example.⁸⁰

However, since I am primarily interested in the intellectual prominence of the New Constitutionalism, the point I want to make is not directly this institutional or political pressure. Instead, I want to emphasize that these external expectations were, to a great extent, met by the aspirations of the intellectual elite of new democracies. European institutions made the choice of judicial review salient, but what made judicial review highly desirable in those countries was that they internalized those expectations. Judicial review was part and parcel not only of the institutional set-up of their model countries, but also of the European project. Since they wanted to belong to Europe, and judicial review was part of the European project, the desirability of judicial review was beyond question.

As an additional point, it is also worth emphasizing that constitutional imitation is not necessarily a conscious process. In some cases, the constitutional imagination of the framers is so limited that they do not even realize the alternatives. Alec Stone Sweet notes, for instance, that the drafters of the Spanish constitution did not even consider *not* adopting a Kelsenian court.⁸¹ This formulation is telling. If true, it shows that the constitutional imagination of the Spanish framers was limited when they adopted constitutional review. The highly successful democratic transition of Germany (a reason for constitutional learning), the political and intellectual reputation of the FCC, Germany's weight within the EU (reasons for constitutional conformity) and the civil law paradigm as a common legal framework (network effect) have all made the German model a salient choice for the Spanish founding fathers. For very similar reasons, the German model was also an obvious choice for Central European countries. However, for them, the spread of judicial review to Southern Europe made the choice even more compelling. First, Spain's successful transition to democracy was an additional reason for imitation. Second, the fact that Spain, Portugal and Greece also joined the club made the club bigger, and thereby more attractive. In addition, Central and Eastern European countries also learnt from and were competing with each other. The fact that others were experimenting with judicial review gave strong incentives to each Central European country. The snowballing effect helped to introduce constitutional review all over Central Europe during a very short historical period.

⁸⁰ Sólyom (n 77) 153, footnote 1.

⁸¹ Stone Sweet (n 49) 41.

This short overview could not do full justice to the six hypotheses that it surveyed. However, I hope that my overview could establish that these hypotheses are at least highly plausible in explaining why the New Constitutionalism has become the dominant paradigm of constitutional law. The survey of these explanatory theories also sets the stage for my normative analysis: so far I have identified the beliefs of the intellectual elite that explain the success of the New Constitutionalism. The following chapters will subject some of these beliefs to critical scrutiny. The explanatory theories surveyed above raise at least four questions that will surface in the chapters that follow. First, the success of the New Constitutionalism can be explained to a great extent by the general belief that judicial review is an integral part of a conception of democracy that is superior to majoritarianism. But is the new conception of democracy really more attractive than the majoritarian one? Second, others believe that judicial review is justifiable because their sophisticated theories of constitutional interpretation impose sufficiently strong limits on judicial discretion. Is this account of constitutional interpretation adequate? Third, many people are of the opinion that we should choose between decision-making procedures on the basis of which procedure is more likely to make decisions that we genuinely believe to be morally right. Is this assumption correct? Finally, most advocates of the New Constitutionalism believe that judges are more likely to make good decisions (whatever they mean by that) than legislators. Are they really right? All of these questions will play a pivotal role in the central chapters of the book.

1.3 FROM EXPLANATION TO JUSTIFICATION

1.3.1 Some Methodological Points

I have defined what the New Constitutionalism means, explained how the new paradigm has emerged, and also surveyed the most plausible explanations for the intellectual dominance of the new paradigm. Now I am in the position to address the central question of the book: is the central institutional tenet of the New Constitutionalism, that is to say, strong judicial review, justified? I am going to challenge the normative underpinnings of the New Constitutionalism and defend a position that, broadly speaking, is sceptical about the justifiability of this institution. The purpose of the present section is to give my readers a rough road map to the argument of the book. However, to draw this map properly

and explain it, I also have to clarify some of the methodological assumptions of my project.

In the course of developing my argument against the New Constitutionalism, I will commit myself to a couple of methodological tenets. Although they are hardly original or controversial in principle, they are so often overlooked in the literature that it is worth emphasizing them here. Also, since these methodological insights can be detached from my substantive claims, it might be useful to identify and isolate them at the outset. I contend that these claims can and should be endorsed even by those people who hold a position on the substantive issues that is diametrically opposed to mine.

1.3.1.1 Comparative institutional analysis

First, I submit that a proper analysis of the legitimacy of judicial review has to proceed at two, relatively autonomous, levels: at the level of political principles and the level of institutional design.

Writing on the legitimacy of judicial review, many scholars conceptualize the debate as a disagreement between different conceptions of democracy. Ronald Dworkin's distinction between majoritarian and constitutional democracy, or Bruce Ackerman's distinction between monistic democracy, dualist democracy and rights foundationalism⁸² are well known to most constitutional theorists. Although these distinctions are very useful for some purposes, the fundamental problem with them is that they conflate the two levels of analysis and suggest necessary links between certain principles of political legitimacy and certain forms of institutional design.

I will use the concept of majoritarian democracy to explain my point. Majoritarian democracy can be understood both as a decision-making process that belongs to the institutional level of constitutional theory or as a claim about the legitimacy of political institutions. To simplify the issue, I will assume that, as an institutional arrangement, majoritarian democracy is roughly identical with the Orthodox Model of Parliamentary Supremacy. However, this decision-making process is compatible with more than one set of justificatory principles. (1) One can argue that in a modern pluralist society where people disagree on the principles of justice, the fairest procedure is the one that gives equal weight to the views of each citizen (the principle of procedural fairness). (2) Alternatively, one can claim that a political system is legitimate only if it satisfies a certain conception of justice (the principle of justice) and

⁸² Dworkin (n 72) 17; Ackerman (n 10) 3–33.

simultaneously believe that the Orthodox Model of Parliamentary Supremacy is the best way to approximate this state of affairs. (3) I will contend in this book that, as a general rule, majoritarian democracy is the best way to define the publicly justified principles of justice (the principle of public reason). (4) The critics of majoritarian democracy sometimes associate the Orthodox Model of Parliamentary Supremacy with the view that the majority's decision constitutes what is morally right or wrong (the majoritarian conception of justice). (5) Some moral relativists suggest that since there are no moral truths, whatever the majority favours is politically legitimate (the will of the majority).⁸³

At this stage of the analysis, I can remain agnostic in the debate about the justification of majoritarian institutions. The upshot of my argument is that there is not always a one-to-one correspondence between certain legitimizing political principles and certain political institutions. On the one hand, different justificatory principles can converge on the same institutional design, as the above example testifies. On the other hand, people who agree on roughly the same political principles can disagree on the institutional implications of those principles. People who share the same conception of justice, for instance, can disagree whether parliaments or courts are more likely to track their preferred principles of justice. (See subsection 1.2.4 on maximizing policy preferences.)

Furthermore, commentators often compare the outcomes generated by imperfect majoritarian institutions to their ideal anti-majoritarian political principles. However, our political principles are not self-executing but are applied by fallible human beings and imperfect institutions. Institutional transmission is necessary, and ignoring the price of this transmission is not an option. The relevant comparison is therefore not between ideal political principles and outcomes generated by imperfect political institutions, but either between two sets of principles or two sets of imperfect political institutions. It is not sufficient for the critics of majoritarian institutions to establish that majoritarian decisions fall short of their ideal political principles, but they are also required to establish that imperfect anti-majoritarian political institutions are superior to imperfect majoritarian institutions in light of some attractive justificatory principles.

1.3.1.2 The need for empirical analysis

Second, when justificatory principles underdetermine the proper institutional set-up, the choice between different institutional solutions will

⁸³ For the link between democracy and relativism, see Hans Kelsen, *Vom Wesen Und Wert Der Demokratie* (Mohr 1929) 36–8.

very often depend on empirical premises. This book embraces the 'institutional turn' in constitutional theory urged by Neil Komesar, Cass Sunstein, Adrian Vermeule and others,⁸⁴ even if it often fails to live up to its own aspirations. As the above authors claim, constitutional theory must necessarily address the questions of institutional capacities, and these questions are, to a great extent, empirical. 'Empirical questions always and necessarily intervene between high-level premises, on the one hand, and conclusions about the decision-procedures that should be used at the operating level of the legal system, on the other.'⁸⁵

Many people have the impression that the arguments for and against judicial review are so well known and well rehearsed that the debate has reached a certain impasse, and the chances of making further progress are relatively slim. I emphatically disagree with this position. If my argument is correct, empirical questions about institutional capacities are directly relevant to the justificatory enterprise. Therefore, even if it were true that everything has been already said about the political principles that are relevant for the debate, the same certainly does not apply to the related empirical questions. I tend to think that Adrian Vermeule is right in claiming that the empirical analysis of our political institutions is still in its infancy.⁸⁶ But if empirical research about institutional capacities is in its infancy, and this research is directly relevant to the broader justificatory enterprise, then the progress we make in empirical research can also result in some progress in the overall justificatory enterprise.

1.3.1.3 Institutional analysis cannot be self-standing

The above considerations have made some institutionalists highly sceptical about the relevance of normative political theory for constitutional design and constitutional interpretation. As Vermeule puts it, 'a commitment to democracy or majoritarianism is too abstract to tell us how to interpret statutes ...'⁸⁷ and 'democracy is too abstract a commitment to cut between various positions on the desirability of judicial review. The

⁸⁴ Neil K Komesar, *Imperfect Alternatives: Choosing Institutions in Law, Economics and Public Policy* (University of Chicago Press 1997); Neil K Komesar, 'The Logic of the Law and the Essence of Economics: Reflections on Forty Years in the Wilderness' (2013) 2013 *Wisconsin Law Review* 265; Cass R Sunstein and Adrian Vermeule, 'Interpretation and Institutions' (2003) 101 *Michigan Law Review* 885.

⁸⁵ Adrian Vermeule, *Judging under Uncertainty: An Institutional Theory of Legal Interpretation* (Harvard University Press 2006) 13.

⁸⁶ *ibid* 3.

⁸⁷ *ibid* 45.

choice between those positions turns on questions of institutional capacities and systemic effects.⁸⁸

As I have emphasized, I consider the institutional turn a major contribution to constitutional theory and, therefore, we have a good reason to embrace this turn. But, in contrast to Vermeule, I would like to stress not only the relative autonomy of the institutional approach, but the interplay between our abstract political principles on the one hand and empirical institutional considerations on the other. Even if our political principles are not determinate enough to single out one particular institutional choice, sometimes these theories do cut between the various institutional choices.

Institutional capacities are influenced by many factors, and the error-cost of decision-making is one of them. To assess the competence of our institutions, we need to know their purpose. We cannot intelligibly answer the question of whether a hammer is a good tool without knowing the nature of the task at hand. Similarly, we cannot intelligibly form a judgement on the adequacy of an institution without first specifying the purpose of the institution in question. Our claims about error-costs will make sense only if we have an idea about the institution's function. In the context of constitutional theory, the political principles that define the proper relationship between democracy and fundamental rights will define the purpose of our institutions, and different conceptions of democracy will define this purpose in different ways. I do not claim that we have to know the right answer in advance for each case to form a judgement about the likelihood of erroneous decisions.⁸⁹ Nevertheless, the political principles that define the purpose of our institutions can make the range of sensible institutional choices more determinate and can make certain institutional features salient when evaluating the strengths and weaknesses of different institutional designs.

Vermeule himself has admitted that his institutional theory is based on a consequentialist approach;⁹⁰ but our political institutions are not always justified in such terms. Jeremy Waldron's distinction between outcome-related and process-related reasons seems highly relevant in this context.⁹¹ Although we often assess our institutions in light of the outputs

⁸⁸ *ibid* 237.

⁸⁹ Adrian Vermeule, *Law and the Limits of Reason* (Oxford University Press 2009) 8; Jeremy Waldron, 'The Core of the Case against Judicial Review' (2006) 115 *Yale Law Journal* 1346, 1373–4.

⁹⁰ Vermeule (n 85) 5.

⁹¹ Waldron (n 89) 1372–3.

they (are likely to) produce, sometimes we value the fairness of the procedures our institutions employ independently of the outcomes.

Even if a general commitment to democracy is unhelpful in this context, the fact that people disagree on the concept of democracy does not show that the more specific conceptions of democracy would not cut between various positions on the desirability of judicial review. The choice between the process-related and outcome-related justifications of democracy will have far-reaching consequences for the issue under consideration. On the one hand, if someone opts for the procedural justification of democracy, the institutional considerations central to Vermeule's investigation will have only a marginal role. If, on the other hand, someone defends democracy by outcome-related reasons, those institutional considerations will become eminently relevant. The caveat is that the debate about the proper institutional capacities of our legal institutions presupposes that we have already committed to an outcome-related justification of democracy. Yet, the choice between the outcome-related and the procedural justification for democracy cannot be based on empirical considerations; it must be based on a normative political theory.

1.3.1.4 Interpretation and the institutional turn

Fourth, the above methodological considerations have important implications not only for institutional design but also for the theory of constitutional interpretation. Many theories of constitutional interpretation tend to focus on the question of *how* the true meaning, or the best interpretation, of the constitution can be established and abstract away from the agent *who* interprets the constitution. To put it otherwise, they presume that the 'how-question' can be usefully separated and insulated from the 'who-question'. Once we have reached a decision on institutional design, so the argument runs, we can focus our efforts on the proper method of interpretation. Although I do not deny that these two issues can be analytically separated, for practical purposes the how-question cannot be insulated from the considerations of institutional capacities and political legitimacy.

The four comments above, taken together, provide us with a rudimentary map of constitutional theory. This map suggests that an adequate theory has at least three different, but interconnected domains. We need to have a theory about the meaning of the constitution. However, since the constitution is not self-executing but is interpreted by fallible human beings and imperfect institutions, the analysis has to remain open to institutional considerations. In addition, although the questions about institutional capacities are to a large extent empirical, empirical analysis

cannot be self-standing, since institutional capacities have to be assessed in light of the underlying justificatory principles of our institutions. Although the theories of constitutional interpretation, institutional design and political legitimacy are relatively autonomous, there is a complicated interplay between them, and an adequate theory must be able to handle the complexity of these interrelationships.

1.3.2 Outline of the Argument

The methodological considerations sketched above will shape how my argument will proceed. I will develop my position in four steps.

1. Chapter 2 is about the justificatory principles of constitutional democracies. I will argue that there are two dominant theories that shape the debate about the legitimacy of judicial review, and I will call them the Principle of Equal Participation (hereinafter PEP) and Rights Foundationalism (hereinafter RF), respectively. The two theories aim to prevent very different dangers, and they put the emphasis on different values. I will contend that in a modern pluralist society we cannot rely on RF, and PEP is a more plausible contender for our allegiance. However, I will also argue that there is a principled middle way between these two extremes. Political liberalism, properly articulated, unlike PEP, imposes substantive limits on the range of legitimate political decisions. And unlike RF, it takes reasonable pluralism seriously.
2. Chapter 3 will be devoted to institutional considerations and will present a *prima facie* case against the desirability of judicial review. Constitutions with written bills of rights tend to employ highly abstract language. As a consequence, the institution that is authorized to articulate fundamental rights and give more specific content to these abstract provisions becomes a moral arbitrator: it has the right to adjudicate between reasonable, but inconclusively justified, moral beliefs. I will call this process the *specification* of human rights and argue that in light of the most attractive justificatory principles, the arguments for a strong form of judicial review are not robust enough.
3. Even if my case against the desirability of strong judicial review were conclusive, a realistic constitutional theory would have to face the fact that the authority to specify abstract human rights provisions has been, in most countries, already conferred on the judiciary. Those who are sceptical about the legitimacy of judicial review must therefore also offer a non-ideal, or second-best, theory

as to how courts already authorized to apply human rights provisions should interpret those provisions. That is the primary reason why I dedicate a separate chapter to constitutional interpretation. The general thrust of my argument in Chapter 4 is that judges should usually defer to the views of the legislature in interpreting the constitution. However, the chapter on constitutional interpretation is also instrumental in developing the concept of deferential judicial review that plays a crucial role in the argument of Chapter 5.

4. Although Chapter 3 puts forward a *prima facie* case against strong constitutional review, it does not claim that judicial review is always illegitimate. In Chapter 5, building on the insights of the previous chapters and equipped with the concept of deferential judicial review, I aim to explore the nuanced institutional implications of my general sceptical stance. Chapter 5 will develop what can be called a theory of weak judicial review. In doing so, I will deviate from the established terminological conventions of the literature in one important respect. Simply put, according to the established convention, the hallmark of strong judicial review is judicial supremacy, that is, that courts have the final say in constitutional disputes, their interpretation cannot be overridden by the ordinary legislative process. By contrast, in the terminology of my book, strong judicial review entails not only (1) judicial supremacy, but also (2) the broad scope (rights-based), and (3) the robust exercise of judicial review. As an implication, I will also deviate from how the term of weak judicial review is usually used. I will argue that judicial review can be weak in three different dimensions and, therefore, distinguish three forms of weak judicial review; each of them is lacking one of the defining features of strong constitutional review.

Judicial review is *limited* if the constitution lacks a bill of rights and judges can appeal only to structural-organizational norms when they scrutinize the constitutionality of legislation. Among mature democracies, Australia exemplifies this form of limited judicial review. Judicial review can be coined *penultimate*, if judges are authorized to scrutinize legislation, but the legislature has the possibility to override or disregard judicial decisions.⁹² If that is the case, the final word on the meaning of the constitution (or a

⁹² I borrow the term from Michael J Perry, 'Protecting Human Rights in a Democracy: What Role for the Courts' (2003) 38 *Wake Forest Law Review* 635.

parliamentary bill of rights), at least formally, belongs to the legislature. That is a defining feature of the Commonwealth model of judicial review that was introduced in Canada, New Zealand and the United Kingdom.⁹³ Finally, judicial review is *deferential* if courts usually defer to the views of the elected branches or are constitutionally required to do so. The legal systems of the Nordic countries are consistently characterized by a strong tradition of judicial self-restraint and trust in representative institutions. In addition, in Sweden and Finland judicial deference is not only an empirical feature of the legal system but is also a constitutional requirement.⁹⁴

My main reason for deviating from the established terminological convention and using weak judicial review as an umbrella concept that covers all these three types of judicial review is that to some extent these institutional solutions can be considered as functional equivalents: they all want to strike a balance between democracy and the protection of human rights that differs from the balance struck by the New Constitutionalism. In Chapter 5, I am going to compare the strengths and weaknesses of the different forms of weak judicial review and evaluate them in light of the normative principles that are spelled out in the earlier chapters of the book.

⁹³ Stephen Gardbaum, *The New Commonwealth Model of Constitutionalism: Theory and Practice* (Cambridge University Press 2013).

⁹⁴ J Lavapuro, T Ojanen and M Scheinin, 'Rights-Based Constitutionalism in Finland and the Development of Pluralist Constitutional Review' (2011) 9 *International Journal of Constitutional Law* 505, 505.