

Judicial Review and American Constitutional Exceptionalism

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This article challenges the conventional view of the pervasiveness of American-style judicial review. It questions why social movements contest constitutional meaning by fighting over judicial appointments in the United States, and why this strategy makes little sense in democracies that constitutionalized rights in the late twentieth century. The United States has been both a model and an anti-model in the global spread of judicial review, as the hope of *Marbury* (constitutionalized rights) has been tempered by the fear of *Lochner* (courts run amok). In reconciling *Marbury* and *Lochner*, other polities have adopted stronger mechanisms of judicial accountability that make it difficult for social movements to fight over appointments. Two particular models of judicial review are examined: the political court model, which relies on *ex ante* mechanisms of accountability such as supermajority appointment provisions; and the politicized rights model, which relies on *post facto* mechanisms of accountability such as statutory override provisions. The article concludes that while judicial review may have originated in the United States, it has thrived better abroad than at home.

Cet article conteste la perception conventionnelle de l'omniprésence de l'examen de la constitutionnalité des lois judiciaires de style américain. L'auteur se demande pourquoi les mouvements sociaux contestent le sens constitutionnel en s'opposant aux nominations judiciaires aux États-Unis, et pourquoi cette stratégie est incompréhensible dans les démocraties qui ont constitutionalisé les droits à la fin du XX^e siècle. Les États-Unis ont été autant un modèle qu'un contre-modèle de la propagation mondiale de l'examen de la constitutionnalité des lois, puisque l'espoir engendré par l'affaire *Marbury* (droits constitutionalisés) a été modéré par la crainte provenant de l'affaire *Lochner* (tribunaux débridés). En réconciliant l'affaire *Marbury* et l'affaire *Lochner*, les pays ont adopté des

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mécanismes plus forts d'imputabilité judiciaire, qui rendent difficile l'opposition des mouvements sociaux aux nominations. Deux modèles particuliers d'examen de la constitutionnalité sont examinés : le modèle de tribunal politique, qui repose sur des mécanismes *ex ante* d'imputabilité, tels que les clauses de nomination à une majorité absolue ; et le modèle de droit politisé, qui repose sur des mécanismes *post facto* d'imputabilité, tels que les clauses d'annulation statutaire. L'article conclut que même si l'examen de la constitutionnalité vient sans doute des États-Unis, il s'est épanoui davantage à l'étranger que dans son pays d'origine.

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CONSTITUTIONALLY SPEAKING, the United States differs from other Western democracies. It tolerates hate speech and the death penalty, while disdaining international and foreign sources in constitutional interpretation as well as positive economic and social constitutional guarantees.¹ With respect to judicial review, however, it is commonly assumed that the United States has been a model for the world's democracies.² There is a conventional narrative about the spread of judicial review that goes as follows. The United States pioneered the notion of a constitution as a supreme law protected by courts against political inroads. The US Supreme Court heroically articulated the power of judicial review in 1803 in *Marbury v. Madison*.³ *Marbury* made few inroads abroad, however, until the second half of the twentieth century when democracies throughout the world borrowed judicial review from the United States. To complete the myth,

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1. See e.g. Michael Ignatieff, ed., *American Exceptionalism and Human Rights* (Princeton: Princeton University Press, 2005); Georg Nolte, ed., *European and US Constitutionalism* (Cambridge: Cambridge University Press, 2005).
 2. Ronald Dworkin, *Freedom's Law: The Moral Reading of the American Constitution* (Cambridge: Harvard University Press, 1996) at 71 (arguing that judicial review is America's "most distinctive and valuable contribution to democratic theory").
 3. 5 U.S. (1 Cranch) 137 (1803) [*Marbury*].

then, the horrors of the Second World War convinced the democracies of Western Europe that they needed entrenched rights and constitutional courts.⁴ From Western Europe, judicial review spread throughout the globe,⁵ and democracy and judicial review are now seen as inseparable.

This article questions the conventional wisdom that the logic of *Marbury* has conquered the world's democracies by exploring two questions: why do social movements contest constitutional meaning by fighting over judicial appointments in the United States, and why does such a strategy make little sense in democracies that constitutionalized rights in the late twentieth century?⁶ The short answer is that the United States has been both a model and an anti-model⁷ in the worldwide spread of judicial review. The United States stood astride the world after the Second World War and elements of American constitutionalism such as judicial review proved irresistible to democracies around the globe.⁸ Politics that adopted judicial review in the late twentieth century, however, rejected the key assumption on which judicial review in the United States is founded. American constitutionalism assumes that law is separate from politics and that courts have the power and the duty to maintain that distinction.

This assumption was rejected because other democracies learned from the American experience that courts that exercise judicial review are powerful political as well as legal actors. The fear of providing constitutional courts with too much power played an important role in shaping judicial review outside the United States.⁹ When judicial review began to spread around the globe in the second half

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4. Mauro Cappelletti, "Repudiating Montesquieu? The Expansion and Legitimacy of 'Constitutional Justice'" (1985) 35 *Cath. U. L. Rev.* 1.
 5. For a critical analysis of the intellectual debates over the worldwide spread of judicial review, see Miguel Schor, "Mapping Comparative Judicial Review" (2008) 7 *Wash. U. Global Stud. L. Rev.* 257 [Schor, "Mapping"].
 6. The best comparative study of judicial appointments is Kate Malleson & Peter H. Russell, eds., *Appointing Judges in an Age of Judicial Power: Critical Perspectives from around the World* (Toronto: University of Toronto Press, 2006).
 7. Heinz Klug, "Model and Anti-Model: The United States Constitution and the 'Rise of World Constitutionalism'" (2000) 3 *Wis. L. Rev.* 597.
 8. Thomas Ginsburg, "The Global Spread of Constitutional Review" in Keith E. Whittington, R. Daniel Kelemen & Gregory A. Caldeira, eds., *The Oxford Handbook of Law and Politics* (New York: Oxford University Press, 2008) 81; Schor, "Mapping," *supra* note 5.
 9. See e.g. Alec Stone Sweet, "Why Europe Rejected American Judicial Review and Why It

of the twentieth century, the hope of *Marbury* (the promise of constitutionalized rights) became fused with the fear of *Lochner*¹⁰ (the possibility that courts might run amok). In seeking to thread a needle between *Marbury* and *Lochner*, the American assumption that a constitution is a species of law was rejected in favour of a very different baseline assumption that constitutions are neither law nor politics, but an entirely new genus of “political law.”¹¹ Consequently, democracies abroad adopted stronger mechanisms by which citizens can hold constitutional courts accountable¹² and which make it less likely that social forces will use appointments as a vehicle for constitutional battles.

The rejection of the American model of judicial review comes in two principal flavours. Germany and Canada are America’s principal competitors in the export of constitutional norms.¹³ Germany and Canada—along with the democracies they influenced¹⁴—rejected the American constitutional assumption

May Not Matter” (2003) 101 Mich. L. Rev. 2744 at 2748-63 (arguing that a fear of importing *Lochner* played an important role in France’s decision to reject judicial review before the Second World War) [Sweet, “Judicial Review”]; Sujit Choudhry, “The *Lochner* Era and Comparative Constitutionalism” (2004) 2 Int’l J. Const. L. 1 at 15 (noting that “[t]he *Lochner* era and its multilayered legacy loom large in the Canadian constitutional imagination”).

10. *Lochner v. New York*, 198 U.S. 45 (1905) [*Lochner*].
11. Mark Tushnet, “*Marbury v. Madison* Around the World” (2004) 71 Tenn. L. Rev. 251 at 257 [Tushnet, “*Marbury*”].
12. Those mechanisms include appointment procedures that reduce the power of factions to shape the membership of constitutional courts and rules that prevent courts from having the final word in constitutional interpretation. See Part III below.
13. Tom Ginsburg, *Judicial Review in New Democracies: Constitutional Courts in Asian Cases* (New York: Cambridge University Press, 2003) at 9 (observing that the “centralized system of constitutional review, designed by Hans Kelsen for Austria and subsequently adopted in Italy and Germany, has been predominant in the recent wave of democratization”); Adam M. Dodek, “Canada as a Constitutional Exporter: The Rise of The ‘Canadian Model’ of Constitutionalism” (2007) 36 Sup. Ct. L. Rev. (2d) 309 at 312 (noting that Canadian constitutionalism has proven to be an influential model in a number of countries).
14. The German model influenced many of the democracies of continental Europe as well as democracies in East Asia and Latin America. See Alec Stone Sweet, *Governing with Judges: Constitutional Politics in Europe* (Oxford: Oxford University Press, 2000) [Sweet, *Governing with Judges*]; Ginsburg, *ibid.*; and Patricio Navia & Julio Rios, “The Constitutional Adjudication Mosaic of Latin America” (2005) 38 Comp. Pol. Stud. 189. The Canadian model influenced the United Kingdom, New Zealand, Israel, and South Africa. See Dodek,

that law is separate from politics. Germany sought to craft a constitutional court sufficiently powerful to serve as a counterweight to the legislature and able to arbitrate disputes between political elites.¹⁵ This is the political court model of judicial review. Canada sought to preserve a role for Parliament in interpreting the Constitution.¹⁶ This is the politicized rights model of judicial review. Both of these models provide stronger mechanisms by which citizens can hold courts accountable than does the American model.¹⁷ Popular constitutionalism—the notion that citizens should play a role in construing their constitution—may have originated in the United States,¹⁸ but has thrived better abroad than at home.

I. THE AMERICAN MODEL: POLITICIZED APPOINTMENTS

The American model of judicial review, unlike the political court and politicized rights models, rests on a weak form of political accountability for the US Supreme Court. Although the framers distrusted power, they gave little thought to how the Supreme Court should be held politically accountable. In the eighteenth century, no one envisioned how powerful the Court would become. By

ibid.; David Oliver Erdos, *Mace, Sword, and Scales: The Bill of Rights Debate in Westminster Democracies* (PhD Dissertation, Princeton University, 2007) [unpublished, on file with author]; and Stephen Gardbaum, “The New Commonwealth Model of Constitutionalism” (2001) 49 *Am. J. Comp. L.* 707.

15. See Part III.A below.

16. See Part III.B below.

17. Scholars use a number of inconsistent terms to describe the different models of judicial review. The political court model of judicial review is most often described as the European model. Cappellotti, *supra* note 4. The politicized rights model is most often termed the Commonwealth model. Gardbaum, *supra* note 14. Mark Tushnet favours the term “weak-form review,” which he contrasts with the strong forms of review exercised in the United States and Germany. Tushnet, “*Marbury*,” *supra* note 11 at 264ff. The problem with the terms most commonly used, the “European” and “Commonwealth” models, is that the spread of constitutionalism around the world proves that geography is not dispositive when it comes to constitutional models. This article, therefore, adopts two new terms in the hope of infusing the scholarly debate with greater analytical clarity. The terms used by this article—the political court and the politicized rights models of judicial review—reflect both the essence of these models and how they differ from each other.

18. Larry D. Kramer, *The People Themselves: Popular Constitutionalism and Judicial Review* (New York: Oxford University Press, 2004) at 6-8.

contemporary lights, Alexander Hamilton's view that courts exercise neither force nor will is a charming fairy tale.¹⁹ Wrong ideas can have important consequences, however. If courts are subject only to weak political checks, then how they interpret the Constitution becomes the key issue of constitutional theory. Absent external constraints on the exercise of power, internal constraints, such as the ideology of who exercises the levers of power, surface as a key theoretical and practical issue. American constitutional theory has fixated obsessively on interpretation²⁰ in large part because the original design of checks and balances has proven inadequate to deal with the growth in judicial power.²¹

While scholars happily disputed the niceties of constitutional interpretation, practical men and women sought to resolve the issue in a brutal struggle over who should exercise the levers of judicial power. Appointment battles have become the means by which social groups vie over the meaning of the Constitution, since it is practically impossible to amend the Constitution in order to overrule the Supreme Court.²² Conservative social movements, in particular, have sought to topple *Roe v. Wade*²³ by changing the membership of the Court.²⁴ The struggle

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19. Alexander Hamilton, "The Federalist No. 78" in Benjamin F. Wright, ed., *The Federalist* (Cambridge: Harvard University Press, 1961) 489. For a useful corrective, see L.H. LaRue, "Neither Force Nor Will" in William N. Eskridge, Jr. & Sanford Levinson, eds., *Constitutional Stupidities, Constitutional Tragedies* (New York: New York University Press, 1998) 57.
 20. It is difficult to imagine any other field of intellectual inquiry that has wrestled with one paradigm for as long as American constitutional theory has with the counter-majoritarian difficulty. Alexander Bickel framed the issue almost half a century ago and scholars persist in seeking to pull the "sword of judicial review from the stone of illegitimacy." Rebecca L. Brown, "Accountability, Liberty, and the Constitution" (1998) 98 *Colum. L. Rev.* 531 at 531. See also Stanley C. Brubaker, "The Counter-majoritarian Difficulty: Tradition versus Original Meaning" in Kenneth D. Ward & Cecilia R. Castillo eds., *The Judiciary and American Democracy: Alexander Bickel, The Counter-majoritarian Difficulty, and Contemporary Constitutional Theory* (Albany: State University of New York Press, 2005) 105; Barry Friedman, "The Birth of an Academic Obsession: The History of the Counter-majoritarian Difficulty, Part Five" (2002) 112 *Yale. L.J.* 153.
 21. In states that have stronger mechanisms by which citizens can hold courts accountable, disputes over constitutional interpretation are less significant. Sweet, "Judicial Review," *supra* note 9.
 22. The Supreme Court has been overruled only four times by amendment. See Akhil Reed Amar, *America's Constitution: A Biography* (New York: Random House, 2005) at 334.
 23. 410 U.S. 113 (1973).
 24. This strategy recently bore (partial) fruit. *Gonzales v. Carhart*, 550 U.S. 124 (2007).

is clearly larger than abortion, as social movement conservatives feel threatened by modernity and seek to tear down the wall between church and state by constitutionalizing a more prominent role for religion in public life.²⁵ Abortion is the linchpin, however, as it mobilizes a broad spectrum of citizens to contest constitutional meaning.²⁶ Angry citizens are more likely to vote and fight over judicial appointments than are complacent ones. Intensity of preferences may matter more in constitutional politics than it does in ordinary politics because the myth that judges are umpires provides a partial firewall against citizen mobilization.²⁷

The nation was poised for a struggle over appointments as President George W. Bush began his second term. No other president has so clearly sought to mobilize social movement conservatives.²⁸ In his 2004 re-election campaign, President Bush made it clear during the presidential debates with John Kerry²⁹ that he would seek to transform the Court via appointments when he criticized *Dred Scott v. Sandford*,³⁰ which conservatives pair with *Roe v. Wade* as evil twins conjoined in their denial of personhood to certain classes of human beings. Moreover, under Chief Justice Rehnquist, the Supreme Court had gone eleven years without a change in membership.³¹ Although Republican presidents

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25. Noah Feldman, *Divided by God: America's Church-State Problem and What We Should Do About It* (New York: Farrar, Straus and Giroux, 2005).
 26. The role that *Roe v. Wade* plays in mobilizing religious conservatives is explored in N.E.H. Hull & Peter Charles Hoffer, *Roe v. Wade: The Abortion Rights Controversy in American History* (Kansas City: University Press of Kansas, 2001).
 27. Chief Justice Roberts recited this myth in the opening statement of his confirmation hearing: "Judges are like umpires. Umpires don't make the rules, they apply them." U.S., *Confirmation Hearing on the Nomination of John G. Roberts, Jr., To Be Chief Justice of the United States: Hearing Before the Senate Committee on the Judiciary*, 109th Cong. (2005) at 55.
 28. See e.g. Ron Suskind, "Faith, Certainty and the Presidency of George W. Bush" *The New York Times Magazine* (17 October 2004), online: <<http://www.nytimes.com/2004/10/17/magazine/17BUSH.html>>.
 29. The Second Bush-Kerry Presidential Debate (8 October 2004), online: Commission on Presidential Debates <<http://www.debates.org/pages/trans2004c.html>>.
 30. 60 U.S. (19 How.) 393 (1857).
 31. Linda Greenhouse, "Under a Microscope Longer Than Most" *The New York Times* (10 July 2005) A3 (noting that the period "during which a court's membership remained unchanged is known to political scientists as a "natural court" and is a "kind of controlled experiment that

appointed a majority of its members, the Rehnquist Court surprisingly upheld *Roe v. Wade*.³² Conservatives have long been disappointed by how justices nominated by Republicans seem to move leftward after their appointment. Conservatives complain that justices “drift” left³³ because they “listen” to the opinions of cultural and media elites such as Linda Greenhouse, a reporter who writes extensively on the Supreme Court for the New York Times, in what some have called the “Greenhouse effect.”³⁴

To guard against the pernicious influence of Linda Greenhouse and other elites, conservatives in the Republican Party waged a fierce and successful battle to enforce ideological orthodoxy over President Bush’s nominees.³⁵ The role of social movements in affecting judicial appointments was highly visible in both the institutional battles that preceded Bush’s nominations and the subsequent appointment struggles. The first priority was to remove any institutional obstacles to the confirmation of a conservative whose record demonstrated that he or she was impervious to elite blandishment. When Arlen Specter, Republican senator and chairman of the Judiciary Committee, stated that he would not approve nominees who desired to overrule *Roe v. Wade*, he was forced to retract his words under the threat of losing his chairmanship.³⁶ In addition, Republicans feared that Senate Democrats might use the filibuster to defeat a Bush nominee and advocated changing the Senate rules on judicial confirmations to eliminate this possibility. While a compromise brokered by fourteen moderate senators prevented the elimination of the filibuster, it was clearly off the table for all practical purposes.³⁷

permits study of the institution itself without the distraction of judges coming and going”).

32. See *Planned Parenthood v. Casey*, 505 U.S. 833 (1992).

33. Lee Epstein *et al.*, “Ideological Drift Among Supreme Court Justices: Who, When and How Important?” (2007) 101 Nw. U.L. Rev 127.

34. Jan Crawford Greenburg, *Supreme Conflict: The Inside Story of the Struggle for Control of the United States Supreme Court* (New York: Penguin Press, 2007) at 161 (noting that conservatives claim that Justice Kennedy in particular is a “victim of the ‘Greenhouse Effect.’”) Political scientists speak of the importance of audience in influencing judicial behaviour. See *e.g.* Lawrence Baum, *Judges and their Audiences: A Perspective on Judicial Behaviour* (Princeton: Princeton University Press, 2006).

35. Greenburg, *ibid.*; Jeffrey Toobin, *The Nine: Inside the Secret World of the Supreme Court* (New York: Doubleday, 2007).

36. Toobin, *ibid.* at 240-41.

37. *Ibid.* at 265-66.

Conservatives also turned their attention to the forthcoming nominations. Within hours of the announcement of Justice O'Connor's retirement, conservative interest groups began to work against the possible appointment of Alberto Gonzales because he was thought to be soft on abortion.³⁸ The nomination of John Roberts aroused little opposition; he had a fine resumé and a thin record on divisive social issues, and the administration had spent a year selling him to Christian conservatives.³⁹ The nomination of Harriet Miers, in contrast, led to a surreal political battle.⁴⁰ Conservatives disapproved of her nomination, regarding her as insufficiently conservative and insufficiently qualified, whereas liberals held back their criticism.⁴¹ The conservative outcry was sufficiently strong that she withdrew her nomination.⁴² The nomination of Samuel Alito, with his clear conservative track record, led to the return of ideological normalcy.⁴³ Alito's confirmation was surprisingly close (58 to 42) given his obvious qualifications.

The conventional view among scholars is that ideology has always mattered when it comes to a president's judicial nominations, and that appointment battles are nothing to worry about. It is not surprising that prominent political scientists Lee Epstein and Jeffrey Segal argue that appointments have always been about ideology in their recent book on the topic.⁴⁴ Political scientists have long thought that the Court eventually follows the election returns as presidents change the composition of the Court over time.⁴⁵ Perhaps somewhat more

38. *Ibid.* at 267-78. See also Adam Nagourney *et al.*, "Conservative Groups Rally Against Gonzales as Justice" *The New York Times* (3 July 2005) A1.

39. David D. Kirkpatrick, "A Year of Work to Sell Roberts to Conservatives" *The New York Times* (22 July 2005) A14.

40. Greenburg, *supra* note 34 at 266-84.

41. Dan Balz, "Right Sees Miers as a Threat to Dream" *Washington Post* (7 October 2005) A1.

42. Robin Toner *et al.*, "Steady Erosion in Support Undercut Nomination" *The New York Times* (28 October 2005) A16. Jeffrey Toobin notes that Miers enjoys the dubious distinction of being the only person whose nomination was withdrawn even though "she probably would have been confirmed," because she was opposed by the "most conservative elements of the Republican party." Toobin, *supra* note 35 at 284.

43. Toobin, *ibid.* at 311-12.

44. Lee Epstein & Jeffrey A. Segal, *Advice and Consent: The Politics of Judicial Appointments* (New York: Oxford University Press, 2005) at 2-3.

45. For the classic statement of this position, see Robert A. Dahl, "Decision-Making in a

surprisingly, a number of law professors agree. Jack Balkin and Sanford Levinson, for example, argue that partisan entrenchment is a major vehicle for changing the Constitution.⁴⁶ Presidents strive to place their partisans on the Court as a means of etching their preferred policies into the Constitution. In this view, President Franklin Roosevelt's court-packing plan was a template to be emulated by subsequent presidents rather than an unfortunate aberration.

This article disagrees with the conventional view and argues that current battles over appointments represent something new under the empirical sun and matter normatively. The normative problem is that appointment battles undermine the Constitution.⁴⁷ James Madison argued that the proposed constitution addressed the problem of factions. He was speaking of the propensity of individuals to coalesce into groups and act in ways that are inimical to the public good. The Constitution resolves this problem by dividing politics into two tracks.⁴⁸ One is ordinary politics where, at least in theory, simple majorities govern. The other is constitutional politics where change can occur only by the consent of a super-majority. The logic of this innovation has swept the world as constitutions around the globe are promulgated and amended by super-majoritarian mechanisms. Article V of the Constitution, in short, is designed to prevent factions from gaining control over the meaning of the Constitution.⁴⁹

The judicial appointment clause is the Achilles heel of the Constitution, however, because it gives a prominent voice to factions. Social conservatives do not represent "We the People,"⁵⁰ yet they clearly had the key voice in the appointments of Chief Justice Roberts and Justice Alito. Social conservatives represent the most obdurate element of the Republican coalition when it comes to appointments⁵¹ and they exercised their "veto" in preventing the consideration

Democracy: The Supreme Court as a National Policy-Maker" (1957) 6 J. Pub. L. 279.

46. Jack M. Balkin & Sanford Levinson, "Understanding the Constitutional Revolution" (2001) 87 Va. L. Rev. 1045.

47. Miguel Schor, "Squaring the Circle: Democratizing Judicial Review and the Counter-Constitutional Difficulty" (2007) 16 Minn. J. Int'l L. 61 at 67-72 [Schor, "Squaring the Circle"].

48. See Bruce Ackerman, *We The People: Foundations* (Cambridge: Harvard University Press, 2000) at 5ff. [Ackerman, *We The People*].

49. U.S. Const. art. V.

50. U.S. Const. pmb. l.

51. The continuing importance of judicial appointments among Republicans is evidenced by their

of Gonzales and undermining Miers's nomination. The reason that social conservatives seek to place their partisans on the Court is not particularly mysterious. They are angered by a number of Supreme Court decisions and desire to change the meaning of the Constitution by changing the make-up of the federal courts.⁵² The meaning of the Constitution should, however, reflect the views and desires of a super-majority, not those of a faction within the governing coalition with intense preferences. The political logic of the appointments clause amplifies the power of factions, thereby undermining the protections afforded by Article V.

II. HOW FACTIONS LEARNED TO FIGHT OVER JUDICIAL APPOINTMENTS

Appointment wars represent something new empirically even if most scholars think otherwise. Scholars emphasize the role of elected officials while largely ignoring the institutional developments and historical processes that led interest groups to fight over appointments. Presidents and senators have always bickered over nominations with an eye towards politics, but interest groups have not always cared deeply about who sits on the Supreme Court. Given that the linkages between citizens and politics have changed dramatically since the

attitudes towards John McCain as a presidential candidate. See *e.g.*, Steven G. Calabresi & John O. McGinnis, "McCain and the Supreme Court" *The Wall Street Journal* (4 February 2008) A14 (arguing that conservative suspicions over whom McCain would appoint if he were elected president are misguided); Carl Hulse, "Conservative Distrust of McCain Lingers Over '05 Deal on Judges" *The New York Times* (25 February 2008) A1 (noting that McCain's role in preserving the possibility of a filibuster of appointments has led to a "lingering distrust of him among many conservatives").

52. Changing the make-up of the courts is a goal shared by a broad swath of conservatives. This article emphasizes the role of social movement conservatives, however, as they care deeply about appointments and their turnout was critical to the Republican electoral ascendancy. Liberals, on the other hand, are less incensed by the Supreme Court than conservatives, though that might change given its current composition. President Clinton, for example, chose moderate nominees in part because he did not face the same degree of mobilization by his supporters that President Bush faced. See Mark Silverstein, "Bill Clinton's Excellent Adventure: Political Development and the Modern Confirmation Process" in Howard Gillman & Cornell Clayton, eds., *The Supreme Court in American Politics: New Institutional Perspectives* (Kansas: University Press of Kansas, 1999) 133; Henry J. Abraham, *Justices, Presidents and Senators: A History of the U.S. Supreme Court Appointments from Washington to Clinton* (Lanham: Rowman & Littlefield, 2008) at 315-26.

founding of the Republic,⁵³ it is not surprising that the relationship between citizens and constitutional politics has changed as well. Public anger over Supreme Court decisions has been a feature of our democracy from its inception,⁵⁴ but a sustained wave of popular mobilization designed to change the ideological make-up of the Court as a means of transforming the meaning of the Constitution is not constitutional politics as usual.

Interest groups did not pressure appointments during the early Republic for two reasons. First, today's democratic appointment battles are fought on an institutional terrain that was not designed for public participation. The appointment clause in the US Constitution provides that the president nominates judges and the Senate confirms those nominations by a simple majority.⁵⁵ The process was designed to be free of popular politics since, at the time of the founding, neither the Senate nor the president was popularly elected. Second, the Court lacked the power to be a sufficient thorn in the public's side for a sustained wave of popular mobilization to occur before the Civil War. The Court then as now riled up citizens,⁵⁶ but it lacked the power to generate an attempt at a popular coup d'état given that the Bill of Rights did not bind the states.⁵⁷

Three institutional changes democratized appointments battles. The first was the transformation of the presidency so that elections became plebiscites that legitimized a president's claims of a mandate to govern the nation.⁵⁸ In his farewell address in 1796, George Washington warned the nation of the evils of political parties.⁵⁹ Four years later, the disputed election of 1800 between

53. See e.g. Michael Schudson, *The Good Citizen: A History of American Civic Life* (New York: Free Press, 1998).

54. See e.g. Dwight Wiley Jessup, *Reaction and Accommodation: The United States Supreme Court and Political Conflict, 1809-1835* (New York: Garland, 1987); Michael J. Klarman, "How Great Were the 'Great' Marshall Court Decisions?" (2001) 87 Va. L. Rev. 1111 at 1164-81.

55. U.S. Const. art. II, § 2, cl. 2.

56. Jessup, *supra* note 54; Klarman, *supra* note 54.

57. *Barron v. City of Baltimore*, 32 U.S. (7 Pet.) 243 (1833).

58. Bruce Ackerman, *The Failure of the Founding Fathers: Jefferson, Marshall, and the Rise of Presidential Democracy* (Cambridge: Belknap Press of Harvard University Press, 2005) at 5 [Ackerman, *Presidential Democracy*].

59. "Washington's Farewell Address 1796," online: The Avalon Project at Yale Law School <http://avalon.law.yale.edu/18th_century/washing.asp>.

Thomas Jefferson and John Adams demonstrated that parties, not genteel delegates to the Electoral College, would drive presidential elections. Elections were no longer “contests among local notables for the privilege of representing their constituents” but became “forums for a larger debate over national political ideals.”⁶⁰ The second change was the ratification of the Fourteenth Amendment in 1868,⁶¹ which revolutionized the role of the Supreme Court in American politics. The Constitution now limited what states could do and gave the Court an important role in defining America’s national identity. The due process clause of the Fourteenth Amendment provided a lever of power around which different factions would henceforth coalesce. The third change was the ratification of the Seventeenth Amendment in 1913 providing for the direct election of senators,⁶² which made it easier for citizens to pressure senators over judicial appointments.⁶³

It takes more than institutional change to create a political battle, though institutions do provide the terrain around which political battles are fought. In particular, it took over a century of political learning for interest groups to engage in sustained battles over appointments as a tool to change the meaning of the Constitution. Although today it seems obvious that who sits on the Supreme Court matters, this has not always been so clear. We can see the beginnings of the social mobilization needed to fight appointment battles during the *Lochner* era as business interests and popular forces fought over whether the Constitution precluded economic regulation of business.⁶⁴ The battle between the people and the Supreme Court for control of the Constitution was fought in a variety of

60. Ackerman, *Presidential Democracy*, *supra* note 58 at 21.

61. U.S. Const. amend. XIV.

62. U.S. Const. amend. XVII.

63. The Seventeenth Amendment was not a dramatic change, but represented the culmination of long-term democratic changes. Senators were not the agents of state government that the framers envisioned. Although senators were elected by state legislatures, political parties pioneered the use of the public canvas of voters “in which candidates for the Senate helped elect those state legislators who were more or less formally pledged to vote for them.” William H. Riker, “The Senate and American Federalism” (1955) 49 *Am. Pol. Sci. Rev.* 452 at 463.

64. See William G. Ross, *A Muted Fury: Populists, Progressives, and Labor Unions Confront the Courts, 1890-1937* (Princeton: Princeton University Press, 1994) at 41-42.

venues, including occasionally over appointments.⁶⁵ More importantly, the progressive era laid the groundwork for public criticism of the Supreme Court, which was no longer seen as the non-ideological institution envisioned by Hamilton.⁶⁶ There are two important differences, however, between the *Lochner* era and our own: one is that presidents had not yet become involved in appointment battles as a means of mobilizing voters; the other is that there was a shared respect for the judiciary that muted the fury of progressives.⁶⁷

It was not just citizens who had to learn that there could be a pay-off to changing the membership of the Court. The constitutional revolution of 1937 provides another partial precedent for current appointment battles. The battle between the Supreme Court and President Roosevelt over the meaning of the Constitution⁶⁸ taught subsequent presidents that a change in membership of the Court could lead to a dramatic shift in constitutional meaning. President Roosevelt was not the first president to fight the Court over the meaning of the Constitution,⁶⁹ but his court-packing plan was an important paradigm shift in constitutional politics. Yet there are clear differences as well. The president's plan to pack the Court with his supporters lacked popular support,⁷⁰ as there was no sustained wave of mobilization directed toward changing the meaning of the Constitution. We have become accustomed to Republican presidents seeking to mobilize citizen anger by disputing the meaning of the Constitution with the Court and promising

65. Scott H. Ainsworth & John Anthony Maltese, "National Grange Influence on the Supreme Court Confirmation of Stanley Matthews" (1996) 20 Soc. Sci. Hist. 41; Richard L. Watson Jr., "The Defeat of Judge Parker: A Study in Pressure Groups and Politics" (1963) 50 Miss. Valley Hist. Rev. 213.

66. Hamilton, *supra* note 19. See also William E. Nelson, *Marbury v. Madison: The Origins and Legacy of Judicial Review* (Lawrence: University Press of Kansas, 2000) at 84-94.

67. Ross, *supra* note 64 at 15.

68. See *e.g.* William E. Leuchtenberg, *The Supreme Court Reborn: The Constitutional Revolution in the Age of Roosevelt* (New York: Oxford University Press, 1995).

69. Thomas Jefferson, Andrew Jackson, and Abraham Lincoln were also strong proponents of presidential authority in construing the Constitution. Keith E. Whittington, *Political Foundations of Judicial Supremacy: The Presidency, the Supreme Court, and Constitutional Leadership in U.S. History* (Princeton: Princeton University Press, 2007) at 28-81.

70. Leuchtenberg, *supra* note 68 at 144-45; Gregory A. Caldeira, "Public Opinion and the U.S. Supreme Court: FDR's Court-Packing Plan" (1987) 81 Am. Pol. Sci. Rev. 1139.

transformative appointments,⁷¹ but this represents a profound change in constitutional politics.

Current appointment battles differ markedly from past ones, therefore, in two important respects. First, the Reagan administration marked a clear watershed in how appointment battles are waged. President Reagan “made the transformation of the federal judiciary his gift to ... [social conservatives] and, in so doing, instilled in this politically powerful element of the Republican coalition an obsession with judicial appointments.”⁷² Reagan’s Justice Department issued a number of reports identifying substantive disagreements with the Court over constitutional meaning and noting the importance of appointments in transforming the meaning of the Constitution.⁷³ The office of the presidency during Reagan’s administration gained considerable capacity to vet the ideology of judicial nominees.⁷⁴ Presidents now have much more information about prospective appointees. The possibility of ideological drift—the so-called Greenhouse effect—diminishes when presidents insist on nominees who have long conservative track records.⁷⁵

Second, citizen mobilization has become a constant feature of the appointment process.⁷⁶ Constitutional politics today is principally concerned

71. Richard Nixon, Ronald Reagan, George H.W. Bush, and George W. Bush each made transformative appointments a key policy of their administrations. See Christopher L. Eisgruber, *The Next Justice: Repairing the Supreme Court Appointments Process* (Princeton: Princeton University Press, 2007) at 124-43.

72. Silverstein, *supra* note 52 at 140.

73. Dawn E. Johnsen, “Ronald Reagan and the Rehnquist Court on Congressional Power: Presidential Influences on Constitutional Change” (2003) 78 *Ind. L.J.* 363 at 386 (noting that the Reagan Justice Department reports displayed an “extraordinary ... independence from then-prevailing Supreme Court doctrine”).

74. David Alistair Yalof, *Pursuit of Justices: Presidential Politics and the Selection of Supreme Court Nominees* (Chicago: University of Chicago Press, 1999) at 9-10.

75. The efficacy of Reagan’s judicial revolution can be measured by the dramatic changes in lower court appointments that occurred. The average time for the Senate to consider district court and circuit court nominees skyrocketed in 1986 and has never returned to the pre-1986 norm of more expeditious confirmations. In addition, confirmation rates for circuit court judges have fallen since the Reagan presidency. See Benjamin Wittes, *Confirmation Wars: Preserving Independent Courts in Angry Times* (Plymouth, U.K.: Rowman & Littlefield, 2006) at 38-39.

76. Richard Davis, *Electing Justice: Fixing the Supreme Court Nomination Process* (New York:

with the ideology of who sits on the Court. Appointments have become similar to elections in that there is considerable public scrutiny of Supreme Court nominees. Constitutional politics is not unlike ordinary politics since intensity of preferences matters. While both liberal and conservative interest groups care deeply about appointments, conservative voters are mobilized by this issue in a way that liberal voters are not. An important part of the “glue” holding the modern conservative movement together is a shared opposition to perceived “judicial activism.”⁷⁷ Social conservatives are willing to criticize judges in a manner that progressives in the nineteenth century were not. The power of social conservatives was manifested in the battles amongst conservatives that shaped President Bush’s nominations. The President’s base made it clear that it thought one of his most trusted advisors, Alberto Gonzales, was unsuitable because he lacked clear conservative ideological credentials on the issue of abortion. The strength of social conservatives was also illustrated by the backlash over the nomination of another of the President’s advisors, Harriet Miers. President Bush had a clear preference for a woman to replace Justice O’Connor but chose to withdraw Miers’s nomination because of opposition within his own coalition.⁷⁸

The path chosen by social conservatives to change the meaning of the Constitution has deepened political fissures. There are two paths that citizens might use in seeking to change the meaning of the Constitution.⁷⁹ One is to change public opinion. The key transformations in the Constitution—the Revolution, the Civil War, and the constitutional revolution of 1937—all rested on significant shifts in public opinion.⁸⁰ The constitutional changes that occurred were eventually supported by a majority of the people. Transforming public opinion can lead to a lasting political settlement. Because social conservatives

Oxford University Press, 2005); Sheldon Goldman, “Judicial Confirmation Wars: Ideology and the Battle for the Federal Courts” (2005) 39 U. Rich. L. Rev. 871 at 889.

77. Steven M. Teles, “Conservative Mobilization against Entrenched Liberalism” in Paul Pierson & Theda Skocpol, eds., *The Transformation of American Politics: Activist Government and the Rise of Conservatism* (Princeton: Princeton University Press, 2007) 160 at 173.

78. Toobin, *supra* note 35 at 284-97.

79. Jack M. Balkin, “How Social Movements Change (or Fail to Change) the Constitution: The Case of the New Departure” (2005) 39 Suffolk U.L. Rev. 27.

80. Ackerman, *We The People*, *supra* note 48.

do not command that level of popular support, they have chosen another path, which is to change the Constitution by changing the membership of the Court. The Court, however, cannot shift deeply entrenched social attitudes by itself.⁸¹ To the extent that the Court is seen as having been overwhelmingly appointed by one side in a divisive struggle over constitutional meaning,⁸² its decisions on important public questions amplify and deepen societal divisions. The Court could declare George W. Bush the president in 2000, but it could not avoid the perception that the result turned on its partisan make-up.⁸³

III. DEMOCRATIZING JUDICIAL REVIEW

The American experience with judicial review demonstrates that democracy may have an acidic effect on institutions.⁸⁴ Democracy and constitutionalism can be at odds. By strengthening the formal mechanisms by which citizens hold courts accountable, politics can weaken the informal mechanisms by which interest groups seek to mould constitutional meaning. Courts must be sufficiently independent of interest group politics to retain legitimacy but not so independent as to undermine popular input into constitutional evolution. For courts to play a positive, long-term role in maintaining constitutions, judicial independence must be optimized, not maximized.⁸⁵ The solution to an overly democratized nomination process lies, paradoxically, in strengthening the institutional,

81. Gerald N. Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change?* (Chicago: University of Chicago Press, 1991).

82. The Supreme Court currently has seven justices appointed by Republican presidents, six of whom were appointed by presidents who had promised to make transformative appointments. The lone exception among Republican nominees is Justice Stevens, who was appointed by President Ford. Justice Stevens noted the remarkable transformation that the Supreme Court has undergone in his dissent in a case striking down a school desegregation plan. *Parents Involved in Community Schools v. Seattle School District No. 1*, 127 S. Ct. 2738 (2007) at 2799 (“It is my firm conviction that no Member of the Court that I joined in 1975 would have agreed with today’s decision”).

83. Howard Gillman, *The Votes That Counted: How the Court Decided the 2000 Presidential Election* (Chicago: University of Chicago Press, 2001).

84. Fareed Zakaria, *The Future of Freedom: Illiberal Democracy at Home and Abroad* (New York: W.W. Norton, 2003).

85. Owen M. Fiss, “The Right Degree of Independence” in Irwin P. Skotzky, ed., *Transition to Democracy in Latin America: The Role of the Judiciary* (Boulder, CO: Westview Press, 1993) 55.

democratic sinews of judicial review. The tension between democracy and constitutionalism is ameliorated by properly designing judicial accountability.

This article argues that the mechanisms of judicial accountability adopted by other countries reduce this tension. When judicial review spread around the globe, the American system served as model and anti-model. The framers gave no sustained thought to the political power that the US Supreme Court would one day wield. The calculus of modern constitution-makers and the stock of ideas they have to draw from are quite different from those that animated the framers of the American Constitution. In the twentieth century, the hope of *Marbury* became fused with the fear of *Lochner*. As a result, most other countries adopted different and stronger rules with which to hold courts politically accountable. Courts abroad, as in the United States, are politically powerful and their decisions may anger citizens.⁸⁶ Any political backlash occasioned by this growth in judicial power, however, is likely to take a different form than it does in the United States. In particular, interest groups are less likely to fight over appointments abroad than in the United States.

Scholars have failed to properly appreciate the exceptionalism of the US Supreme Court because they have largely ignored why judicial review was transformed when it spread around the globe. Because of this failure, we lack a grammar of judicial accountability. Constitutional courts can be accountable either *ex ante* or *post facto*.⁸⁷ *Ex ante* controls are appointment mechanisms; *post facto* controls include amendments and a legislative override of judicial decisions.⁸⁸ Political accountability, whether *ex ante* or *post facto*, can be either weak or strong. National high courts are weakly accountable if their decisions are difficult to overrule or if factions dominate appointments.

The US Supreme Court is weakly accountable both *ex ante* and *post facto*. Confirmation of presidential nominations by the Senate only requires majority

86. C. Neal Tate & Torbjörn Vallinder, eds., *The Global Expansion of Judicial Power* (New York: New York University Press, 1997).

87. There are other forms of popular control, such as impeachment or legislative control over jurisdiction, but they have largely fallen into disuse both in the United States and abroad as they undermine judicial independence. John A. Ferejohn & Larry D. Kramer, "Independent Judges, Dependent Judiciary: Institutionalizing Judicial Restraint" (2002) 77 N.Y.U. L. Rev. 962.

88. The distinction between *ex ante* and *post facto* controls is explored in Schor, "Squaring the Circle," *supra* note 47 at 87-107.

approval, which allows factions to have a real voice in appointments. The excessive independence afforded the US Supreme Court and the difficulty in amending the Constitution⁸⁹ make the Court a tempting target for interest group capture. Factions that care deeply about the meaning of the Constitution have no choice but to fight over appointments. Supreme courts are strongly accountable, on the other hand, if their decisions can be more readily overruled or if judicial appointments reflect the desires of a super-majority. The political court model of judicial review adopted by Germany and the constitutional democracies it influenced illustrates the importance of *ex ante* controls; the politicized rights model adopted by Canada and the democracies it influenced illustrates the value of *post facto* controls.

A. THE POLITICAL COURT MODEL OF JUDICIAL REVIEW

Scholars in Europe began to think about the implications of American constitutionalism in the nineteenth century.⁹⁰ American constitutional ideas, including judicial review, played an important role in the debates of the German National Assembly that met in Frankfurt in 1848.⁹¹ The Frankfurt Constitution suffered political defeat but it became the “most influential document for the future of German democratic constitutional development.”⁹²

89. The United States has one of the most difficult constitutions in the world to amend, as super-majority approval is needed both in Congress and among the states. See Donald S. Lutz, *Principles of Constitutional Design* (New York: Cambridge University Press, 2006) at 171. The difficulty of amending the Constitution is illustrated by the fact that the Supreme Court has elicited considerable public opposition but has been overruled only four times by amendment. See Amar, *supra* note 22, at 334.

90. Helmut Steinberger, “Historic Influences of American Constitutionalism upon German Constitutional Development: Federalism and Judicial Review” (1998) 36 *Colum. J. Transnat’l L.* 189 at 193. The first scholarly treatise on the American Constitution appeared in German in 1824, and by the 1830s, translations of the Federalist Papers and de Tocqueville’s *Democracy in America* appeared. See generally Wolfgang Hoffmann-Riem, “Two Hundred Years of *Marbury v. Madison*, The Struggle for Judicial Review of Constitutional Questions in the United States and Europe,” (2004) 5 *Germ. L.J.* 685.

91. Steinberger, *ibid.* at 194-201.

92. *Ibid.* at 194. Germany’s current Constitution or Basic Law was principally shaped by its constitutional traditions as well as the politics of post-war Germany. John Ford Golay, *The Founding of the Federal Republic of Germany* (Chicago: University of Chicago Press, 1958); Donald P. Kommers, *The Constitutional Jurisprudence of the Federal Republic of Germany*, 2d

While the hope of *Marbury* dominated the discussions on judicial review in Frankfurt, the pan-European debate took a different and more realist turn when France began to discuss the possibility of adopting judicial review in the first half of the twentieth century. A movement to adopt American-style judicial review was ultimately defeated by scholars who argued that conservative courts in the United States had derailed needed social legislation.⁹³ The fear of *Lochner* effectively destroyed political support for judicial review in France prior to the establishment of the Fifth Republic in 1958.

The key figure in the European debate on judicial review is Hans Kelsen.⁹⁴ Kelsen faced two significant problems in conceptualizing how judicial review might fit in continental Europe's constitutional and political landscape. The first was that civil law courts were not attractive organs to endow with the power of constitutional interpretation because they were staffed by civil servants and were ideologically accustomed to being subservient to legislatures.⁹⁵ What was needed was a specialized constitutional court that could speak with a single, authoritative voice⁹⁶ and have equal dignity with the legislature. The second

ed. (Durham: Duke University Press, 1997) at 7 (observing that the drafters of Germany's Basic Law were "familiar with the American system of judicial review and were guided by the American experience in shaping their constitutional democracy"). See also Steinberger, *ibid.* at 207 ("At no time since 1848 has political and legal thought in Germany been so intensely engaged with American constitutionalism than after World War II").

93. Alec Stone, *The Birth of Judicial Politics in France: The Constitutional Council in Comparative Perspective* (New York: Oxford University Press, 1992) at 37-40.

94. Kelsen, who was Austrian, played a key role in drafting the Austrian Constitution of 1920 and particularly its provisions on judicial review. Stanley L. Paulson, "Constitutional Review in the United States and Austria: Notes on the Beginnings" (2003) 16 *Ratio Juris* 223. The Austrian provisions on judicial review were "[t]he most significant experiment in constitutional review in pre-World War II Europe." Sweet, "Judicial Review," *supra* note 9 at 2766. See generally Pedro Cruz Villalón, *La Formación del Sistema Europeo de Control de Constitucionalidad (1918-1939)* (Madrid: Centro de Estudios Constitucionales, 1987). Kelsen also played a role in drafting the provisions for judicial review in Germany's highly influential post-war Constitution. Kommers, *supra* note 92 at 8.

95. John Henry Merryman & Rogelio Pérez-Perdomo, *The Civil Law Tradition: An Introduction to the Legal Systems of Europe and Latin America*, 3d ed. (Stanford: Stanford University Press, 2007).

96. Kelsen feared that diffuse review as exercised in the United States would pose too great a "risk" of "non-uniformity." Hans Kelsen, "Judicial Review of Legislation: A Comparative Study of the Austrian and American Constitution" (1942) 4 *J. Pol.* 183 at 185 [Kelsen, "Judicial Review of Legislation"].

problem was that prior to the Second World War, parliaments in Western Europe largely reigned supreme over constitutions as well as politics. The success of judicial review in Europe hinged, therefore, on satisfying both “politicians suspicious of the judiciary and judicial power, and a pan-European movement of prominent legal scholars who favored installing American judicial review on the Continent.”⁹⁷

Kelsen’s imaginative solution was to reject the American idea that the constitution was a species of law⁹⁸ and to embrace its political nature.⁹⁹ He argued that while legislatures engaged in positive lawmaking, the power to declare legislation unconstitutional was also a form of lawmaking, albeit a purely negative one.¹⁰⁰ The power of constitutional courts would therefore be circumscribed by carefully drafting constitutions to exclude from judicial competence broad principles such as equality, justice, and liberty.¹⁰¹ Kelsen argued that in the “domain of constitutional justice, such principles can play an extremely dangerous role.”¹⁰² In short, judicial review was necessary to effect horizontal and vertical separation of powers, but courts would gain too much influence if they had a broad power to construct rights.¹⁰³

Kelsen’s idea to limit the power of courts to construe rights was rejected in post-war Europe. The desire to deal with the horrors of the Second World War led Germany and other continental democracies to embrace a broad set of judicially enforceable rights.¹⁰⁴ Kelsen’s legacy is visible, however, in the three features that characterize the political court model of judicial review that was adopted by the democracies of Western Europe after the war: first, judicial review is concentrated in one constitutional court rather than spread diffusely throughout the judicial system as in the United States; second, judicial

97. Sweet, “Judicial Review,” *supra* note 9 at 2766.

98. See *Marbury*, *supra* note 3 at 177 (concluding that the Constitution is a type of law and that it is “emphatically the province and duty of the judicial department to say what the law is”).

99. Tushnet, “*Marbury*,” *supra* note 11.

100. Sweet, “Judicial Review,” *supra* note 9 at 2766-68.

101. Hans Kelsen, “La garantie juridictionnelle de la Constitution” (1928) *Rev. D.P. & S.P.* 197 at 240 [translated by author].

102. *Ibid.* at 241.

103. Paulson, *supra* note 94 at 237; Sweet, “Judicial Review,” *supra* note 9 at 2767.

104. Cappelletti, *supra* note 4 at 5-6.

review does not require a case or controversy, as legislation can be reviewed abstractly before it goes into effect; and third, appointments require a legislative super-majority.¹⁰⁵ Scholars have spilled considerable ink discussing the relative merits of concentrated versus diffuse review and abstract versus concrete review and whether these differences lead to an overly politicized form of judicial review.¹⁰⁶ In the final analysis, these differences may not matter as much as scholars imagine since both supreme courts and constitutional courts do a tolerable job of effectuating rights *and* arousing political backlash.

The difference that does matter is the one that scholars generally ignore, which is that appointments to a constitutional court require the approval of a legislative super-majority.¹⁰⁷ By adopting super-majority appointment procedures, the political court model of judicial review reduces the power of factions to influence constitutional interpretation. As a consequence, appointments turn on deals brokered between different political factions.¹⁰⁸ While “never perfect,” a super-majority appointment process works by providing “rough proportionality” between different factions and regions.¹⁰⁹

A super-majoritarian appointment mechanism rests on a different vision of democracy than does a majoritarian mechanism. Democracy can mean either rule by a bare majority or rule by as many as possible.¹¹⁰ Majoritarian democracies tend to be more divisive than those that require a higher degree of consensus.¹¹¹ The value of consensus is amply illustrated by how super-majoritarian appointment procedures have prevented the divisive political appointment

105. Sweet, *Governing with Judges*, *supra* note 14 at 46-49.

106. See *e.g.* Michel Rosenfeld, “Constitutional Adjudication in Europe and the United States: Paradoxes and Contrasts,” in Nolte, *supra* note 1, 197 at 198. Kelsen, for example, emphasized the importance of these features. Kelsen, “Judicial Review of Legislation,” *supra* note 96.

107. But see John Ferejohn & Pasquale Pasquino “Constitutional Adjudication: Lessons from Europe” (2004) 82 *Tex. L. Rev.* 1671 at 1676-80.

108. See Christine Landfreid, “The Selection Process of Constitutional Court Judges in Germany” in Malleson & Russell, *supra* note 6 at 196.

109. Lisa Hilbink, “Assessing the New Constitutionalism” (2008) 40 *Comp. Pol.* 227 at 230.

110. Arend Lijphart, *Patterns of Democracy: Government Forms and Performance in Thirty-Six Countries* (New Haven, CT: Yale University Press, 1999) at 1-2.

111. *Ibid.* at 300-08.

battles that have become commonplace in the United States.¹¹² Europe did not solve the problem posed by *Lochner*—that citizens are occasionally deeply angered by judicial decisions—but it did ameliorate the pernicious consequences of *Lochner*-type decisions by blunting the power of factions to shape judicial appointments.

B. THE POLITICIZED RIGHTS MODEL OF JUDICIAL REVIEW

When the Westminster democracies of Canada, New Zealand, and the United Kingdom began to debate whether to constitutionalize rights in the latter part of the twentieth century, they faced a very different set of problems than the nations of Europe after the Second World War. Parliamentary supremacy in Europe had failed to prevent the rise of totalitarianism. Democracy had been shattered and it was thought that a political court empowered to construe a constitution could play an important role in preventing a totalitarian relapse.¹¹³ The Westminster democracies, on the other hand, had not suffered a democratic breakdown. Historically Canada, the United Kingdom, and New Zealand lacked constitutionalized rights or statutory bills of rights, and legislatures, therefore, had the job of protecting rights. The decision to entrench rights in those democracies¹¹⁴ was motivated by a belief that the political process did not adequately protect

112. Another factor that plays a role in reducing the power of factions is that amendments in Europe typically require only a super-majority in parliament so that constitutional court decisions can be more readily overridden than in the United States. See Lutz, *supra* note 89.

113. Cappelletti, *supra* note 4. Germany, with its notion of a militant democracy that would repress anti-democratic elements, pioneered the idea that constitutional courts could cement a democratic transition. See Russell A. Miller, “Comparative Law in the Era of Global Terrorism: A Case Study of Germany’s Militant Democracy” in Russell A. Miller, ed., *U.S. National Security, Intelligence and Democracy: From the Church Committee to the War on Terror* (London: Routledge, 2008) 506.

114. All three democracies adopted bills of rights in the last two decades of the twentieth century: Canada in 1982, New Zealand in 1990, and the United Kingdom in 1998. These profound transformations in three closely related constitutional democracies have elicited considerable attention by comparative constitutional scholars. See e.g. Rosalind Dixon, *Designing Constitutional Dialogue: Bills of Rights and the New Commonwealth Constitutionalism* (S.J.D. dissertation, Harvard Law School, 2008) [unpublished, on file with author]; Erdos, *supra* note 14; Gardbaum, *supra* note 14; and Mark Tushnet, *Weak Courts, Strong Rights: Judicial Review and Social Welfare Rights in Comparative Constitutional Law* (Princeton: Princeton University Press, 2008) at 18-42 [Tushnet, *Weak Courts*].

rights.¹¹⁵ In so doing, these countries fashioned the politicized rights model of judicial review, which preserves a role for the legislature in construing rights since courts have the first but not the final word in construing bills of rights.¹¹⁶

Canada provides the key to understanding the politicized rights model of judicial review both because it was the first Westminster democracy to constitutionalize rights and because the *Charter* has proven highly influential.¹¹⁷ Pierre Trudeau sought to ward off the threat of secession by Quebec by constitutionalizing rights and thereby protecting the rights of minorities from legislative majorities.¹¹⁸ In no other polity have constitutional developments occurred with as much knowledge of American constitutionalism as in Canada.¹¹⁹ In particular, the move from parliamentary supremacy to entrenched

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115. Erdos, *ibid.*; Gardbaum, *ibid.* Australia has resisted the erosion of Westminster democracy. Unlike Canada, New Zealand, and the United Kingdom, it failed to adopt a bill of rights yet its national high court has controversially exercised judicial review based on the notion of implied rights. Jeffrey Goldsworthy, "Australia: Devotion to Legalism" in Jeffrey Goldsworthy, ed., *Interpreting Constitutions: A Comparative Study* (Oxford: Oxford University Press, 2006) 106.
116. Canada permits a temporary legislative override of many *Charter* rights. See *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11, s. 33 [*Charter*]. New Zealand and the United Kingdom have adopted stronger versions of the politicized rights model of judicial review than did Canada. New Zealand's *Bill of Rights Act 1990* (N.Z.), 1990/109 ("NZBORA") is a statutory bill of rights. Sections 4 and 6 preclude courts from striking down legislation while empowering them to construe statutes as conforming to NZBORA insofar as possible. The United Kingdom's *Human Rights Act 1998* (U.K.), 1998, c. 42, s. 3 ("UKHRA") empowers courts to construe statutes so that they are in conformity with the rights protected therein insofar as possible. Unlike NZBORA, however, s. 4 of the UKHRA also authorizes courts to declare that statutes are incompatible with its provisions. Once such a declaration is made, it is incumbent on Parliament to respond.
117. Dodek, *supra* note 13.
118. See Edward McWhinney, *Canada and the Constitution 1979-1982: Patriation and the Charter of Rights* (Toronto: University of Toronto Press, 1982) at 52ff.; Peter H. Russell, *Constitutional Odyssey: Can Canadians Become a Sovereign People?* (Toronto: University of Toronto Press, 2004) at 111-12.
119. Russell, *ibid.* at 15-31 (noting that the drafters of Canada's original Constitution, the *British North America Act of 1867*, rejected both the American notions of popular sovereignty and federalism, which they believed had played a deleterious role in the outbreak of the American Civil War).

rights was informed by constitutional learning from the American experience.¹²⁰ The proposal to entrench rights touched off a debate over the wisdom of adopting an American-style Supreme Court.¹²¹ The “framers of the *Charter* were well aware of the sometimes unfortunate American experience with judicial activism” and took “important and innovative steps” to limit the power of courts to construct rights.¹²² In short, the hope of *Marbury* was fused with the fear of *Lochner* in the drafting of the *Charter*.¹²³

Canada sought to constitutionalize rights while avoiding the pitfall of the political backlash occasioned by some court decisions with two constitutional innovations: a general limitations clause that informs courts that rights are not absolute but must be balanced,¹²⁴ and the “notwithstanding” clause that allows legislatures to override judicial decisions.¹²⁵ Although both the general limitations and the notwithstanding clauses were important innovations, scholars generally regard the former a success and the latter a failure. Section 1 of the *Charter* provides that the rights and freedoms set forth therein are “subject only to such

120. Erdos, *supra* note 14 at 98-139.

121. McWhinney, *supra* note 118.

122. Kent Roach, *The Supreme Court on Trial: Judicial Activism or Democratic Dialogue* (Toronto: Irwin Law, 2001) at 6.

123. The fusion of *Marbury* and *Lochner* in the comparative constitutional imagination is also illustrated by the British experience in constitutionalizing rights. The United Kingdom was the last of the Westminster democracies to entrench rights with the *Human Rights Act* in 1998, and it is no accident that it did so under a Labour government. The Labour Party long resisted empowering the judiciary, as British courts had used common law principles in the first part of the twentieth century to “interfere rather substantially with efforts to organize workers.” The Party’s resistance was informed by constitutional learning from the United States, as its leaders “found the contemporaneous experience in the United States,” where courts had long obstructed social welfare legislation, confirmed “their suspicion that courts—staffed by upper-class professionals—would systematically disfavor Labour Party interests.” Tushnet, *Weak Courts*, *supra* note 114 at 28.

124. *Charter*, *supra* note 116, s. 1. Although the Canadian limitations clause has become a highly influential model around the globe, it was not created out of whole cloth. See Lorraine E. Weinrib, “The Canadian Charter’s Transformative Aspirations” (2003) 19 *Sup. Ct. L. Rev.* (2d) 17 at 25, where she notes that in “[f]ollowing the examples of developed rights-protecting systems operating within sophisticated welfare states, the Charter did not treat rights guarantees as absolute entitlements.”

125. *Charter*, *ibid.*, s. 33.

reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.”¹²⁶ It tells judges that legislatures have an important role to play in construing rights. Section 1 has proven a successful Canadian export¹²⁷ and scholars vigorously dispute whether it helps reconcile parliamentary democracy with constitutionalism.¹²⁸ There is little dispute, however, over the political fate of the notwithstanding clause. Section 33 of the *Charter* allows for a temporary legislative override of judicial decisions construing the *Charter*.¹²⁹ It was first used by Quebec to preserve its distinct traditions,¹³⁰ but the resulting backlash in English-speaking Canada has discouraged its use.¹³¹

Scholars are mistaken, however, in discounting the political importance of the notwithstanding clause. Canada should be susceptible to appointments battles.¹³² The Supreme Court of Canada is a powerful political actor that decides contentious social issues such as abortion¹³³ and gay rights.¹³⁴ As in the United States, there has been an orientation of interest group activity directed toward shaping the path of the law by means of strategic litigation.¹³⁵ The prime minister has relatively unfettered authority in appointing judges to the Supreme Court,¹³⁶

126. *Ibid.*, s. 1.

127. Dodek, *supra* note 13.

128. Symposium, “*Charter* Dialogue: Ten Years Later” (2007) 45 Osgoode Hall L.J. 1.

129. *Charter*, *supra* note 116, s. 33. The notwithstanding clause was a last-minute compromise that reconciled opposing political forces to the adoption of the Charter. See Howard Leeson, “Section 33, the Notwithstanding Clause: A Paper Tiger?” *IRPP Choices* 6:4 (June 2000) 3 at 11-12.

130. Leeson, *ibid.* at 14. See also Christopher P. Manfredi, *Judicial Power and the Charter Canada and the Paradox of Liberal Constitutionalism*, 2d ed. (Don Mills, ON: Oxford University Press, 2001) at 181-92.

131. Manfredi, *ibid.* at 187.

132. F.L. Morton, “Judicial Appointments in Post-Charter Canada: A System in Transition” in Malleon & Russell, *supra* note 6, 56 at 56-57.

133. *R. v. Morgentaler*, [1988] 1 S.C.R. 30.

134. *Vriend v. Alberta*, [1998] 1 S.C.R. 493; *Reference re Same-Sex Marriage*, [2004] 3 S.C.R. 698.

135. See e.g. F.L. Morton & Rainer Knopff, *The Charter Revolution & The Court Party*, (Peterborough, ON: Broadview Press, 2000) at 29-30; Charles R. Epp, *The Rights Revolution: Lawyers, Activists and Supreme Courts in Comparative Perspective* (Chicago: University of Chicago Press, 1998) at 171-96.

136. Jacob S. Ziegler, “Merit Selection and Democratization of Appointments to the Supreme Court of Canada” *IRPP Choices* 5:2 (June 1999) 3 at 6; Peter McCormick, “Selecting the

which suggests that politicians could mobilize factions over appointments. This has not occurred, as there is little reason for factions in Canada to seek to influence appointments to change the meaning of the Constitution when they can directly pressure the legislature to override unpopular decisions. Factions are unlikely to choose the uncertain path of influencing appointments when they can seek a legislative override of constitutional interpretations.¹³⁷ The notwithstanding clause, in short, acts as a breakwater for the waves of citizen anger occasioned by unpopular judicial decisions.

IV. CONCLUSION

Constitutional theory has largely ignored the role that institutional design plays in shaping battles over the meaning of the constitution. The emphasis has been on crafting the correct interpretive theory that will constrain the court's discretion. This article argues that scholars need to pay attention to the mechanisms by which citizens assert control over constitutional meaning.¹³⁸ Judicial review should be judged by how it works rather than by normative theories. Once the emphasis shifts from normative arguments to empirical ones, a number of structural features of judicial review become important. Judicial review is not apolitical because all polities provide mechanisms by which citizens hold courts accountable.¹³⁹ There are two paths to democratizing judicial review. One is that taken by the United States, where weak rules of political accountability provide factions with considerable power to shape appointments. American exceptionalism in judicial review has not served American democracy well. The other path is to blunt the power of factions by providing for stronger formal mechanisms of judicial accountability. Stronger democratic controls—whether super-majoritarian

Supremes: The Appointment of Judges to the Supreme Court of Canada" (2005) 7 J. App. Pra. & Pro. 1 at 13.

137. Peter H. Russell, "Standing up for Notwithstanding" (1991) 29 Alta. L. Rev. 293 at 298 ("Absent a Canadian-style legislative override, court-packing or court-bashing are the decisions to which democratic leaders are most likely to resort when faced with judicial interpretations of the constitution they consider to be unjust and harmful").

138. The leading account of popular constitutionalism oddly fails to analyze the role that institutions play in mediating the construction of constitutional meaning. See Kramer, *supra* note 18.

139. Martin Shapiro, *Courts: A Comparative and Political Analysis* (Chicago: University of Chicago Press, 1981).

appointment mechanisms or a legislative override—prevent factions from seeking to influence appointments and thereby undermining the judicial independence needed to maintain constitutions. Formal mechanisms of accountability are preferable to informal ones because they limit the power of factions to change the meaning of the constitution.

There is no easy solution to the politicization of appointments in the United States. The Senate should take ideology into account as seriously as do presidents but this has not occurred.¹⁴⁰ Nor is the United States likely to adopt any of the sensible features that can be found in either the political court model or the politicized rights model of judicial review. Formal constitutional change in response to the deficiencies of the US Constitution is unlikely, as the high bar to amendment stunts America's constitutional imagination. Comparative constitutionalism has an important role to play, nonetheless, in solving the crisis of judicial appointments. Comparative constitutionalism provides a vantage point by which institutions may be critiqued,¹⁴¹ and criticism lays the groundwork for future democratic change.¹⁴²

Comparative constitutionalism also deepens our understanding of constitutional theory. This article concludes by making the following three contributions to our understanding of constitutionalism. First, it is a misnomer to speak of the worldwide judicialization of politics as if the logic of *Marbury* has conquered the world's democracies. When the hope of *Marbury* travelled abroad in the second half of the twentieth century, it was joined with the fear of *Lochner*. The spread of constitutional ideas, not unlike the migration of peoples, depends on push and pull factors.¹⁴³ As a consequence, other polities adopted rules that allow citizens to hold courts accountable and which make it difficult for social movements to fight over appointments when disputing the meaning

140. See Eisgruber, *supra* note 71.

141. Miller, *supra* note 113 (arguing that comparative constitutionalism is a valuable tool of critical analysis).

142. For a trenchant criticism of the Constitution based in part on the author's engagement with comparative sources, see Sanford Levinson, *Our Undemocratic Constitution: Where the Constitution Goes Wrong (And How We the People Can Correct It)* (New York: Oxford University Press, 2006).

143. Sujit Choudhry, ed., *The Migration of Constitutional Ideas* (Cambridge: Cambridge University Press, 2006).

of the constitution. The political court model of judicial review relies on *ex ante* mechanisms of accountability. When the members of national high courts are selected by super-majority appointment provisions, factions are forced to negotiate with each other. The politicized rights model of judicial review, on the other hand, relies on *post facto* mechanisms of accountability. When courts have the first but not the final word in interpreting the constitution, citizens do not need to fight appointment battles to contest the meaning of the constitution.

Second, when the framers designed the US Constitution, they thought at length about political checks and balances but gave no sustained thought to the problem of checks and balances in constitutional politics. They thought, incorrectly, that Article V would be the engine of constitutional change. The reality is that the US Supreme Court has been one of the key actors in the evolution of the Constitution. The power of factions to shape nominations speaks volumes to the lack of checks and balances in constitutional politics.

Finally, battles over appointments have effectively resolved a long-standing scholarly debate between law professors and political scientists. Law professors believe that the US Supreme Court is a counter-majoritarian institution whose discretion is checked by law, whereas political scientists believe that it is an anomalous majoritarian institution whose discretion is ultimately checked by appointments.¹⁴⁴ It turns out that the law professors were right but for the reasons given by political scientists. For the first time in US history, factions have succeeded in fashioning a counter-majoritarian Court, but they have done so through the politics of appointment.¹⁴⁵

144. Mark A. Graber, "Foreword: From the Countermajoritarian Difficulty to Juristocracy and the Political Construction of Judicial Power" (2006) 65 Md. L. Rev 1.

145. A statistical study ranking the 43 justices from 1937 to 2006 from more to less conservative shows that five of the ten most conservative justices are currently sitting on the Court (Justices Thomas, Scalia, Roberts, Alito, and Kennedy). William M. Landes & Richard A. Posner, "Rational Judicial Behavior: A Statistical Study", John M. Olin Law & Economics Working Paper No. 404 (2d Series, April 2008), online: <<https://www.law.uchicago.edu/files/404.pdf>>.