ABSTRACT

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Differences in institutional architecture and political culture notwithstanding, constitutional democracies worldwide are increasingly relying on courts for their maintenance, most notably in regards to the settlement of conflicts involving fundamental rights and values. This dissertation explores the foundations of juristocracy and argues that its intellectual roots lies in the proliferation of a depoliticized understanding of democracy that emerged as a reaction to the experience of totalitarianism. By examining the historical, institutional, and ethical shifts that shaped constitutional development after World War II, it reveals how contemporary democracies have accepted the diagnosis that the rise of totalitarian and authoritarian regimes was caused by an inherent flaw within democracy, particularly its inability to counteract subversive movements that harness legitimacy from plebiscitarian methods and mass mobilization. The anxiety towards unconstrained collectivities and majoritarian power has led intellectuals in both the United States and Europe to re-conceptualize democracy as the distribution of fundamental rights, as opposed to the distribution of self-governing power amongst

citizens to collectively determine public affairs. As a result of this emerging consensus, the participatory dimension of democratic politics was attenuated in the name of preserving the idea of democracy safeguarded through judicial or quasi-judicial means. Although this conceptual shift has been obscured by its use of familiar jargons from early modern political thought, this dissertation offers a critical inquiry into understanding how the core premises of constitutional democracy has been historically reconstructed in a way that informs the rise of juristocracy across different parts of the world.

FOUNDATIONS OF JURISTOCRACY

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In Loving Memory of my Father

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CHAPTER 1: INTRODUCTION

1.1. The New Guardianship

In *Democracy and Its Critics* (1998), Robert Dahl suggested that the most enduring and formidable rival to democracy, in both theory and practice, is guardianship. While guardianship has historically taken a variety of forms, ranging from aristocracy, philosopher kingship, to rule by vanguard parties, they have categorically shared two major premises. The first is the negative presumption that ordinary people lack certain necessary qualifications to govern themselves, while the second is the opposing proposition that the right to govern should be entrusted to a specially qualified minority who possess superior knowledge and virtue (52). Dahl concluded that even the best form of guardianship is inferior to democracy. While all regimes are subject to the risk of making bad decisions, democracy is the only regime that offers the institutionalized opportunity for its members to learn from and ultimately correct their mistakes.[1] He writes:

[1] In *Democracy in America* ([1835 & 1840] 2000), Alexis de Tocqueville emphasized that one of the greatest strengths of democracy, despite all its shortcomings, is in the "ability to make repairable mistakes." He writes:

> […] if democracy has more chance of being mistaken than a king or a body of nobles, it also has the chance of coming back to the truth, once enlightenment comes to it, because generally there are within it no interests contrary to that of the greatest number, and which struggle against reason. But democracy can only obtain truth from experience, and many peoples cannot await the results of their errors without perishing. The great privilege of the Americans is therefore not only to be more enlightened than others, but to have the ability to make repairable mistakes. (216)

Despite this acknowledgement, Tocqueville was at best an ambivalent advocate of democracy, who tried to reconcile himself to its coming wave while remaining nostalgic for the aristocratic past in which he was rooted. He believed that it would be necessary to preserve aristocratic values in order to safeguard liberty under democracy. See, for example, Wolin 2001 and Jaume 2013.

> […] the opportunity to make mistakes is an opportunity to learn. Just as we reject paternalism in individual decisions, because it prevents the development of our moral capacities, so too we should reject guardianship in public affairs, because it will stunt the development of the moral capacities of an entire people. (78-79)

Dahl understood the importance of popular engagement and the cultivation of citizenship for maintaining a democracy. Conversely, a government of guardians will inevitably deprive its members of "one of the most fundamental of all freedoms, the freedom to participate in the making of the laws that will be binding on oneself and one's community" and of the educative experience obtained by practicing this freedom. Having witnessed the rise of totalitarianism and the atrocities committed under its reign of terror, Dahl believed that "the experience of the twentieth century argues powerfully against the idea of guardianship" (78). The unprecedented wave of democratization that swept the globe after World War II seemed to confirm the triumph of democracy over guardianship.

Contemporary democracies, however, seem to be facing a new challenge. Dahl warned about the possibility of democracy to give way to a "quasi guardianship" where a "judiciary [exercises] final authority over certain substantive and procedural protections" (188). Unlike traditional forms of guardianship, this particular variation appears more appealing—and, thus, arguably more dangerous—in being able to accommodate liberal or democratic ideals (such as the equal consideration for all) as well as rest on the actual or tacit consent of the people rather than some self-legitimating claim to esoteric wisdom. In some cases, it may also be circumstantially justified on limited grounds when it is "intended to be transitional" in assisting the soft landing of democracy (59). Dahl raises the concern that there has been an emerging consensus in contemporary democracies to "take for granted that a vigilant judiciary empowered and willing to strike down national

policies adopted by the national legislature and executive is essential to the preservation of fundamental rights" (188).

The proliferation of democracy after World War II indeed illustrates a convergence towards a specific type of constitutional democracy, namely one that transfers an unprecedented amount of power from representative institutions to courts. The idea of constitutionalism, according to Leslie Goldstein (2009), is "increasingly seen as constitutionalism guarded or enforced by the practice of judicial review under a written constitution" (79). In numerous parts of the globe, whether in existing democracies of the west or in newly established non-western democracies, fundamental constitutional reforms have occurred that assign broad review power to courts or court-like tribunals that can hold acts of the state invalid when it is inconsistent with the mandates of the constitution.[2] Not only has the institution of constitutional review become commonplace, but courts around the world are exercising their powers more aggressively and are playing an increasingly active role in politics. Scholars have come to describe this trend in various terms, such as the "rise of world constitutionalism" (Ackerman 1997), the "global expansion of judicial power" (Tate and Vallinder 1995), or the "judicialization of politics" (Stone 1992). Some have even argued that this development indicate the emergence of a "juristocracy" (Hirschl 2004) or a "courtocracy" (Scheppele 2002a).

[2] As Tom Ginsburg (2008) observes, "[w]hereas before World War II, only a small handful of constitutions contained provisions for constitutional review, [as of 2008], 158 out of 191 constitutions include some formal provision for constitutional review" (81). He further specifies how "[s]eventy-nine written constitutions had designated bodies called constitutional courts or councils. Another sixty had explicit provisions for judicial review by ordinary courts or the supreme court. Finally, a small number of constitutions (China, Vietnam, and Burma) provide for review of constitutionality by the legislature itself" (81, fn.1). The data can be accessed via the website for the Comparative Constitutions Project at http://comparativeconstitutionsproject.org (last visited June 24, 2014).

C. Neal Tate and Torbjörn Vallinder (1995) describe the judicialization of politics as illustrating two core meanings:

1. The process by which courts and judges come to make or increasingly dominate the making of public policies that had previously been made by other governmental agencies, especially legislatures and executives.
2. The process by which non-judicial negotiating and decision making forums, even outside of the political processes, come to be dominated by quasi-judicial/legalistic rules and procedures.

The first meaning is apparent in the unprecedented frequency and magnitude in which political issues are being channeled into the judicial arena. Ran Hirschl (2008) highlights how there has been an increasing "reliance on courts and judicial means for addressing core moral predicaments, public policy questions, and political controversies" (119).[3] Democratic governance today is rigidly structured by a ubiquitous web of constitutional constraints. Judges are routinely involved in legislative processes by establishing limits on law-making behavior, reconfiguring policy-making environments, and even drafting the precise terms of legislation (Stone Sweet 2000). The pervasiveness of judicial involvement suggests that courts are no longer an exogenous influence *on* policy-making but an endogenous variable *within* policy-making. The recognition and expansion of fundamental rights has been instrumental in broadening the scope of judicial intervention in the political arena. "Constitutional norms," Louis Favoreu (1990) writes, "are progressively impregnating all branches of law, thanks to the increasingly important jurisprudence of fundamental rights." Through judicial interpretation, constitutional law

[3] The range of issues are too vast to fully survey, but some notable examples include: the scope of free speech and religious freedoms; the treatment of racial, ethnic, and sexual minorities; privacy and reproductive freedoms; the meaning and application of welfare rights; retroactive justice for past atrocities; electoral processes and campaign financing; the punishment of official corruption; the scope of executive prerogative; trade and commerce; to list just a few.

is “no longer just institutional law [but] also substantive law whose application has a direct effect on individuals” (34).

The quantitative growth of the judicialization of politics has also been accompanied by a qualitative transformation of the judicial function. For example, Gordon Silverstein (2009) illustrates how the power of judicial review in the United States was originally understood as serving a “blocking function”—that is, “to stop government action or to certify its legitimacy.” This power, however, has been complemented by a “new command function” where the Supreme Court is also actively prescribing what government *must* do (6-7). Carlo Guarnieri and Patrizia Pederzoli (2002) make a similar observation in regards to the situation in Europe. Courts in Europe were traditionally called upon to decide cases retrospectively for the purpose of adjudicating disputes within the rigid confines of the law. In contrast, contemporary courts serve a “promotional function” where they are formulating general guidelines for individual and collective conduct as well as directing government towards broad objectives (7). As a result, national high courts not only apply the letter of the law to adjudicate specific disputes, but also define the content of the nation’s most fundamental values and determine the appropriate workings of the basic structures of governance.

The second meaning expresses a less tangible, but deeper, social dimension of the phenomenon of judicialization. Not only does the judicialization of politics entail a shift in the balance of power between the judiciary and the legislature, but it also suggests “the repositioning of the courts in social and state-society relations” (Domingo 2005, 22-23). Today, legalized procedures, jargons, and rules have permeated beyond the political sphere and into everyday discourse. The political tools of negotiating, bargaining, and

deliberating are increasingly being replaced by the active use of formal rules, automated procedures, litigation, and judicial decision making (Silverstein 2009). In this regard, judicialization entails a broader juridification of social relations and of political culture. The implications stretch beyond the realm of politics and inform the changing attitudes toward the rule of law and the understanding of rights, which are evidenced by the growing propensity to seek judicial recourse as a means for social reform and change (Rosenberg 2008).

In light of these major changes, Ran Hirschl (2008) contends that the global convergence towards juristocracy is "arguably one of the most significant phenomena of late twentieth and early twenty-first century […]" which has now become an inextricable part of democratic governance as well as of contemporary political and legal culture (119). National high courts armed with the power of constitutional review are crucial actors in "mega-politics" that "define (and often divide) whole politics" (123). While judicialization has occurred with different degrees of intensity in different institutional, political, and cultural settings, the central idea of judicial guardianship is present today everywhere constitutionalism is proclaimed. The emergence of juristocracy thus suggests a paradigmatic shift in constitutional governance.

1.2. The Foundations of Juristocracy: A Historical-Theoretical Approach

The implications of juristocracy for the theory and practice of constitutional democracy have become the source of heated debate amongst political scientists and legal scholars. Some have celebrated the expansion of judicial power as an important step towards the strengthening or deepening of democracy around the world by virtue of the

enhanced protection for basic rights and liberties. Ronald Dworkin (1990), for example, strongly supported the incorporation of the European Convention on Human Rights into British domestic law and the empowerment of judges to interpret and apply it against statutes passed by parliament. He argued that such incorporation would help invigorate a deeper commitment to liberal and egalitarian values in Britain, thereby bringing the country closer to a more "mature" democracy (13-14). Kim Scheppele (2005) also claims that courts can promote strong, substantive democratic principles against a thinner, more procedurally oriented definition of democracy. Drawing upon the example of the Hungarian Constitutional Court, she argues that "aggressively enforcing constitutional provisions" may at times more accurately mirror "what democratic publics actually prefer and what democratic publics expect democracies to provide" (26). In a similar spirit, Bruce Ackerman (1996) suggests that strong constitutional review was necessary for new democracies in post-communist Europe to establish the "democratic floor" and "redeem the promise of the political" in reaction to "Europe's imperfect liberation from its monarchical past" (206-208). All these accounts view independent and active courts as advancing the consolidation of constitutional democracy and the rule of law, whether in existing or new democracies.

Critics, on the other hand, have contended that the massive transfer of authority to courts inhibits democratic assemblies from taking on a more active and positive role in constitutional decision-making. They argue that juristocracy systematically excludes people from reflecting and deliberating upon important constitutional questions (Kramer 2004; Tushnet 1999). It further seeks to impose a top-down solution to trenchant disagreements in society, most notably regarding those over the scope and meaning of

rights (Waldron 1999b). There are, of course, realistic limits to popular engagement regarding the determination of constitutional values or the settlement of disputes over fundamental rights. The scale of modern democracies precludes the possibility of citizens regularly convening in an agora to voice their opinions and deliberate with one another.[4] Even so, the same response cannot be applied to the exclusion of elected representatives. Considering how all modern democracies are representative democracies, early constitutional thought reserved the central role of constitutional decision-making to legislative assemblies.[5] The people thus retain control over constitutional issues by their capacity to hold representatives accountable when their collective judgment is incongruent with that of their representatives. Critics argue that juristocracy marginalizes the people and their representatives from this process thereby displacing popular self-government.

Recent studies have rejected both conclusions by illustrating that judicial power is politically constructed. According to this literature, the emergence of juristocracy is primarily a result of rational-strategic behavior by legislative officials to delegate power to courts. Within the context of American politics, studies have provided a variety of explanations ranging from the systematic entrenchment of partisan interests to the

[4] Some constitutions have addressed this issue by adopting a process of popular referendum (also known as a 'citizens' veto'). Referendums may be held in particular circumstances (e.g. to amend a country's constitution) or regarding particular issues of major political significance (e.g. whether or not to join a supranational organization such as the European Union). While this institutional mechanism is aimed at incorporating elements of direct democracy, both the procedural and political difficulties of frequently calling upon referendums have made it more of a symbolic rather than a practical solution for fostering popular engagement in constitutional affairs.

[5] Today, legislatures still retain the authority of amending the constitution when faced with opposing court decisions. Some contemporary constitutions have made the amendment process considerably easier in comparison to a supermajority requirement such as that of the United States (Elkins, Ginsburg, and Melton 2009). However, this alone falls short of ensuring the legislature's continued presence and participation within the settlement of constitutional disputes in ordinary politics.

strategic deference to courts regarding socially divisive issues (Gillman 2002; Graber 2005; Whittington 2007). Comparative studies have similarly identified specific domestic political incentives to judicialize politics. Political actors may empower courts as a means to sustain power in the midst of electoral uncertainty or to entrench their hegemony in the fear of losing power (Ginsburg 2003; Hirschl 2004). This recent body of literature complicates matters for assessing juristocracy since delegation to courts "need not create any substantial barrier to electoral accountability" when it is a result of procedurally legitimate choices made by representatives. The "finality of judicial rulings" may well be the "result of choices made by elected officials rather than the result of judges having any fixed power to have the final word" (Lovell and Lemieux 2006, 110-113). Though the legislative-judicial dynamic can be complex, the fact that judicial power is politically constructed suggests that juristocracy is neither inherently anti-democratic nor anti-political.

Despite successfully documenting numerous, case-specific instances when elected officials deliberately transfer power to judges, the political empowerment literature has largely neglected the broader ideational context in which these strategic incentives are generated. While delegation to courts may occur in "some fortuitous political circumstances and a more advantageous institutional environment," strategic incentives alone cannot explain *how* or *why* these "circumstances" or "institutional environment" have become normalized in the late twentieth and early twenty-first century (Gillman 2002, 521). Stated differently, if the delegation to courts is "a product of strategic politics and in part an instrument of legitimacy enhancement," there remains the question as to *why* legitimacy—whether real or perceived—is enhanced when issues are resolved by

courts rather than legislatures, or more broadly by law rather than politics (Soltan 2006, 116-120).[6]

My research explores the *historical* and *intellectual* foundations in which judicialization has become a global phenomenon in contemporary politics. I argue that the restructuring of power from legislatures to courts is rooted in the proliferation of a depoliticized understanding of democracy that emerged as a reaction to the experience of totalitarianism after World War II. From the viewpoint of constitutional development, the advent of totalitarianism marks a significant break from the past as it revealed the fragility of republican remedies in combating the abuse of democratic institutions. Contemporary democracies have accepted the diagnosis that the rise of totalitarianism was caused by an inherent flaw *within* democracy, particularly its inability to counteract subversive movements that harness legitimacy from plebiscitarian methods and mass mobilization. The anxiety towards unconstrained collectivities and majoritarian power has led intellectuals in both the United States and Europe to re-conceptualize democracy as the distribution of fundamental rights, as opposed to the distribution of self-governing power amongst citizens to collectively determine public affairs. As a result of this emerging consensus, the participatory dimension of democratic *politics* was attenuated in the name of preserving the *idea* of democracy that was to be safeguarded through judicial

[6] Recent studies in comparative politics have similarly acknowledged the limits of the generalizing assumptions of the political empowerment literature. Drawing upon examples in Turkey, Israel, Canada, and the United Kingdom, Patricia Woods and Lisa Hilbink (2009) conclude that "[t]he strategies invoked are often not based on simple interests in political power or on electoral politics and, in some cases, are not related to majoritarian institutions at all" (750). Alternatively, they highlight the importance of the historical and ideational context in which actors may choose to promote judicial empowerment. (Also see Hilbink 2008 and 2009). While I agree with this assessment, their understanding of history and ideas are highly context specific, thus neglecting the *shared* intellectual context that has informed constitutional development across different countries and cultures. This point will be further addressed in chapter 2.

or quasi-judicial means. Although this conceptual shift has been obscured by the use of familiar jargons from early modern political thought, I argue that democracy today has been redefined and structured in a way that lends itself to juristocracy, which is a distinct type of regime with its own set of commitments, priorities, and institutional arrangements.

My work contributes to current scholarship in two ways. First, my analysis addresses the limits of understanding juristocracy as a result of political empowerment by highlighting the importance of ideas shaped by past experience in conditioning the presupposed appeal of delegating to courts. Constitutional discourse has neglected the way in which our contemporary understanding of constitutional democracy informs the rise of juristocracy. The issue is not simply that democracies today are less majoritarian, but that constraints on popular sovereignty are increasingly viewed as an expression of popular sovereignty. Donald Lutz (2006), for example, writes that "[i]f there is such a thing as popular sovereignty in the political world we inhabit, it should be revealed by the tendency for those who write constitutions to include more and more constitutional limits" (133). Lutz's view of popular sovereignty as inherently incorporating the idea of constraints allows for the odd conclusion that popular sovereignty can be enhanced by the adoption of greater checks to what the people can actually do. While the idea of limited government certainly isn't new in the history of constitutional thought, its contemporary manifestation places greater emphasis on the function of law as a set of necessary limits on popular rule rather than as an expression of popular will. Juristocracy represents a unique response to democracy as it seeks to solve its problems not simply by constraining its practices but, more fundamentally, by defining them away.

Second, my research also challenges the normative claim that juristocracy is justified for the purpose of protecting or even advancing core democratic principles. The defense of juristocracy rests on the presumption that popular sovereignty is a legal principle that can be elaborated and protected by courts. Popular sovereignty, however, is not merely some historical abstraction that needs to be more clearly defined or pronounced, but a dynamic concept that evolves through practice. As John Stuart Mill ([1861] 1991) recognized in his defense of popular government:

> […] the rights and interests of every or any person are only secure from being disregarded when the person interested is himself able, and habitually disposed, to stand up for them. […] [H]uman beings are only secure from evil at the hands of others, in proportion as they have the power of being, and are, self-protecting […] (245)

The expectation that only courts are authorized to decide or are capable of deciding constitutional questions has had an educative effect that habituate officials and citizens to internalize an impoverished view of participation and democratic action.[7] Even if one believes juristocracy may have been historically necessary to prevent backsliding into a totalitarian past, it has outgrown this purpose by systematically forcing a trade-off in elevating judicial means at the cost of marginalizing ordinary politics and civic

[7] The classic statement of this problem comes from James Bradley Thayer (1901) who warned that the reliance on courts "is always attended with a serious evil, namely, that the correction of legislative mistakes comes from the outside, and the people thus lose the political experience, and the moral education and stimulus that comes from fighting the question out in the ordinary way, and correcting their own errors" (106). While Thayer was referring to the practices of the Supreme Court of the United States in the late nineteenth century, his statement has gained general applicability in light of the contemporary rise of juristocracy. Interestingly, Thayer believed that this problem could be resisted if judges themselves exercised restraint. In an earlier essay (1893), he advanced the view that the Court should abstain from invalidating legislation unless there was a violation that was "so clear that it is not open to rational questions" (144). There is a problem with this argument, however, as it heavily relies on the judges' ability to be self-correcting or self-restraining, rather than on external checks. For an interesting analysis of "Thayerian review," see Tushnet 2008, 36-42.

participation. Juristocracy presents a challenge not simply because it places too much power in the hands of unaccountable judges, but because its foundations rests on an impoverished understanding of democratic politics. Beyond its immediate causes and effects, juristocracy must be understood as a form of political socialization that has seized the political imagination of citizens today.

1.3. Scope and Approach

The global convergence towards juristocracy raises a challenge for the study of constitutionalism and of constitutional development. For the most part, studies in comparative law have typically focused on comparing a certain procedural or substantive aspect of law—such as free speech, contract law, criminal law, etc.— to demonstrate how the rules or doctrines of one country is similar to or different from that of another. Others offer a descriptive comparison between different legal systems, most notably between common law and civil law systems. These approaches, however, have limitations for understanding 'constitutional trends' that penetrate conventional differences in institutional structure, doctrine, or legal tradition.

My research seeks to identify the underlying currents of thought that have informed the intellectual context of and prerequisite for the judicialization of politics. The analysis will be driven by an examination of primary historical sources and major works in political thought. I also selectively draw upon case examples when they evidence the changing understandings of constitutional politics and democracy. The analysis, however, will not be organized around specific case studies, but will rather offer a broader theoretical analysis of the historical, institutional, and ethical foundations of juristocracy.

Constitutional theory has sometimes been discredited amongst scholars advocating a more scientific approach. It has been accused of advancing a 'grand theory' based on "simple, sweeping claims" that gloss over important details specific to the historical background and experience of different constitutional systems (Hilbink 2008, 238-239). There is also a general skepticism or cynicism in which constitutional theory is merely considered as an "expression of opinion or prejudice, or […] is the expression of an ideology which is not amendable to proof or disproof" (Vile [1967] 1998, 323). Against these claims, I maintain that the utility of a theoretical approach is in its capacity to offer a "global approach" that can draw general conclusions about constitutional trends that cut across many countries (Elkins, Ginsburg, and Melton 2009, 9). The strengths of the theoretical approach was widely acknowledged by an earlier generation of public law scholars. Carl Friedrich (1951), for example, recognized the importance of looking beyond descriptive features of specific constitutions by searching for "the broad framework of general ideas on politics into which […] constitutions are set" (13). In a similar spirit, Karl Loewenstein (1951) emphasized an "ontological evaluation of constitutions" where constitutional structures must be situated within the historical and ideational context in which they emerged (203-204). My work can be viewed as building upon this lineage of thought.

In establishing that juristocracy is a new constitutional paradigm that departs from historical antecedents, I draw upon the Aristotelian understanding of constitutions supplemented by a historical institutionalist approach. The study of constitutions in the classical sense includes, but is not limited to, the study of law. Rather, constitutions are defined broadly as the basic character of political regimes as a whole, encompassing the

way in which political, legal, and social relations are defined and constituted. Aristotle understood constitutions as "the organization of offices in city-states, the way they are distributed, what element is in authority in the constitution, and what the end is of each of the communities" (*Politics*, 1289a: 14-17). His political theory was driven by an interest in the study of a variety of actual political institutions and practices "to see what is correct or useful in them" (1260b: 31).[8] The etymology of the very word 'theory,' or *theôria* (θεωρία), captures the story of how 'theorists'—either as official emissaries or as seekers of wisdom—embarked on a journey 'to see' or 'to observe' the laws, institutions, custom, and culture of neighboring territories for the purpose of contemplating how political communities are constructed. Constitutional theory was considered to be the ultimate expression of practical wisdom or *phronēsis* (φρόνησις) which is empirical and practical in outlook, comparative and even international in scope, yet which overtly involves the elaboration and justification of normative values unfolding in intellectual discourse. The study of constitutions was also of interest to Aristotle for the purpose of understanding why some constitutions are more susceptible to change than others and

[8] In the last sentences of the *Nicomachean Ethics*, Aristotle provides a rough outline of what may be considered his 'comparative constitutions' project, part of which he later develops in the *Politics*. He writes:

> So perhaps collections of laws and constitutions would be useful to those who are capable of examining them and judging what is good or the contrary, and what sorts of things harmonize with what; but for those who, lacking the active capacity, go through such things, it would not be possible to judge them well except spontaneously, though perhaps one might become more astute about them. […] First, then, if anything partial has been well said about our predecessors, let us try to go through it, and then, on the basis of the collection of constitutions, to look at what sorts of things preserve and destroy cities, and what sorts do so for each sort of constitution, and for what reasons some are governed well and others are the reverse. For when these things have been examined, perhaps we might also have more insight into what sort of constitution is best, and how each sort is best arranged, and by using what laws and customs. (1181b 7-24)

Aristotle is believed to have compiled descriptions of over 158 constitutions in neighboring territories and city states, all of which were lost until a copy of his *Constitution of Athens* was discovered in 1890.

how they can be preserved. As opposed to the contemporary understanding of constitutional change as generally being associated with formal amendment or revision of the constitutional text, Aristotle believed that when the "end [in which the community aspires] changes or when [its] offices come to be distributed differently, the constitution is no longer the same, and the nature of the state will have been likewise transformed." Thus, according to this broader definition, "a polis may physically retain all of its recognizable characteristics but project a different identity if its "scheme of composition" is transformed" (Jacobsohn 2010, 8). The Aristotelian framework offers a distinct approach to constitutional change or transition that encompasses political, legal, social, and ethical dimensions. This framework is vital for understanding how juristocracy has retained the appearance of constitutional democracy while is in fact grounded upon principles and practices that depart from classical democratic commitments.

Historical institutionalism shares some important assumptions with this classic view of constitutions. Rather than treating institutions as formal rules of behavior, historical institutionalists emphasize a more dynamic approach where political actors are both produced by, and are producers of, history. This viewpoint is best captured in the following statement by Rogers Smith (1988):

> Political institutions appear to be "more than simply mirrors of social forces." They are themselves created by past human political decisions that were in some measure discretionary, and to some degree they are alterable by future ones. They also have a kind of life of their own. They influence the self-conception of those who occupy roles defined by them in ways that can give those persons distinctively "institutional" perspectives. Hence such institutions can play a part in affecting the political behavior that reshapes them in turn—making them appropriate as units of analysis in their own right. (95)

From a modern standpoint, constitutional theory has been narrowly understood as the advocacy of certain types of institutional structures. Institutions, however, are not self-sustaining but rely on the belief that there are certain demonstrable relationships between given types of institutional arrangement and the safeguarding of important normative ends (Vile [1967] 1998, 8-9). The historical institutionalist approach not only underlines the importance of past experience in shaping these ends, but also recognizes the role of institutions in actively transmitting these ends to members of the community through political socialization. In this regard, constitutions are a "conjunction of prescriptive theories and behavioral categories" or a "symbiosis of prescription and analysis" where institutions are "designed to train generations of citizens to prefer certain goods and conduct over all others" (Jacobson 1963, 561). They are "an instrument of citizen education" through which political identities, interests, and values are forged (Soltan 1993, 4). This educative dimension is crucial for understanding how juristocracy not only embodies, but also reproduces a distrust against majoritarian practices in contemporary constitutional democracies. In addition to understanding the historical and theoretical foundations of juristocracy, this research seeks to redirect existing studies to contemplate how constitutions shape behavior and forge political identities.

1.4. Outline of the Argument

This dissertation consists of six chapters including this introductory chapter. Chapter 2 offers an overview of the contemporary discourse regarding the relationship between democracy and juristocracy. I categorize the literature into two major camps based on whether they focus more on the question of justification or on that of legitimacy.

The first camp consists of legal scholars as well as democratic theorists who take the "countermajoritarian difficulty" as their starting point. These works view the relationship between popular rule and constitutional review as being grounded upon a deeper conflict between the normative ideas of constitutionalism and democracy. Despite this tension, they offer a qualified justification of the practice of constitutional review by defining the parameters in which it can facilitate an improvement upon democratic governance. The second camp emerged as a critique of the countermajoritarian framework and focuses on the actual process in which political issues are channeled into courts. Rather than viewing constitutional review as being inimical to democracy, they alternatively suggest that a democracy will transition to a juristocracy when political elites willingly delegate more and more power to courts. The implication of this account is that the expansion of judicial power is politically constructed and is thus legitimate, regardless of whether it is normatively justified. Against these two viewpoints, I illustrate the limits of understanding juristocracy either as a normatively justified or an empirically legitimate phenomenon by proposing a historical investigation of the changing social and political conditions that have informed the rise of juristocracy. I suggest that the experience of totalitarianism represents a profound break in intellectual and political thought that has shaped the ideational basis of constitutional development in the post-war era. An alternative point of departure for the study of juristocracy must thus begin with identifying the underlying patterns and ideas that emerged in reaction to these events during the second-half of the twentieth century. This inquiry will provide the key to understanding how we share a historically constructed definition of constitutional democracy today that informs the rise of juristocracy across different parts of the world.

In Chapter 3, I examine the period surrounding World War II to identify the historical roots that inform the constitutional development towards juristocracy. I argue that post-war democratic politics has been institutionally constructed to fulfill the demands of 'militant democracy.' While militant democracy was proposed as a direct response to the emergence of totalitarian movements, it inherits a deep-seated suspicion towards open participation and inclusion from nineteenth-century liberal doctrine. The core difference from this past is that the instruments for limiting popular power was itself depoliticized or constitutionalized—shifting from internal qualifications within electoral politics to external restraints placed outside the political processes. While militant democracy was most explicitly pronounced in post-war Europe, the imperative of democratic self-defense became the template for the wave of constitution-building across the world during the second-half of the twentieth-century. I also present the United States as an alternative model of militant democracy. Although taking a markedly different developmental path, the American example illustrates how the patterns and ideas that defined the post-war experience in Europe have informed even the oldest and most familiar modern constitutional regime. Lastly, I consider the implications of the proliferation of militant democracy for the shaping of constitutional democracies today. Militant democracy as a constitutional model represents a highly constrained vision of democracy which by default is suspicious of collective action and of politics in general. Contemporary democracies have inherited this impoverished vision which in turn has been institutionalized and reified within their constitutional structures and political culture. The significance of this conceptual shift is that it provides the missing historical detail for the restructuring of political power from legislatures to courts.

Chapter 4 investigates how post-World War II constitutional design is based on a particular understanding of democratic practice and individual rights that surfaced in response to the shadows of totalitarianism. In regards to the origins of contemporary constitutional review, scholars have generally assumed that its institutional prototype is based on one of two models: the American model of judicial review as pioneered by John Marshall in *Marbury v. Madison* (1803) or the Austrian model of constitutional courts as created by Hans Kelsen. In response, I argue that the structure of constitutional review derives its origins from neither Marshall nor Kelsen but is rooted in an alternative historical and intellectual narrative exogenous to the theory and practice of modern constitutionalism. I begin with a discussion of the general features of contemporary constitutionalism in comparison to its modern predecessor. The inquiry illustrates how courts occupied a marginal role under the institutional design of early constitutions, only to be expanded subsequently with the growing importance of rights discourse. I then reinforce this observation by tracing the early development of constitutional review in the United States and in Austria. Despite their presumed differences, both models manifest striking similarities regarding how the scope of constitutional review was originally directed towards the adjudication of competing claims between federal and state law. Furthermore, the guardianship role of fundamental rights and values was explicitly denied to courts in both models. My analysis will suggest that the institutional foundations of juristocracy lie not simply in the expansion of judicial *power*, but in the transformation of the judicial *function* that breaks with the theory and practice of modern constitutionalism. By understanding the political theory underlying twentieth century constitutional design, my goal is to illustrate how the post-war paradigm has redefined

constitutional politics by structurally facilitating the judicialization of politics as a necessary remedy to the failure of republican, representative institutions once considered the hallmark of modern constitutionalism.

In Chapter 5, I turn to the ethical underpinnings that sustain juristocracy in order to understand why courts are viewed as iconic guardian of fundamental rights and values in contemporary democracies. To trace this development, I examine how the enhanced legitimacy of judicial power is rooted in a particular understanding of constitutions as fundamental law that emerged in response to the intellectual and cultural crisis of totalitarianism. I begin with an overview of the basic social logic of courts as a triadic dispute resolving mechanism to underline how the prototype of courts suffers from an inherent instability that necessitates the use of judicial myth for the purpose of maintaining social and institutional legitimacy. The historical and political context that inform this judicial myth, however, has changed as constitutions were elevated as expressions of meta-positive norms beyond the written text. The ascendance of constitutions as fundamental law reflect an effort to place certain core principles, such as natural law or justice, beyond the reach of democratic majorities who were considered the source of the totalitarian crisis. The elevated status of law, which was accompanied by a corresponding loss of faith in politics, has been gradually internalized within ordinary political practice through the path dependent force of legalized procedures and the creation of new institutions that sought to channel political disputes towards the judicial processes. In conclusion, these changes reflect how juristocracy is grounded on an impoverished view of participation and citizenship that has become a part of the political ethos of contemporary democracies. Juristocracy is ultimately sustained by a form of

political socialization that has gradually instilled elected officials and citizens with the expectation that only courts are authorized to decide or are capable of deciding constitutional questions.

Chapter 6, which is the concluding chapter of this dissertation, revisits the central argument and suggests some practical difficulties that contemporary democracies may face in responding to juristocracy. I also briefly examine the limits of recent scholarship that raise a popular constitutionalist challenge towards juristocracy. Lastly, I consider the possibilities for initiating a counter discourse that can restore confidence and trust towards democratic institutions in constitutional decision-making.

CHAPTER 2: JURISTOCRACY AND DEMOCRACY

2.1. Introduction

The field of constitutional studies has achieved astonishing growth during the past few decades. The central narrative has been largely driven by a response to two periods or "waves" of constitutional development: the proliferation of domestic charters of rights and their enforcement through the adoption of constitutional review in Western European countries after World War II; and the constitution-making and creation of constitutional courts in Latin America, Asia, and later in central and eastern Europe during the era of decolonialization and democratization (Ginsburg 2008; Tushnet 2014). The rise of the modern welfare state and the parallel attention towards socioeconomic rights and collective or group rights was also instrumental in this development, as these new rights accompanied a demand for broader judicial protection (Guarnieri and Pederzoli 2002). The worldwide increase of judicial involvement in policy-making has also furthered comparative works that have sought to empirically test the theories on law and courts across both existing and new democracies.[9] As Patricia Woods and Lisa Hilbink (2009) remark, contemporary scholarship reflect the aspiration "that their work will help unpack both the causes and consequences of […] the "judicialization of politics", that is the reasons behind and implications of more frequent judicial, rather than legislative or social, resolution of political conflict" (746).

[9] There is extensive literature that deal with the construction of judicial power in various regions and countries, including Western Europe (Stone 1992; Stone Sweet 2000; Guarnieri and Pederzoli 2002), post-Communist Eastern Europe (Czarnota, Krygier, and Sadurski 2006), North America (Whittington 2007; Silverstein 2009), Latin America (Sieder, Schjolden, and Angell 2005; Mainwaring and Welna 2003), East Asia (Ginsburg 2003), and authoritarian regimes worldwide (Ginsburg and Moustafa 2008).

A widely shared point of departure—if not, *the* point of departure—for the literature has been to address what Mauro Cappelletti (1980) called the "mighty problem" of constitutional review. In this classic statement, Cappelletti writes that the central concern was:

> […] the "problème formidable" of the role and democratic legitimacy of relatively unaccountable individuals (the judges) and groups (the judiciary) pouring their own hierarchies of values or "personal predilections" into the relatively empty boxes of such vague concepts as liberty, equality, reasonableness, fairness, and due process. (409)

The "mighty problem" contains both an empirical and normative dimension revolving around two separate questions, concerning the *justification* and *legitimacy* of constitutional review. According to A. John Simmons (1999), justification involves demonstrating that a certain practice or institution is "prudentially rational, morally acceptable, or both" against "a background presumption of possible objection" (740). The goal is to prove that a certain practice is generally desirable or defensible against actual or hypothetical objections. Legitimacy, on the other hand, "turns on [whether] consent" is provided by actual persons in the establishment of a certain practice or institution (745). A justified practice does not necessarily mean that it will be legitimately endorsed by particular persons and, conversely, a legitimate practice may not necessarily be seen as prudentially or morally justifiable. As applied to the case of constitutional review, there can be two separate concerns as to whether courts are justified in determining the hierarchy of constitutional values as opposed to a political resolution; and whether courts have been formally authorized to exercise its powers according to legitimate rules or democratic procedures. These two issues are closely intertwined with one another in

practice, and are not always consciously distinguished in constitutional studies. Cappelletti's (1985) own response to the "mighty problem" expresses this entanglement as he argued that "judicial review in very many countries has been a valuable instrument to reinforce our fundamental freedoms, [by virtue of which] its democratic legitimacy is also confirmed" (32).

This chapter offers an overview of the constitutional discourse regarding the relationship between democracy and juristocracy. I will categorize the mainstream literature into two major camps based on whether they focus more on the question of justification or on that of legitimacy. The first camp consists of legal scholars as well as democratic theorists who take the "countermajoritarian difficulty" as their starting point (2.2.). These works view the relationship between popular rule and constitutional review as being grounded upon a deeper conflict between the normative ideals of constitutionalism and democracy. Despite this tension, they offer a qualified justification of the practice of constitutional review by defining the parameters in which it can facilitate an improvement upon democratic governance. The second camp, led by political scientists, emerged largely as a critique of the countermajoritarian framework (2.3.). These works focus heavily on the actual process in which political issues are channeled into courts. Rather than viewing constitutional review as being theoretically inimical to democracy, they alternatively suggest that a democracy will transition to a juristocracy when elected officials willingly delegate more and more power to courts. The implication of this account is that the expansion of judicial power is politically constructed and is thus legitimate, regardless of whether it is normatively justified. Against these two viewpoints, I illustrate the limits of understanding juristocracy either as

a normatively justified or an empirically legitimated phenomenon by proposing a historical investigation of the changing social and political conditions that have informed the rise of juristocracy (2.4). I suggest that the experience of totalitarianism represents a profound break in intellectual and political thought that has shaped the ideational basis of constitutional development in the post-war era. An alternative point of departure for the study of juristocracy must thus begin with identifying the underlying patterns and ideas that emerged in reaction to these events during the second-half of the twentieth century. This inquiry will provide the key to understanding how we share a historically constructed definition of constitutional democracy today that informs the rise of juristocracy across different parts of the world.

2.2. Democracy versus Juristocracy: The Countermajoritarian Framework

Modern scholarship on judicial review has been predominantly concerned with what is known as the "countermajoritarian difficulty." First coined by Alexander Bickel (1986), the problem underlines the democratic deficit that occurs when non-elected judges overturn daily enacted decisions of the legislature or the executive. As Bickel points out, the exercise of constitutional review by courts "thwarts the will of representatives of the actual people of the here and now; it exercises control, not in behalf of the prevailing majority, but against it." The expansion of judicial power comes at the expense of representative institutions, Bickel claims, indicating that constitutional review is a "deviant institution" inimical to core democratic values and practice (16-18). Scholars have long been—and still are, though with less intensity— preoccupied with addressing the conflicting nature of constitutional review to democracy. Erwin

Chemerinsky (1989), for example, describes that the countermajoritarian difficulty has been "the dominant paradigm of constitutional law and scholarship" (61). Similarly, Mark Tushnet (1985) observes that constitutional theory has been concerned with the "main of theories of judicial review" and its relation to democracy. He adds that "[a]lmost all recent work in the field takes as its central problem what Alexander Bickel called the 'countermajoritarian difficulty' with judicial review" (1502).

The countermajoritarian framework originally surfaced as a theory offered by progressive or leftist critics of constitutional review (Tushnet 2014). One prominent concern was that authorizing the courts to invalidate legislation would generate anti-redistributive results because of the assumed conservatism of judges, such as in the protection for the freedom of contract in the United States during the early twentieth century (Nedelsky 1990) or, more recently, in the protection for neo-liberal economic policies in Israel, Canada, or South Africa (Hirschl 2004). Others are concerned that constitutional review would hold out a false hope to activists that they could achieve in the courts what they could not achieve through political action. Litigation has gained widespread appeal due to the relative ease in which lawyers could pursue social reform within the safety of courthouses, as opposed to applying pressure through mobilization or protest. However, as Gerald Rosenberg (2008) argues, "not only does litigation steer activists to an institution that is constrained from helping them, but also it siphons off crucial resources and talent, and runs the risk of weakening political efforts." The choice to pursue social justice in the judicial arena "means that other strategic options are starved of funds" (422-423). The motivation underlying the development of the countermajoritarian critique in the United States was more clearly political. As the

Supreme Court shifted away from being an ally of liberals in the 1960s and 1970s by gradually taking a conservative turn, liberals waged the countermajoritarian critique as a means to deny to conservatives a weapon they were previously wielding with great success (Kramer 2004, ch.8). Whatever its origins, the countermajoritarian difficulty deserves to be evaluated on its merits in light of how "the attempt to reconcile judicial independence with democratic premises has preoccupied several generations of political theorists and academic lawyers" (Seidman 1988, 1573).[10]

Most countermajoritarian critiques share several core premises. The first premise is how the expansion of judicial power through the use of constitutional review is a manifestation of an underlying tension between the ideals of democracy and constitutionalism (Elster and Slagstad 1988). On a normative plane, the countermajoritarian difficulty presumes a simplistic theoretical framework: democracy is understood as popular will of the here and now expressed through majority rule, whereas constitutionalism refers to limits on majoritarian power.[11] Judges and elected political officials are thus pitched against one another as being engaged in "a zero-sum competition in which each branch uses fixed institutional powers" to gain an upper hand over policy-making authority (Lovell and Lemieux 2006, 100).

[10] In light of these developments within the literature, Barry Friedman (1998) suggests that the countermajoritarian difficulty has been "the central obsession of modern constitutional scholarship" (334). For a thorough, critical overview of the development of the countermajoritarian difficulty in the United States, see his five-part series of articles titled: "The History of the Countermajoritarian Difficulty," Parts 1-5 (1998, 2000, 2001, 2002a, 2002b).

[11] Some have gone even deeper, suggesting a fundamental tension between 'constituent' (*pouvoir constituant*) and 'constituted' power (*pouvoir constitute*), the former being the expression of sovereign will that predates the constitution and is superior to it, whereas the latter refers to positive constitutional forms that constrain constituent discretion by determining how public power is to be exercised. See, for example, Cohen and Arato 1994 and Kalyvas 2005.

The second premise is that the countermajoritarian difficulty is primarily a manifestation of judicial usurpation or overreach. While critics have proposed different remedies to temper the aggressive intervention of courts into politics, a common prescription has been to urge judges to practice a form of judicial restraint. For example, Bickel (1986) himself proposed ways in which the Supreme Court could restrain itself from turning into a "countermajoritarian force" by practicing "passive virtues" (ch.4). He refers to doctrines such as standing, ripeness, political question, and certiorari jurisdiction which the Court can use to avoid deciding questions that are too controversial. Drawing upon Bickel's work, Cass Sunstein (1999) proposed a similar remedy where judges could use a form of "judicial minimalism" by leaving core controversies undecided. By postponing decisions in important cases, courts could leave sufficient time and space for the issue to be further developed and resolved in the political arena through democratic debate. These remedies conversely suggest that the underlying cause driving countermajoritarian courts is the abuse of constitutional review by activist or 'imperial' judges. Both the cause and the remedy presume that the countermajoritarian difficulty is largely contingent upon the character, will, or qualifications of judges.

Lastly, the countermajoritarian critique is ultimately an attempt to normatively justify the institution of constitutional review rather than to renounce it altogether.[12] As suggested by the second premise, constitutional review can have a mixed record of producing both positive and negative outcomes for democracy. The central purpose of countermajoritarian critics has been to identify and define the precise boundaries for what

[12] A rare exception is Mark Tushnet (1999) who proposes the radical proposition of "taking the constitution away from the courts" by abolishing constitutional review. His later works, however, have been more moderate as he suggests an alternative, "weak form" of constitutional review. For this reformulation, see Tushnet 2008.

may otherwise become an unchecked, anti-majoritarian power. As Mark Tushnet (1988) describes:

> […] judicial review alone cannot eliminate the possibility of a certain kind of government oppression—oppression by judges themselves. Constitutional theory completes the structure by providing guidance to the judges on when and how they should exercise the power of judicial review and by giving the citizenry widely shared criteria by which to evaluate judicial performance. (4)

This point has sometimes been overshadowed by the forcefulness of Bickel's original formulation that constitutional review is a "deviant institution." At times, scholars have misconstrued the countermajoritarian critique as advancing a "skeptical" or "downright dismissive" view of judicial power (Hilbink 2008, 227). While critics have presumed that judges are unrepresentative or unaccountable because they are unelected, they also suggest that the insulation from electoral politics is precisely what allows for judges to perform a unique function in a constitutional democracy. The standard rationale is that judges are in the best position to protect the integrity of democratic institutions and minority rights from populist pressures of the majority. Bickel, for example, suggested that courts are better than legislatures "in sorting out the enduring values of a society." Whereas elections can pressure representatives to focus their attention on the "immediate materials needs" of society, judges are equipped with the ability to identify long-term goals and values due to their institutional independence and training. Furthermore, the nature of courts in dealing with actual, concrete cases give judges a sober insight that can "modify" and "lengthen everyone's view" (24-26). Although judges are not elected and, thus, undemocratic, they nevertheless occupy a distinct role in a constitutional democracy in spite of potentially being a "deviant institution." Another prominent defense of

constitutional review is that offered by John Hart Ely (1980). Ely begins with a familiar concern that the "central problem […] of judicial review [is that] a body that is not elected or otherwise politically responsible in any significant way is telling the people's elected representatives that they cannot govern as they'd like" (4-5). Despite this inconsistency, he assigns a "representation reinforcing" role to courts that can ensure that the political process is open and fair to all viewpoints, most notably that of discrete and insular minorities (87). He claims that judges are uniquely qualified to serve this purpose because they are trained to be experts in procedural fairness. However, judges must only concern themselves with correcting procedural obstacles for participation rather than being involved in the outcomes that the procedures can produce. As Ely states in his conclusion, "constitutional law appropriately exists for those situations where representative government cannot be trusted, not those where we know it can" (183).

In the end, the countermajoritarian critique is a theoretical framework used to ascertain the proper role and scope of constitutional review. Even democratic theorists who are more strongly committed to the idea of popular sovereignty carve out a constitutional space in which courts distinctively contribute to facilitating majoritarian processes. "While courts should never act imperially to impose the results on recalcitrant legislatures or to protect society from majority rule," Ian Shapiro (2003) argues, "they should use their authority to get legislatures to confront contradictions in their own actions" (66-67). In his critical examination of the American Constitution, Robert Dahl (2002) also acknowledges that "[w]hen the court acts within [the] sphere of fundamental democratic rights, the legitimacy of its actions and its place in the democratic system of government can hardly be challenged." Even though Dahl maintains a general pessimism

about the democratic credentials of the American political system, he is nevertheless marginally optimistic that there is a "democratic role for the Supreme Court" (152-153). Courts are justified to serve as guardians where democratic politics itself threatens to burst the bounds of constitutional order due to the unique advantages that they possess over democratic assemblies. In this regard, the countermajoritarian framework resolves the inherent tension between juristocracy and democracy through a form of Hegelian synthesis by institutionalizing or internalizing judicial oversight that is originally exogenous to the idea of democracy.

2.3. From Democracy to Juristocracy: The Political Empowerment Framework

An emerging group of scholars, spear-headed by political scientists, have rejected the countermajoritarian framework for a more complex account exploring the direct causes of judicialization. They begin with the observation that the countermajoritarian difficulty is grounded upon simplifying assumptions that neglect the empirical dimensions of institutional dialogue occurring within government amongst the different branches. For example, Mark Graber (1993) points out how the countermajoritarian presumption that legislators "wish to bear the responsibility for resolving conflicts" is empirically false. Judges exercise power only because elected officials have either actively or passively made choices that expand judicial discretion or the institutional capacities of the courts. The literature thus heavily focuses on identifying the strategic environment in which elected officials are more likely to turn to courts. One such instance, according to Graber, is "when the dominant national coalition is unable or unwilling to settle some disputes." Elected officials may decide to "consciously invite the

judiciary to resolve those political controversies that they cannot or would rather not address" (36-37). There may also be other incentives for legislatures to defer to courts. In a comparative study of courts in Taiwan, Korea, and Mongolia, Tom Ginsburg (2003) argues that constitutional review in these new democracies was adopted as "a form of insurance to prospective electoral losers." Political parties seek to sustain their power even after losing control over the legislative or executive offices by preparing the courts as "an alternative forum." According to Ginsburg, "the party system and the configuration of political forces at the time of constitutional drafting" is key for explaining variation in the scope of judicial power across different democracies (25). The more uneven the power differential between parties negotiating constitutional change, the less likely it is that constitutional review will be introduced. Ran Hirschl (2004) takes Ginsburg's "insurance" model a step further and argues that the constitutionalization of judicial power in Canada, Israel, New Zealand, and South Africa was primarily a means of "self-interested hegemonic preservation" by political as well as economic and legal elites who see their prerogatives threatened (11). In arguing that judicial involvement in policy-making is a result of strategic behavior within politics to empower courts, all these studies share the conclusion that judicialization cannot be accurately described as being inherently anti-democratic or countermajoritarian.

The political empowerment literature shares two core premises. The first assumption is that judicial power is inherently weak and passive. These studies fall back on Alexander Hamilton's classical statement in *Federalist* #78 that courts are "naturally feeble" in lacking "influence over either the sword or the purse." Elected officials and judges are understood as engaged within a principal-agent relationship. Judges are

viewed as agents of power delegated from legislatures. Their influence is contingent upon the support—or, in some cases, passive indifference— from politics. As a result, courts are only as powerful as political 'principals' let them to be. The second is a realist premise that political actors are largely driven by incentives to seek power. The delegation to courts is but one manifestation of their interests in maintaining dominant status in the political system. In this sense, the political empowerment literature rests on a "'thin political' rational choice" theory (Goldstein 2004, 623). Given this assumption, constitutional review "has no inherent normative attraction" and "no value to power-seeking politicians, unless and until they find themselves in a weak, insecure, or uncertain positions against their rivals" (Hilbink 2009, 782). Conversely, political parties or groups will not turn to courts when they are dominant, since entrenching judicial power will only create a potential obstacle to their own interests.

There is, however, a familiar challenge that can be raised against the political empowerment framework, namely whether judges can simply be considered agents of political actors. Generally speaking, the principal-agent problem emerges when there are different interests and asymmetric information (where elements of what the agent do are costly for the principal to observe), such that the principal cannot directly ensure that the agent is always acting in its best interests (Furubotn and Richter 2000). Within the particular context of the empowerment of courts, once judges are allowed broad jurisdiction over constitutional issues, they are armed not only with the means for exercising substantive checks on political power but, more importantly, with the authority to broadly define the parameters of democratic governance itself. Regardless of whether elected officials are deliberately making an instrumental use of the courts to advance their

own goals or are simply tossing the ball over to avoid blame, the transfer of power constitutes a massive and virtually open-ended delegation of policy-making authority once it is institutionalized. Defying the courts after power has been delegated is often politically costly as elected officials risk being perceived as undermining the established legal order. Overturning court decisions through passing an amendment can also be difficult and time consuming as it requires mobilizing broad support from the people.

Political scientists have responded to this problem by arguing that judges are rarely rogues that go directly against the national consensus, especially regarding major, divisive issues. Robert Dahl (1957), for example, illustrates how the American Supreme Court is "inevitably a part of the dominant national alliance" (293). Falling back on the Hamiltonian presumption that courts are inherently powerless to affect the course of national policy by its own, he points out how "the policy views dominant on the Court are never for long out of line with the policy views dominant among the law making majorities" (285). To diverge from the national consensus will lead to turmoil, where courts will not only face political resistance but will also undermine their own legitimacy. Since courts are concerned with having their rulings carried out, they may "try to limit negative reactions by […] deferring to the majority will, or fashioning settlements that avoid the declaration of a clear winner or loser" (Stone Sweet 2000, 200). However, the expectation that judges will exercise restraint hardly mitigates the principal-agent problem. Even if judges are "too much products of their time and place to launch social revolutions," the possibility that they may (or may not) choose to affirm values closely reflecting the dominant public opinion or national consensus falls severely short of ensuring a minimal degree of accountability (Klarman 2007, 231). Considering the broad

discretion involved in the interpretation of most any constitutional provision, judges are only loosely constrained even when they decide on the basis of popular opinion. Furthermore, the presumption that judges will adopt moderate decisions is becoming empirically questionable in contemporary democracies where the increasing level of public confidence (or indifference) has allowed courts to get away with issuing polarizing decisions.[13]

The political empowerment literature offers insight into the ways in which the emergence of juristocracy is a result of legitimate delegation to courts. The primary responsibility for the proliferation of constitutional review and the expansion of judicial power is assigned to elected officials, rather than to imperial judges. The framework also enables a comparative analysis of courts because it focuses on analyzing the institutional environment in which strategic incentives are more likely to exist. However, the political empowerment framework falls short of offering a complete explanation of judicialization as it discounts the relevance of justification that may inform the values and interests of elected officials. Furthermore, issues of accountability are pushed aside as a secondary concern, as demonstrated by the failure to fully address the unintended or even negative consequences that may emerge from the principal-agent relation.

2.4. Juristocracy as Democracy: An Alternative Point of Departure

The question that divides the political empowerment literature from the countermajoritarian framework is that of the relation between the possibility of juristocracy being made legitimate by active delegation and the theoretical justification

[13] That the means for constraining courts may be behaviorally or psychologically limited under a certain political culture will be a topic to be further developed in chapter 5.

for its (co-)existence in a democracy. The central problem for countermajoritarian critics was the normative dilemma that a constitutional democracy faces in trying to devise a system of government that can avoid and effectively restrain both democratic and judicial tyranny (Tushnet 1988). Unless judges are guided and confined in the exercise of their authority, they argue that democracy is susceptible to oppression driven by judges. On the other hand, the political empowerment framework responds to this viewpoint by illustrating that judges are only as powerful as elected officials allow them to be. Even if in fact judges turn out to be excessively aggressive in certain circumstances, the underlying cause isn't some innate will to power to encroach upon the political process but rather that elected officials have constructed judicial power as such whether through active or passive delegation. Both camps, however, do not fully address how the relationship between democracy and juristocracy must be understood as a result of choice laid down by *politically* and *historically circumstanced* human agents. In its roots, the foundations of juristocracy are and can only be organically grown from patterns of historical practice as distinguished from acts or expressions of anyone's isolated will, whether it be that of judges or of elected officials. The prominence of constitutional review today flows in the last analysis from the social acceptance of juristocracy as part of constitutional democracy's ultimate rule of recognition.[14] The point here is that this social acceptance may precede the judges' or elected officials' manifest behavior. The recognition need not be an intentional production nor a rational necessitation but a matter of reflexive social practice. In sum, juristocracy is not itself fully graspable as a

[14] For H.L.A. Hart ([1961] 1994), the ultimate rule of recognition refers to a specific and factual pre-legal understanding within a society about what is to count as a norm. Prior to positive law, Hart writes that society slowly develops a "standing disposition […] to take [certain] patterns of conduct both as guides to their own future conduct and as standards of criticism" (255).

normatively justified or an empirically legitimated phenomenon but rather is a matter of changing social and political conditions to be discovered by historical investigation.

This historical and ideational dimension has received surprisingly little treatment in the existing literature on juristocracy. Scholars in the political empowerment camp have generally acknowledged the increased demand for the protection of human rights or an elevated rights consciousness as fueling the emergence of the "new constitutionalism" after World War II (Goldstein 2004; Guarnieri and Pederzoli 2002; Stone Sweet 2000). However, its implications are only ambivalently recognized or quickly reduced to a background condition that is only nominally addressed before moving on to a serious, scientific inquiry of what is considered to be a more direct impetus for the judicialization of politics. Some have even tried to control for this historical variable by excluding it altogether. In searching for the causes of the new constitutionalism, Ran Hirshl (2004), for example, methodologically removes countries that experienced a fundamental transition after World War II from his analysis in order to identify the 'pure' political origins of the constitutionalization of rights and the fortification of constitutional review. This leads to an examination of the supreme courts in Israel, New Zealand, the Republic of South Africa, and Canada, all of which he claims fit the "no apparent transition scenario" (8). By virtue of this exclusion, Hirschl reaches the conclusion that the transition towards juristocracy is an expression of elites seeking to entrench their prerogatives by supporting broad neo-liberal economic policies through judicial means. His narrow case selection, however, undercuts the general applicability of his conclusion considering how an overwhelming majority of contemporary constitutions are precisely the direct result of fundamental constitutional revolution or reform that occurred post-

1945. The exclusion is even more puzzling in light of how he seems to presume that there can be identifiable political motives at work detached from or (semi-) independent of larger historical and ideational forces. Furthermore, as Linda McClain and James Fleming (2005) point out, the very same courts in the four countries that Hirschl analyzes have not only served as a bulwark of elite interests but also have been instrumental in bringing about progressive social changes, such as gains in gender equality. Thus, at best, it is much more reasonable to view the strategic delegation to courts by elites as one amongst many factors that has contributed to what may in fact be an existing trend towards judicialization.

Recent studies in comparative politics have similarly highlighted the limits of understanding judicialization primarily as a result of political empowerment. They present counter evidence in which judicialization has occurred in countries where the institutional conditions for strategic delegation were absent, such as in Spain and Chile (Hilbink 2009), Turkey (Shambayati and Kirdiş 2009), Mexico (Inclán Oseguera 2009), or Israel (Woods 2009). Patricia Woods and Lisa Hilbink (2009) observe from these various studies that "judicial empowerment may be advanced by strong actors rather than weak actors" who are seeking insurance or hegemonic preservation. They also find that "regime type is not a significant predictor of judicial empowerment." The conclusion they reach is that "ideas were critical factors driving judicial empowerment" in each of these cases and urge scholars to pay closer attention to "the importance of past experiences to the perceived interests of those who promote judicial empowerment" (750). As an alternative explanation, scholars are gradually turning their attention to the importance of ideational factors that inform the judicialization of politics.

These evidence raise new possibilities for the study of juristocracy, but must go further in addressing the importance of *shared* experience and *collective* memory that more broadly informs the ideational basis of constitutional development in the post-war era. As Jeffrey Olick (2007) explains, experience is not simply a reflection of subjective values, ideas, or attitudes distinct to particular individuals or groups, but at times leaves an imprint on collective memory across broader communities. In his examination of the effects of the "Holocaust myth" in German politics, Olick writes:

> Central to the effort here to understand how the German past and present shape each other is the recognition that political cultures are not static systems—that is, structures without histories. Political culture is always a historical process, not a determinate set of relations or a once-and-for-all definition of the situation. Claim-making by actors in political contexts is conditioned by significant pasts as well as by meaningful presents; it is always path-dependent, though not necessarily always in obvious ways. This point calls attention to historical events of definitive importance, to how broad parameters are fixed or transformed at particular moments, and to how those moments manifest themselves or are invoked differently in subsequent contexts. Conceiving of collective memory as part of a political-cultural process thus remedies the presuppositional tendency to view it either as an unchanging and definitive past or as pure strategy, always malleable in the present. (40)

The historical and cultural significance of the mass violence and atrocity that occurred during the Second World War was not merely an issue isolated to post-war Germany but one that was debated on a global scale. As Hannah Arendt ([1951] 1973) suggested, the experience of totalitarianism had constituted a profound break in intellectual and social thought where existing political institutions, practices, and perceptions all had to be fundamentally reevaluated. An alternative point of departure for the study of juristocracy must therefore identify the underlying patterns and ideas that emerged in reaction to these events during the second-half of the twentieth century. This

inquiry will provide the key to understanding how we share a historically constructed definition of constitutional democracy today that informs the rise of juristocracy across different parts of the world.

History does not necessarily develop in a straightforward, linear fashion. Understanding the conditions under which the actual trajectory of history has taken must be accompanied by specifying why other paths were not taken. I close this section by briefly considering two competing diagnoses or interpretations of the post-war experience that highlight the importance of intellectual discourse for shaping institutions and political practice. One possible interpretation is to view the rise of totalitarianism as a minority movement that took advantage of people with underdeveloped democratic commitments on its accession to power. While popular power may have provided the necessary legitimation for fascist leaders, the people at the same time can be viewed as victims of manipulation. If one takes this to be the proper diagnosis, the remedy would be to institute a more robust democracy in which the people themselves could learn to serve as a bulwark against those seeking to abuse the democratic system for malevolent political purposes. An alternative diagnosis would be to treat totalitarianism as a mass movement or even a form of democratic movement—one that may have been manipulated by fascist leaders but nevertheless democratic in its nature. Under this interpretation, the central imperative is to reinvent constitutional democracy to be anti-fascist or anti-extremist, but not necessarily more democratic as the demos is framed as an accomplice to the rise of totalitarianism. The remedy thus entails instituting more stringent checks on popular power, most notably by institutionalizing means of control *outside* the hands of the people *in the name of* protecting the people. The path that was

taken between this cross road will broadly inform the upcoming chapters that examine the historical, institutional, and ethical foundations of juristocracy.

CHAPTER 3: THE HISTORICAL FOUNDATIONS OF JURISTOCRACY

3.1. Introduction

Empirical evidence that constitutional democracies are transitioning towards juristocracy has not been accompanied by a historical inquiry into the origins of what scholars agree is a global phenomenon (Hirschl 2004; Scheppele 2002; Tate and Vallinder 1995). Existing studies have at least shared the preliminary observation that the development began only after the second-half of the twentieth century (Goldstein 2004; Guarnieri and Pederzoli 2002; Stone Sweet 2000). However, the diversity in political background, institutional architecture, legal culture, national character, as well as numerous other factors all seem to suggest the near impossibility of ascertaining a single point of origin for the 'new constitutionalism.' Alternatively, scholars have tackled the question of origins focusing on the institutional environment (Ferejohn 2002) and domestic political incentives (Ginsburg 2003; Hirschl 2004) that lead political actors to delegate power to courts.[15] This framework has been applied or modified in numerous other case studies where findings have multiplied corresponding to variables unique to the region and local culture. Despite growing scholarly interest, the broader discourse has shied away from explaining why it is only in the post-World War II era that the use of judicial means for resolving core constitutional disputes emerged as a 'rational' or attractive solution for political actors across the world, regardless of differences in political background, legal system, or culture. As Rogers Smith (2009) points out, the

[15] For a concise overview of the literature, see Ginsburg 2008. My own thoughts on the strengths and weaknesses of the various approaches in the existing literature are detailed in chapter 2.

"patterns of history" in which juristocracy has gradually emerged as the dominant model for constitutional democracies remain under-theorized (215).

One way to approach the "patterns of history" is through the lens of democratic theory and constitutional development. Constitutions do not simply impose constraints, but channel political behavior in certain directions rather than others (Holmes 1995; Vile [1967] 1998). The desired directions are made self-conscious through an articulation of the values that are given priority, and the choice of means for furthering these values. If existing studies on juristocracy have primarily focused on what actually happens within the ordered system established by contemporary constitutions, the alternative would be to examine the context of and the prerequisite for such behavior. This is particularly important as the values or ends implicit in constitutions are not static, but subject to comprehensive historical changes. The fact that a specific type of judicial guardianship has become widely accepted as a necessary corrective to or, perhaps, even as a better model of democracy suggests how the guidelines for democratic politics and the means for ensuring its stability has been altered. Thus, the 'historical patterns' underlying the global expansion of judicial power can be reached by examining how the conditions for establishing and maintaining a constitutional democracy have been redefined or reimagined.

This chapter examines the period surrounding World War II to identify the intellectual roots that inform the constitutional development towards juristocracy. I argue that post-war democratic politics has been institutionally constructed to fulfill the expectations of 'militant democracy.' Militant democracy emerged in Europe during the 1920s and 30s in order to counteract the abuse of democratic processes by totalitarian

movements. It originally referred to the enactment of a series of anti-fascist legislation, such as the ban against subversive parties, prohibition of para-military forces and uniforms, as well as censorship on political speech and association. In the wake of recent events following September 11, the idea of militancy has reemerged as a response to terrorist attacks inspired by radical religious fundamentalist ideas (Sajó 2004; Thienel 2008). The shared imperative was described as that of democratic self-defense: "democracies need more robust mechanisms to challenge […] modern anti-democratic mass movements, which adopt plebiscitarian methods and mass mobilization, all the while operating within the letter of the law of democratic constitutional norms" (Avineri 2004, 1). For this reason, studies on militant democracy have placed the constitutional authorization of the use of emergency powers and the legal 'principle' that justifies it at the very center of their discussion (Thiel 2009). In other words, the literature has been skewed towards debating the proper scope and content of militant laws, and their effectiveness in removing threats while preserving the integrity of the rule of law.

The emphasis on the doctrinal or jurisprudential manifestation of militant democracy, however, is not only formalistic, but can also be fundamentally misleading in understanding its true foundations. It is formalistic due to the lacking acknowledgement of extra-legal elements, such as the beliefs and habits of citizens, upon which the success of legal constraints is contingent. While legal constraints may logically be an expression of extra-legal factors, the concentration on the former risks omitting cases that may subscribe to the broader purpose of militant democracy though not necessarily adopting militant laws or doctrines. The legalistic approach is also potentially misleading because it assumes a framework in which militant legal constraints are amendments to, rather than

fundamental alterations of, a pre-existing conception of democracy. It promotes the simplistic notion that militant democracy is an aggregation of democracy with militant laws. As Otto Pfersmann (2004) suggests, democracy and militant democracy "do not pertain to the same structure." It is not simply "democracy plus something legally militant that strengthens its inherent weakness; it is something else" (59). In effect, making democracy militant not only modifies the institutional architecture but also restructures the political processes that is sustained by a unique set of political commitment and identity (Jacobsohn 2010).

There are two preliminary characteristics about militant democracy that deserve particular attention. The first is how the limits on democracy are justified in the name of democracy. Although there have been numerous thinkers prior to the twentieth century who advocated placing limits on popular power, their arguments have rarely been justified as a logical extension of democratic principles.[16] In contrast, militant democracy appears as a self-sufficient conception of democracy that can endogenously provide the necessary means in controlling its own excess. To achieve this purpose, a categorical distinction is made between procedural and substantive democracy, where the former must yield to the latter. The value-oriented, substantive core consists of principles that are independent of and prioritized over actual democratic practice. The second characteristic is how the protection of substantive democracy is placed outside the hands of the political organs. Those who are wary of democratic majorities assume that it would be "an

[16] Modern thinkers have argued that pure democracy in the classical sense was no longer practicable due to the changes in social conditions, but also because it was potentially tyrannical. The common view was that popular sovereignty ought to be tempered by a '*republican* constitution' (Kant [1797] 1996) or '*republican* form of government' (Hamilton, Madison, and Jay [1788] 2003). Note how republican institutions were hardly viewed as stemming from the idea of democracy itself.

abdication of political-legal responsibility to reserve the determination of such matters [i.e. safeguarding democracy] exclusively for the electorate, with its subjective analysis and its swaying moods" (Tardi 2004, 110-111). Since the greatest threat to the principles of democracy is viewed as coming from democratic politics itself, the application of militant authority is least likely to be abused by 'guardians' who are detached from the ordinary political processes. Even if the role of guardianship was strictly limited to the negative function of prohibiting undemocratic groups, this process necessarily entails the positive function of determining the substantive grounds in which their aims are in violation of democratic principles. These two features highlight how militant democracy is defined not simply by the negative protection of political processes through legal constraints, but by a higher positive commitment towards promoting a particular conception of substantive democracy.

In what follows, I explore the origins of militant democracy in order to identify the normative core that has been crucial for restructuring constitutional politics today. A closer look into the historical background reveals how militant democracy inherits a deep-seated suspicion towards open participation and inclusion from nineteenth century liberal doctrine (3.2.). The core difference from this past is that the instruments for limiting popular power was itself depoliticized or constitutionalized—shifting from internal qualifications within electoral politics to external restraints placed outside the political processes. While militant democracy was most explicitly pronounced in post-war Europe, the imperative of democratic self-defense became *the* template for the wave of constitution-building across the world during the second-half of the twentieth century (3.3.). I also examine the United States as an alternative model of militant democracy.

Although taking a markedly different developmental path, the American example illustrates how the patterns and ideas that defined the post-war experience in Europe have informed even the oldest and most familiar modern constitutional regime (3.4.). The final section considers the implications of the proliferation of militant democracy for the shaping of constitutional democracies today (3.5.). Militant democracy as a constitutional model encourages a trade-off that elevates judicial elites at the cost of downplaying participatory politics. It represents a highly constrained vision of democracy which by default is suspicious of collective action and of politics in general. My goal is to show that contemporary democracies have inherited this impoverished vision which in turn has been institutionalized and reified within their constitutional structures and political culture. The significance of this conceptual shift is that it provides the missing historical detail for the restructuring of political power from legislatures to courts ultimately establishing the foundations for juristocracy.

3.2. The Age of Crisis?: The Historical Roots of Militant Democracy

In the period surrounding World War II, a general trend in intellectual thought emerged where totalitarianism was interpreted as a variation of democracy. This stood in stark contrast to how the war effort was internationally advertised as an ideological conflict between democracy and totalitarianism. The German exile political scientist Karl Loewenstein (1937a) observed that the success of totalitarian regimes was grounded in its "perfect adjustment to democracy." Fascists all over the world were utilizing the fact that democracies "could not, without self-abnegation, deny to any body of public opinion the full use of the free institutions of speech, press, assembly, and parliamentary

participation" even when the goal was to "systematically discredit the democratic order." The result was the paralysis of democracy from within. The very "mechanism of democracy" was being accused as the "Trojan horse by which the enemy enters the city" (423-424).

Jacob Talmon (1952) labeled this new political form 'totalitarian democracy.' Totalitarian democracy, according to Talmon, had a long lineage which can be traced back to Jean-Jacques Rousseau and the French Revolution. It was described as a dangerous twin of liberal democracy, both of which emerged concurrently during the eighteenth century. The central difference between the two is not so much the simple "affirmation of the value of liberty by one, and its denial by the other," but their divergent aspirations. Liberal democracy is characterized by the idea of freedom defined as "spontaneity and the absence of coercion." As a result, its political goals are "conceived in rather negative terms, and the use of force for their realization is considered an evil." Totalitarian democracy, on the other hand, is based on the belief that freedom can be "realized only in the pursuit and attainment of an absolute collective purpose." In the realm of politics, totalitarian democracy strives for "the maximum of social justice and security" that will ensure "the fullest satisfaction of [the peoples'] true interest and […] guarantee of [their] freedom." In essence, it was their "different attitudes to politics" that inevitably led totalitarian democracy to violence and destruction, and liberal democracy to peace and stability (1-3).[17] Talmon's caricature of the two regimes has been widely

[17] Talmon's analysis follows the tradition of Benjamin Constant's ([1819] 1988) classic distinction between the 'liberty of the ancients' and the 'liberty of the moderns.' The 'liberty of the ancients' refers to political participation and sovereignty, while the 'liberty of the moderns' refers to freedom from interference in one's private life. Constant observed how the French Revolution provided a pretext for tyranny in urging people to govern themselves, when all they really wanted was the freedom to be left to their own affairs. He was critical of the Revolution

accepted by intellectuals, specifically his warning about the dangers of a democracy without liberalism. For example, Giovanni Sartori (1987) argued that "political democracy cannot be divorced from liberalism, and is actually resolved into liberalism" (389). He confidently stated that once liberalism is rejected "what awaits us is a totalitarian democracy" (393). Similarly, John Rawls (1993) held that "the most reasonable political conception of justice for a democratic regime will be, broadly speaking, liberal" (156). Though Rawls did not completely preclude the possibility of a democracy divorced from liberalism, he believed that the threshold of justice requires some form of minimum liberal commitment protected by institutional forms. Norberto Bobbio ([1988] 2005) offered a more subtle observation regarding how liberalism and democracy in the post-war era have "of necessity become allies" (90). In this hybrid form, any tension between the two "resolves itself into a situation wherein the liberal doctrine, while accepting democracy as a method or set of 'rules of the game,'" determines "the limits within which these rules have application" (88).

The predicament is that the definition of liberal democracy offered in this distinction preemptively places a conceptual bracket over certain forms of political action that qualify as legitimate and even necessary in a democracy. Furthermore, it offers a false dichotomy that conceals how democracy today has still not fully accepted mass politics as a fact of its political existence. A good example is how the techniques of

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for transposing into the modern age a view of collective sovereignty which belonged to the ancients. Constant's distinction was inherited by Isaiah Berlin ([1958] 2002) in the twentieth century who famously distinguished between positive and negative liberty. Positive liberty is based on the understanding of freedom as self-mastery, whereas negative liberty on the idea of freedom as non-interference. He warned that positive liberty has a strong potential to become coercive because its presumption of a rational goal with universal validity enables one to impose the realization of one's true self to that of others. Talmon's description of totalitarian democracy as the pursuit of an "absolute collective purpose" provides an interesting historical context for understanding Berlin's criticism of positive liberty.

totalitarianism, such as mass propaganda or mobilization, have been dismissed as a perverse form of political action that needs to be disposed along with the overthrow of these regimes. Ironically, these techniques eventually became "major tendencies in all politics of the latter half of the century, not least in the politics of liberal democracies" (Wolin 2004, 519). Drowned out by ideological shouting is the fact that the success of totalitarianism in mustering mass support was in part provided by the failure of nineteenth century liberalism. Totalitarian movements were able to effectively play on the register of democracy not because their commitments were genuine but thanks to the liberal disdain for popular participation and inclusion symptomatic during the time. The simplified stories we have inherited about the post-war reconstruction omits how liberalism has failed to fight for democracy in its hour of need.

The sweeping disdain for mass politics can be traced to the vestiges of late nineteenth and early twentieth century European liberal thought.[18] One of the immediate effects of the First World War was the summoning of mass populations for conducting 'total war' which led to the entry of ordinary people previously excluded from the prestige and powers of political participation. The extension of the suffrage was partially premised on the idea that the ability to serve in the military was a qualification and

[18] The historical account that I offer in this section is largely indebted to Jan-Werner Müller's excellent analysis in *Contesting Democracy: Political Ideas in Twentieth-Century Europe* (2011). Müller offers insight into the way in which historical events of the late nineteenth and twentieth century have led to the affirmation of a particular (and, even, peculiar) type of liberal democracy, namely 'Christian Democracy' (132-146). This new post-war constitutional consensus, he argues, has demonstrated great tenacity and resilience in the face of major challenges from both the Left ('1968) and the Right (neo-liberalism) even until this day. My general argument regarding how the foundations of juristocracy can be traced to a redefining of democracy in the post-war era can be read as a different version of Müller's argument. However, it places greater emphasis on how constitutional power and democratic politics has been restructured than on the intellectual history of the ideas and doctrines (the '-isms') animating them. In this sense, our arguments are complimentary.

privilege of citizenship. In some cases, the franchise was further extended to non-taxpaying wage earners and to women as well.[19] Through the widening of the franchise, a significant part of the population legally became active citizens for the first time in history. In short, the social basis of democracy was transformed into a mass (-based) democracy.

The rise of a new Bourgeois middle class constituted a political crisis that threatened the foundations of the existing order. European liberals voiced a deep anxiety about the elevated presence of the masses in both politics and culture. The opening sentences of Spanish political philosopher José Ortega y Gasset's *The Revolt of the Masses* (1932) is telling of the degree of agitation that swept the intellectual circles:

> There is one fact which, whether for good or ill, is of utmost importance in the public life of Europe at the present moment. This fact is the accession of the masses to complete social power. As the masses, by definition, neither should nor can direct their own personal existence, and still less rule society in general, this fact means that actually Europe is suffering from the greatest crisis that can afflict peoples, nations, and civilisation. […] So also is its name. It is called the rebellion of the masses. (11)

It is important to notice that the mass that Ortega describes does not directly refer to specific social classes. In this respect, his critique differs from that of his classical predecessors. Democracy in the history of political thought has been commonly associated with a class element: 'government by the many' was identified with 'government by the poor' (cf. Plato, *Republic*, 557a; Aristotle, *Politics*, 1290b: 16-20).

[19] In regards to the expansion of the suffrage, Müller (2011) writes: "[b]efore the war, women had been allowed to vote only in Finland and Norway; in 1918, Britain introduced universal manhood suffrage and the vote for women over thirty (thereby excluding the women who had worked hardest for military victory). In 1919 the first woman was elected to a European parliament—Lady Astor to the House of Commons. Five years later the Danish Social Democratic politician Nina Bang became the first female cabinet minister in Europe (in charge of education)" (20).

Rather than adopting this conventional class-based approach, Ortega redefines the central dynamics of society as one between "two component factors: minorities and masses." In addition to the obvious quantitative difference, the minorities were "individuals or groups of individuals which are specially qualified" as opposed to the masses who were an "assemblage of persons not specially qualified" (13). A significant part of his work is devoted to illustrating how history has always been a clash between minorities and masses. He writes how the "history of the Roman Empire is also the history of the uprising of the Empire of Masses" (21). While each epoch has adopted different versions of the minority-mass distinction, Ortega is advancing the general view that history is premised on how "human society *is* always […] aristocratic by its very essence, to the extreme that it is a society in the measure that it is aristocratic, and ceases to be such when it ceases to be aristocratic" (22). Jettisoning the class element altogether from his general outlook suggested a radical transformation in political imagination. While classical thinkers were generally critical of democracy, the acknowledgement of class as a social fact and an immutable political condition led to a form of statecraft that sought to 'mix' conflicting class interests.[20] Under Ortega's framework, however, minorities ought to and, for the most part of history, always have governed. The subversion of this logic generates a crisis—a 'revolt' or 'rebellion' of the masses—that threatens what he considered to be the basic fact of social existence.

[20] As M.J.C. Vile ([1967] 1998) points out, "the major concern of ancient theorists of constitutionalism was to attain a balance between the various classes of society and so to emphasize that the different interests in the community, reflected in the organs of government, should each have a part to play in the exercise of the deliberative, magisterial, and judicial functions alike. The characteristic theory of Greece and Rome was that of mixed government, not the separation of powers" (25). Vile writes how the idea of a mixed constitution was later inherited by "the theory of the balanced constitution," most notably illustrated by the three-part division of King, Lords, and Commons in the English government during the seventeenth and eighteenth century (58-82).

The masses were also described as a source of cultural degradation. Although 'rebel masses' have occasionally emerged and intervened throughout history, Ortega observed that the revolt of the early twentieth century was unique in culturally embracing their vulgarity as a positive value. Rather than believing themselves to be capable of excellence, the masses have confidently proclaimed a right to be vulgar as an affirmation of the values and practices that underlie ordinary life. Ortega writes how "there appears for the first time in Europe a type of man who does not want to give reasons or to be right, but simply shows himself resolved to impose his opinions. This is the new thing: the right not to be reasonable, the 'reason of unreason'" (80). The crass attitude was a threat to existing sources of authority, such as the appeal to reason, to objective standards, and to a culture of discussion, all of which were accepted as central to the discourse of nineteenth century liberalism.

Ortega's negative assessments regarding the entry of the masses reflected a prevailing attitude European liberals have held for over a century against the expansion of popular sovereignty and democracy. The philosophical tradition that contributed to the founding of modern liberalism was based on the assumption that the same spiritual substance or moral consciousness is present in each human being. The subjectivism about the human good and the egalitarianism in the faculties of individuals seemed to suggest that superiority of inherent qualities should not lead to a legitimate title to rule. Indeed, upon this assumption rested the doctrine of popular sovereignty, i.e. that the people ought to rule. This philosophical foundation was crucial in challenging the hereditary claims of absolutism and of aristocracy. The demise of the 'old order,' however, did not transition into an active endorsement of political democracy in practice. To the contrary, the

imperative to avoid the pitfalls of radical egalitarianism expressed during the French Revolution had led liberals to develop a new 'theory of capacities' for political participation (Kahan 2003).[21] While there have been variations to this theory, the general scheme was that participation ought to be limited to those who demonstrate the necessary qualifications or political competence. This language of capacity has been implicit in early modern conceptions of citizenship, stipulating that citizens had to be rational, industrious, autonomous, civil, or even civilized in order to responsibly exercise political freedom. Canonical liberal thinkers, such as John Locke, James Madison, François Guizot, and John Stuart Mill have all contributed to the discourse, advocating some version of competent—and, thus, limited—citizenship.[22] While the possession of these

[21] The first debates over proper qualifications predate both the American and French Revolution and can be traced as far back as the exchange between Henry Ireton and Thomas Rainborough during the Putney Debates in 1647 England. Against Rainborough's argument "that [even] the poorest man in England is not at all bound in a strict sense to that government that he hath not had a voice to put himself under […]," Ireton responded that "no man hath a right to an interest or share in the disposing of the affairs of the kingdom […] that hath not a permanent fixed interest in this kingdom." An extract from the Debates can be found at http://www.constitution.org/lev/eng_lev_08.htm (last visited June 24, 2014). Rainborough's claim notwithstanding, very few thinkers during the seventeenth and eighteenth century suggested that all human beings should fully enjoy political liberty. The dominant presumption was that political participation could be limited by property, education, religion, race, gender, and other characteristics.

[22] Each of these thinkers offered different versions (and justifications) for the theory of capacities. For John Locke ([1689] 1988), the state of nature was divided between the "Industrious and Rational" who are capable of acting in accordance with natural law through reason and the "Quarrelsom and Contentious" who make life intolerable for everyone (ch. V, para. 34). The capacity to exercise natural reason to its fullest in the acquirement of property is what qualifies the "industrious and rational" to best serve the public good through the legislature. Similarly, James Madison was a strong advocate of representation, which he thought was necessary "to refine and enlarge the public views by passing them through the medium of a chosen body of citizens" (*Federalist* #10). Although he did not prefer adopting formal qualifications for becoming a member of the "chosen body of citizens," he agreed with Alexander Hamilton that the new constitutional design will make it more likely for representatives to be elected from the commercial class and the 'learned professions' (cf. see *Federalist* #35; and also, Nedelsky 1990). The French politician and conservative liberal François Guizot is probably the most notable advocate of a monarchy limited by a small number of bourgeoisie. During the first suffrage debates of the July Monarchy in 1831, Guizot stated that "capacity […] is the source of the right to vote and the conditions of capacity are the same almost everywhere, education,

qualities did not automatically secure membership in any given political community, the lack of these qualities has often served as a rationale for exclusion.

The institutional arrangement that best captured the liberal theory of capacity was parliamentary absolutism. Representation in parliament was a way in which the unfiltered interests of ordinary people could be moderated by the 'mild voice of reason' of a select group of virtuous gentlemen engaging in informed deliberation (Bessette 1994; Manin 1997). The nature of the distinction between the people and their representatives was not functional but qualitative. The reasoned disposition towards the common good was the defining quality that representatives possessed and ordinary people lacked. While the medium of elections was thought to bridge the two by ensuring a degree of democratic accountability, the liberal theory of representative government ultimately justified how a government *for* the people (in pursuit of liberal goals) ought to take priority over a government *by* the people (democratic inclusion) when the two came into conflict. The blurring of this distinction in liberal thought foreshadowed a similar logic later used by those who sought to legitimize totalitarian dictatorship through mass mobilization.

The language of capacity proved to be useless in the face of radically shifting political and social circumstances. Through the expansion of the franchise, the masses

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independence, the spirit of order and conservation." He also warned against the "return to the principle of universal suffrage, which brought us only lies and tyranny in the name of the people" (quoted in Kahan 2003, 38). John Stuart Mill's ideas regarding capacity are best captured in his work, *Considerations on Representative Government* ([1861] 1991). Although Mill advocated universal suffrage, he suggested that the better-educated amongst the population be given more a larger voice through a system of "plural voting." Unlike his predecessors, he rejected the idea that property would be central to the qualifications for plural voting "unless as a temporary makeshift." He instead endorsed "individual mental superiority" as the only justification (335-338). When read in conjunction with his arguments in *On Liberty* ([1859] 1991), Mill's goal becomes clearer that politics should allow for the individuality of the enlightened few to flourish for society's pursuit of progress and utility. He writes that "these few are the salt of the earth; without them, human life would become a stagnant pool" (71).

were legitimately granted inside access to the state. There was a real demand for a political idea where the state could fundamentally transform itself into a functioning democracy through popular involvement rather than through parliamentary representation based on a limited franchise. Although liberals have been theoretically open to the possibility that more and more people would qualify over time through the proliferation of education and property, the process was imagined to be incremental at best. As Alan Kahan (2003) points out, liberalism was "unable to assimilate the *embourgeoisement* of the lower classes, because although it was designed to deal with the social mobility of individuals, it had never had the sociological imagination to prepare for the rise of whole classes" (189). In effect, the source of the crisis was not framed as an internal failure to adapt to changing social conditions but as an external threat posed by mass politics in general. There is a sense of historical irony as one of the appeals of the philosophical doctrine of modern liberalism was its egalitarian foundations. Rather than returning to this core commitment, liberals at the time expressed a deep reluctance to acknowledge the newly joined people as fellow citizens with equal political status. The uneasiness further developed into general hostility that stigmatized the masses as not only being politically infantile, but also psychologically and culturally depraved. As a result, liberalism revealed itself as an antiquated, "quasi-aristocratic approach to politics, one that simply could not cope with mass democracy" (Müller 2011, 20). The true crisis was that liberalism abandoned democracy in its hour of need.

In the midst of political and intellectual confusion and disarray, totalitarianism was able to seize the opportunity in filling the ideational vacuum left by the failure of liberal statecraft. Totalitarian thinkers exploited how liberalism was merely an ideological

tool to preserve the privileges of a fleeting elitist society. The liberal idea that parliaments would function to select qualified leaders through competition was undermined by the reality that legislative politics had devolved into an object of spoils and compromise for elite parties and their followers (Kennedy 2004; Mommsen 1996) Those who sought to challenge liberalism and the monopoly of 'the political' by parliamentary institutions such as Carl Schmitt ([1923] 1988) claimed that the "distinction between liberal parliamentary ideas and mass democratic ideas cannot remain unnoticed any longer" (2). Schmitt observed how "the situation of parliamentarism is critical today because the development of modern mass democracy has made argumentative public discussion an empty formality" (6). Parliamentarism was based on a principle of distinction between the rulers and the ruled, while democracy by definition was based on the principle of identity between the two. While the principles of representation and identity need not be mutually exclusive, the problem with the liberal theory of representation was its hypocrisy in prioritizing the principle of distinction while claiming to serve the principle of identity. By decoupling democracy from liberalism, Schmitt and other critics of the liberal order sought to provide a new foundation for a mass-oriented regime that derived its political and moral legitimacy from the newly politicized masses.

While there was variation in their rhetoric, totalitarian movements commonly advertised a political program that prioritized political unity and national self-determination, all in the name of democracy. Giovanni Gentile, who penned the official doctrine for Mussolini, asserted that "the Fascist State […] is a people's state, and, as such, the democratic state *par excellence*" (quoted in Müller 2011, 106). Closely mimicking Gentile's recommendations, Mussolini declared that fascism "is the *purest*

form of democracy if the nation is conceived, as it should be, qualitatively and not quantitatively, as the most powerful ideal (most powerful because most moral, most coherent, most true) which acts within the nation as the conscience and the will of a few, even of one, which ideal tends to become active within the conscience and the will of all, that is to say, of all those who rightly constitute a nation" (quoted in Kelsen 1955, 32). Similarly, Nazism also employed the rhetoric of popular participation and democratic inclusion keenly devised and advertised through the channels of the state. They adopted Schmitt's recommendation for a politics of the public sphere (*Öffentlichkeit*) where the people would visibly express their will through the spectacle of acclamations and parades (Kennedy 2004, ch.5). The totalitarian appeal to genuine democracy was grounded in its claim to achieve what liberalism has failed to offer: the true identity between the rulers and the ruled. The conclusion that the popular will could be channeled into a single individual—*Duce* or *Führer*— was grounded on the logic that homogenized plebiscitary politics is a more credible expression of democracy than interest-ridden parliamentary politics.

Totalitarian movements were by no means sincere to their professed democratic commitments. A democracy understood as 'government *by the people*' should in principle be sustained by the beliefs and habits of citizens who autonomously bear the responsibility of leading the struggle for democracy and for the social conditions that they consider to best realize their choice. Those who supported the totalitarian state acknowledged the importance of this educative aspect that undergirds democracy. For example, Schmitt ([1923] 1988) emphasized how "[t]he people can be brought to recognize and express their own will correctly through the right education" (28). The

problem, however, was that they preemptively concluded *for the people* that this education would lead to an endorsement of enlightened dictatorship through a dubious legitimation process, thereby discharging citizens of their responsibility for political judgment. The theory of dictatorship was essentially using the same type of justification as the liberal theory of representation, namely that a government for the people (in this case, a dictatorship) outweighs the goals of achieving a government by the people. In the midst of changing social and political conditions, neither totalitarian nor liberal theories of governance could fully justify the substitution of popular self-government for a system in which the majority of people are relegated to a passive role without real power. In this regard, totalitarianism never was and never could be a variation of democracy, but at best only a dictatorship wearing the garments of democracy.

Liberals, on the other hand, failed to contest how totalitarian movements were only paying lip service to the rhetoric of mass participation and inclusion. The historical irony is that the principle underlying 'people's education,' namely the egalitarian premises of human faculties, was one that was initially at the core of early modern doctrines of liberalism. The radical presumption that anyone can emerge as a citizen with the right education was overshadowed by the demanding threshold subsequently established by the liberal theory of capacities. Though liberals may not have been able to anticipate the entry of the masses at the turn of the century, the unwillingness to rethink their political program and to adjust to changing circumstances served as a catalyst that gave totalitarian movements the opening they needed to appeal to the people.

3.3. "Fire is fought with Fire": Europe and Militant Democracy

By the 1930s, the age of crisis had led to a sense of defeatism, loss of confidence, and pessimism amongst European politicians and intellectuals, many of whom believed that the torch of history has been passed on from liberalism to totalitarianism. Karl Loewenstein observed how totalitarianism was "no longer an isolated incident," but has developed into a "universal movement […] comparable to the rising of European liberalism against absolutism after the French Revolution" (1937a, 417). The political takeover was reinforced by a spiritual takeover through the use of political myths where "fascist propaganda has succeeded in instilling this belief [of a new *Zeitgeist*] in the masses" (422). However, totalitarian movements were not equally successful in all European countries. In fact, Loewenstein noticed instances where countries were able to successfully fend off the totalitarian allure with aggressive political and legal tactics devised to target fascist parties and movements. From these cases, he articulated a new theory of (liberal) democracy and of politics designed to counteract totalitarianism. He called this proposal a call for 'militant democracy.'

From the outset, Loewenstein implicitly suggested that part of the challenge lies in dispelling totalitarianism of its mystical appeal as an unstoppable historical force. Fascism is "only a technique for gaining and holding power, for the sake of power alone" (422).[23] Though it may be "the most effective political technique in modern history," fascism is not an ideology nor does it offer a philosophy or any constructive political program. This "conceptual barrenness" and lack of substantive content gave it the

[23] Loewenstein uses the term 'fascism' to describe what we today would call 'totalitarianism.' The two terms are, therefore, used interchangeably throughout this particular section. Historically, the word 'totalitarian' was not generally shared amongst academics when Loewenstein wrote his articles in 1937. It was first coined by the liberal anti-Fascist Giovanni Amendola during the 1920s to specifically describe (and warn against) Mussolini's dictatorial regime, before being transformed into a seemingly value-neutral social scientific term used to designate a particular type of regime in the 1950s (Müller 2011).

flexibility to be attached to any political, ideological, or philosophical position for the sole purpose of obtaining power. The hallmark of the fascist technique was its use of a crude "emotionalism" particularly designed to use the masses as instruments for exploiting the "manifest deficiencies of the democratic system" (423). Democracy, on the other hand, is defined as a formalistic commitment to procedural openness and accessibility available to all, indifferent to the content of the claims being advanced. According to Loewenstein, "democratic fundamentalism," "legalistic blindness," and "exaggerated formalism" are all characteristics flowing from democracy's central commitment to "legality" (424). There was some truth to Loewenstein's critical assessment since many democracies in Europe during the early twentieth century were extremely nascent and in other cases only nominal. However, there is an important difference whether these weaknesses are diagnosed as a general feature of democracy or as an indicator of underdeveloped democracy. While both cases may justify the use of emergency measures in the shorter run, they do not share the same conclusions when it comes to the long-term maintenance of a democratic order. The former view suggests that democracy in its 'pure' form will always be unstable and internally vulnerable to challenges that come from within, particularly political movements that use the democratic process to advance undemocratic purposes. Therefore, a democracy must adopt precautionary measures in order to protect itself against potential threats. The latter suggests a different remedy. While acknowledging the dangers of democracy to politically abolish itself through its own methods, the only way democracy can be stable is through its own source of power, namely by gradually generating a consensus or political culture within its citizenry strong enough to uphold the integrity of the

democratic processes. A robust democracy will then ultimately be able to win out internal threats through open competition within ordinary political processes rather than through the use of emergency measures.

Although Loewenstein's analysis may arguably be limited to the immediate crisis, he presumes that all forms of appeal to the masses will be grounded in emotionalism and will therefore be inimical to a constitutional democracy. The rise of fascist dictatorships is described as a "supersession of constitutional government by emotional government" (418). Constitutional government is fundamentally grounded in rationality and predictability and, therefore, "can only appeal to reason" (428). Fascist government, on the other hand, is signified by "revolutionary emotionalism [presented] in the garb of legality, propaganda, and military symbolism" (426). According to this dichotomy, constitutional democracy by definition is a "rational system" that is "utterly incapable of meeting an emotional challenge by an emotional counter-attack" (428). It lacks the internal strength or potential to utilize countermeasures that appeal to the 'masses.' The implication of this assessment is that the particular conception of democracy in need of protection is thoroughly detached from any articulation of the popular will, i.e. the expression of the *demos*. Resorting to the "verdict of the people," he writes, is identical to "resorting to emotional methods." With the exception of general elections singled out as the only "legitimate device" for popular engagement, the people do not and should not share an active role in a constitutional democracy (418). In this sense, Loewenstein inherits the general suspicion of the masses and the skepticism towards popular democracy symptomatic of nineteenth century liberalism.

The initiative for defending democracy must therefore be driven by government officials along "political and legislative lines" (428). Loewenstein points to the elaborate body of anti-fascist legislation in various European democracies as the appropriate means for combatting the emotional tactics of fascism. These measures consisted of banning subversive parties, prohibiting para-military forces and uniforms, as well as placing aggressive legal constraints across a wide range of political freedoms including speech, assembly, and press. Specifically designed to target fascist groups, they reflect both the urgency and willingness to prevent the infiltration of parliament at all costs, even at the expense of setting aside democratic principles of publicity and openness. It was precisely the naïve belief in the inviolability of these core principles—a belief that Loewenstein disdainfully calls "democratic fundamentalism"—that became the "principal obstacle […] against fascism" (430). He articulates the urgency of the situation in the following passage:

> A virtual state of siege confronts European democracies. State of siege means, even under democratic constitutions, concentration of powers in the hands of the government and suspension of fundamental rights. If democracy believes in the superiority of its absolute values over the opportunistic platitudes of fascism, it must live up to the demands of the hour, and every possible effort must be made to rescue it, even at the risk and cost of violating fundamental principles. (432)

In light of Loewenstein's definition of constitutional government, his proposal suggests going beyond the confines of democratic legality; that is, the necessity of invoking extra-legality. When the ordinary channels of legislation are blocked by deliberate sabotage and obstruction, anti-fascist laws could still be implemented through government's use of emergency powers justifying a bypass of the democratic processes.

In short, for democracy to survive, it must be willing to go as far as defeating fascism "on its own plane and by its own devices" (430).

Militant democracy borrows a page from the book of fascist tactics in resorting to the use of emergency powers. Listing the various types of anti-fascist legislation being used in Europe, Loewenstein goes as far as recommending the establishment of "a specially selected and trained political police for the discovery, repression, supervision, and control of anti-democratic and anti-constitutional activities and movement" for the war against fascism (1937b, 655). This was virtually identical to the Nazi regime's *Gestapo* whose role was to eliminate opposition forces and repress those suspected of disloyalty to the *Führer*. Furthermore, the "state of siege" cannot be categorically distinguished from Carl Schmitt's ([1922] 2005) "state of exception" which is defined as "a case of extreme peril" that raises a "danger to the existence of the state" (6). Both share the same conditions for success. Government not only determines when it would be necessary to declare a state of siege, but is also granted broad discretionary powers to discern, censor, and punish subversive parties, movements, or propaganda. The application of discretionary powers must be unconditional, even if it meant stepping outside of the positive legal order. Indeed, this very same logic was what supplied Hitler with the opportunity to manipulate article 48 of the Weimar constitution to declare a state of emergency.[24] The theoretical justification offered by Schmitt emphasizes how Hitler's

[24] The emergency provision of the Weimar Constitution refers to the two sentences of the second section of article 48: "If in the German Reich the public security and order are significantly disturbed or endangered, the President can utilize the necessary measures to restore public security and order, if necessary with the aid of armed forces. For this purpose, he may provisionally suspend, in whole or in part, the basic rights established in Articles 114, 115, 117, 118, 124, 153."

dictatorship was aimed at restoring, rather than subverting, order so that the Weimar Constitution can be revivified as a genuine democracy:

> The consequence […] is a dictatorship that suspends democracy in the name of true democracy that is still to be created. Theoretically, this does not destroy democracy, but it is important to pay attention to it because it shows that dictatorship is not antithetical to democracy. Even during a transitional period dominated by a dictator, a democratic identity can still exist and the will of the people can still be the exclusive criterion. ([1923] 1988, 28)

Loewenstein was not oblivious to the dangers of emergency powers being abused in the name of militant democracy. Reviewing how different countries have reacted to domestic fascist threats, he offers Austria as an example of how militant democracy can devolve in the wrong direction. In May 1933, the government headed by Chancellor Dolfuss initiated a ban against subversive movements. A year later, however, Dolfuss ruthlessly suppressed the Socialist Party, which was loyal to constitutional government, and established a one-party dictatorship. This was a case where militant democracy was eventually turned into "a fascist country without even the pretext of constitutional government" (1937b, 640). A contrasting example was Czechoslovakia, which Loewenstein cites as a successful case for the implementation of militant democracy. While he lists a combination of factors, the primary reason for its success was that the consecutive coalition governments reacted efficiently under the direction of parliament. They were able to enact necessary laws as early as 1923 followed by additional laws throughout the 1930s. Another notable feature was its system of separating the functions of the political branches and the Supreme Constitutional Tribunal. The parliamentary bodies and highest courts only possessed the authority to raise allegations regarding a party's political allegiance while the Supreme Tribunal handed down the "final decision

on the legality of an order suspending or dissolving an allegedly subversive party" (641). These two very opposite examples illustrate the predicaments facing militant democracy. In most countries, anti-fascist laws were applied indiscriminately to all political groups falling under the general category of a subversive party or an unlawful association. The "specific legal definitions of what constitutes a subversive party or organization are usually avoided" due to the arbitrariness and burden attached to the judgment (646). In discussing the necessities of placing restrictions on free speech, he concedes that "the borderline between unlawful slander and justified criticism […] is exceedingly dim, and the courts of democratic states are called upon to decide on legal grounds what in fact is a political problem for which a new *ratio decidendi* is yet to discovered" (653-654). Indeed, there was no general *ratio decidendi* or principled solution to this dilemma.

Considering how the fate of democracy was at stake, Loewenstein boldly assumed that the benefits of adopting militant democracy outweigh the potential risks. Constitutional democracy in its original form did not stand a chance against the fascist threat enveloping the world. He warns the nostalgic liberal that "the time has come when it is no longer wise to close one's eyes to the fact that liberal democracy, suitable, in the last analysis, only for the political aristocrats among the nations, is beginning to lose the day to the awakened masses." While the ideal solution would be to "remove the causes, that is to change the mental structure of this age of the masses and of rationalized emotion," he concludes that "[n]o human effort can force such a course upon history." Until a fundamental solution can be developed, the only viable alternative is the "deliberate transformation of obsolete forms and rigid concepts into the new instrumentalities of "disciplined" or even—let us not shy from the word—"authoritarian"

democracy." In short, Loewenstein is suggesting that "democracy has to be redefined" as militant democracy (657).

Loewenstein did not detail a model of militant democracy other than providing some vague guidelines. He concludes: "It should be—at least for the *transitional* stage until a better social adjustment to the conditions of the technological age has been accomplished—the application of disciplined authority, *by liberal-minded men*, for the *ultimate ends of liberal government*: human dignity and freedom" (658, emphasis added). This simple statement, however, contains several hints that deserve closer attention. First, Loewenstein did not insist that militant democracy was meant to serve as a permanent model for constitutional democracy. While he was deeply pessimistic about the possibility of defeating emotional techniques without the use of aggressive measures at the immediate moment, he did not completely preclude the possibility that it could ultimately be "mastered by new psycho-technical methods which regularize the fluctuations between rationalism and mysticism" (657). Whatever the exact form, Loewenstein believed militant democracy can be modified, if not replaced, when social conditions have changed for the better. Second, the only way that a militant democracy will not devolve into a dictatorship is to find a way to guarantee that power will be entrusted in "liberal-minded" government officials. The lesson from the examples of Austria and Czechoslovakia was that the success or failure of militant democracy is highly dependent on the character and fortitude of its political leadership. Loewenstein never discusses how to recruit these "liberal-minded men" let alone how to institutionalize a selection process that can safely guarantee their consistent involvement. One consideration may be that the discretionary powers of militant democracy can be

distributed amongst or delegated to less dangerous branches. The Austrian case illustrates the risks of concentrating discretionary power in the single hand of the chief executive. In contrast, the case of Czechoslovakia offers an alternative by distributing militant powers across the political and legal branches, with the final decision entrusted to a quasi-judicial tribunal. A discussion of the optimal institutional solution was left open for those who remain after the war. Lastly, the ultimate goals of militant democracy are not simply defined negatively against fascism, but positively as the pursuit of "human dignity and freedom." Throughout the two articles, Loewenstein carefully qualifies his recommendation for militant democracy with the provisory statement that democracy must believe "in the superiority of its absolute values" (1937a, 432; see also 423). The content of these absolute values was never mentioned until this very last section of the second essay. If totalitarian dictatorship sought to install a 'genuine democracy' through the overthrow of the nineteenth century liberal parliamentary order, militant democracy seeks to eradicate the fascist threat for the "ultimate ends of [establishing a] liberal government." Loewenstein merely lays down abstract principles such as "human dignity and freedom" without offering any concrete guidance on how they could be realized in actual politics. Given the numerous ways these concept can be defined—including definitions that conflict with one another—the choice was again left open for future generations.

All these questions were central to Europe's post-war reconstruction. Naturally, the goal was to establish a political and social order designed to prevent a return to the totalitarian past at all costs. 'Militancy' broadly defined by tough-mindedness towards the enemies of democracy was very much demanded in institutions as well as in the political

ethos. In order to be successful, democracy had to learn to recognize and know its enemies, understand their tactics, be willing to uncover those tactics, and confront them. One possible diagnosis may have been to view totalitarianism as a minority movement that took advantage of underdeveloped democratic commitments on its accession to power (Lerner [1943] 1989). While the masses may have provided the necessary legitimation for dictators, they were not culpable for the changes in the social conditions that led to their own entry into the political realm. Militancy may indeed be justified, but only as a transitory measure. In the longer run, the remedy would be to institute a learning process for which the people themselves could serve as a bulwark against those seeking to manipulate the democratic system for selfish political purposes. This approach, however, was far from the route that was actually taken. Instead, party leaders and intellectuals in Europe viewed totalitarianism as a majority movement or even a form of democratic movement—one that may have been manipulated but nevertheless democratic in its nature. Totalitarianism, in their diagnosis, was defined by "limitless political dynamism, unbound masses, and attempts to forge a completely unconstrained political subject" such as that exemplified by the "purified German *Volksgemeinschaft*" (Müller 2011, 128). The trauma deeply influenced all parts of society creating a general proclivity heavily skewed towards risk aversion. As a result, the nineteenth century liberal suspicion of popular participation and collective power was revived, albeit not only by the hands of elites but also endorsed by the people themselves. Popular thought and culture tended towards the anti-massism of Ortega y Gasset, embracing the tyranny of the majority as the primary source of the totalitarian threat.[25] All majorities were perceived as mass

[25] During the post-war period, Ortega's *Revolt of the Masses* remained the philosophical bestseller in numerous West European countries from the early 1930s until the late 1950s (see

majorities possessing the potential to grow tyrannical and violent. The fact that majorities will always be exposed to the recurring possibility of emotional manipulation and propaganda was viewed as an inherent flaw of democracy. The remedy was to design a highly constrained form of democracy in which the dangers of popular sovereignty were kept in close check. In short, militant democracy had to be *constitutionalized*.

The innovation of the post-war constitutional settlement came from how the active and participatory aspect of democratic *politics* was effectively discredited without rejecting the *idea* of democracy. The conventional understanding of democracy as being associated with the public life of citizens to take part in practices that addressed shared concerns had to be modified in light of the deep-seated suspicion against collective action. The alternative was a democracy that embraced fundamental values and rights grounded in 'higher' natural law placed beyond the reaches of the actual demos. Protection for these rights was fortified through functionally rigid constitutions that offer strong guarantees against 'unjust' popular or legislative action. For all practical purposes, it was a "codification of natural law" established above democracy (Merryman and Pérez-Perdomo 2007, 137). As Sheldon Wolin (2004) critically points out, what emerged after the war was an idea of "liberalized" or "attenuated" democracy that prioritized the protection of individual rights and the promotion of economic prosperity dissociated from political action (520-521).

An important difference with the nineteenth century liberal approach was that parliament was no longer seen as a reliable site to filter or tame the reckless and uneducated masses. Representation was initially conceived as a form of gatekeeping used not only to decide matters of policy and of the public good, but also to determine the

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Müller 2011).

eligibility for participation and exclusion. While its quasi-aristocratic characteristic was undeniable, representative institutions retained the decision of constitutional matters within the realm of politics. The extension of the franchise, however, had opened up the gate to parliament that could not be retroactively closed. In order to constrain popular sovereignty, parliamentary sovereignty also had to be constrained if not significantly weakened. As Mauro Capelletti (1989) observed, "there arose in Europe an awareness of the need to put a check on the legislature itself, for it had become evident that even legislation could be the source of great abuses" (148). The lessons from the Weimar Republic or the French Third Republic was that the tyranny of the majority can easily translate into the tyranny of parliamentary absolutism. Thus, the distrust of majorities had to be further instituted into the distrust of the majoritarian principle which was motivated by a broader skepticism towards politics in general.

The imperative to prevent democratic self-destruction led to the installation of constitutional courts as the guardians of the new constitutional order. Constitutional courts were an alternative institutional structure developed by Austrian jurist Hans Kelsen intended to add a layer of checks and balances over legislative enactments and executive decrees through the authority of constitutional review.[26] Much like the Supreme Tribunal that was established in Czechoslovakia, these quasi-judicial bodies deliberately served a political function while designed to retain the appearance of courts. Not only were they entrusted with the authority to determine the constitutionality of subversive parties, but they also protected core liberal values pronounced in the new constitutions through their jurisdiction over fundamental rights. By adding veto points to parliamentary legislation,

[26] A detailed examination into the features, functions, and political significance of (neo-) Kelsenian constitutional courts and its architectural variations is a topic that is reserved for the next chapter (chapter 4) on the institutional foundations of juristocracy.

the practice of constitutional review not only altered the legislative process itself but, in effect, blurred the distinction of government functions. Their active involvement in the legislative process seemed to limit or even contradict traditional notions of popular sovereignty as well as alter the separation of powers, all the while claiming to advance democracy and the rule of law. Through the institution of constitutional review, the conditions were prepared for the final authority of constitutional determination to be effectively transferred from politics to law, from elected officials and citizens to specialized elites who are unelected.

The constitutionalization of militant democracy, also known as the principle of *wehrhafte Demokratie*, was most pronounced in West Germany's Basic Law established after the war (Kommers 1997). Article 21 (2) states that "Parties which, by reason of their aims or the behavior of their adherents, seek to impair or abolish the free democratic basic order or endanger the existence of the Federal Republic of Germany, shall be unconstitutional." The authority to decide the question of unconstitutionality was vested in the Federal Constitutional Court. In addition to the prohibition of subversive parties, Article 18 of the Basic Law justifies placing limitations on a broad array of freedoms— such as the freedom of expression, freedom of press, freedom of teaching, freedom of assembly, freedom of association, privacy of posts and telecommunications, property, or the right to asylum— if they are abused in a way that challenges the constitutional order. There are two notable features derived from Germany's *wehrhafte Demokratie* that is important for understanding the general application of militant democracy. First, the legal standard for determining whether a party or person is abusing their constitutional right is predicated on the defense of the "*freiheitliche demokratische Grundordnung* (free

democratic basic order).” The standard is broad enough to trigger aggressive measures not only when the means are undemocratic, such as the use of violence, but also, preemptively, when the *aims* are suspected to be undemocratic. The process of discerning democratic and undemocratic aims implies that the definition of democracy as well as the particular democratic identity of the German people is contingent upon the interpretation offered by the Federal Constitutional Court. Second, these provisions also include the positive function of suggesting to ordinary citizens that the exercise of constitutionally guaranteed rights is predicated on certain principles of political allegiance. Militant democracy operates not only to constrain subversive activity but also to construct political behavior towards the ‘free democratic basic order.’ Constitutional courts fulfill their broader role as guardians of the constitutional order when “permeating all regulated aspects of society with a set of values inherent in the constitutional agreement the society has accepted” (Robertson 2010, 3). In effect, the scope of permissible political conduct is subject to the judicial analysis of democracy as pronounced by constitutional courts.

The imperative of democratic self-defense became pervasive across Europe as well as other democracies emerging from authoritarian rule. Many countries introduced constitutional review directly after World War II, including Brazil (1946), Japan (1947), Burma/Myanmar (1947), Italy (1948), Thailand (1949), India (1949), Luxembourg, Syria (1950), Uruguay (1952), and France (1958). In addition, constitutional review was gradually adopted in post-colonial countries in Asia, Central and South America, and Africa. While there were variations in the institutional design according to local circumstances, many of these new democracies replicated the European template of constitutionalized militant democracy (Ackerman 1992). The problem was that the post-

war constitutional settlement was initially devised as "a kind of apologia for the institutions and values of nineteenth century bourgeois liberalism" (Merryman and Pérez-Perdomo 2007, 83). Detached from the unique historical context and experience of Europe, the 'new constitutionalism' eventually became the global consensus in which the inherent flaws of democracy is corrected through the active involvement of courts.

3.4. Constitutionalism at Crossroads: Militant Democracy in the United States

In the final remarks to his essay on militant democracy, Loewenstein warned that "no country whatsoever is immunized from fascism." He urged his American audience to contemplate "whether legislative measures against incipient fascism are perhaps required in the United States" (1937b, 658). As an émigré intellectual and professor at Amherst College, he consistently expressed his opinion throughout publications, lectures, and speeches regarding the necessities of a militant democracy. In a public lecture, he stated that:

> I prefer to be hysterical now instead of being melancholy later. […] I prefer dictatorship by democrats and decent people to permanent dictatorship by rogues and hooligans. We are at war, war demands emergency solutions. [It is] a risk and a gamble but we have no choice. The best defense is precaution. (quoted in Bendersky 2009)

Fellow intellectuals who fled from the fascist reign of terror to the United States were of a similar mind forewarning the urgency of the situation. In his response to a 1941 questionnaire on anti-Semitism requested by the Council for Democracy, Max Horkheimer expressed his thoughts that the immediate threat was not anti-Semitism but fascism in its entirety. Untypical for an intellectual coming from the left, he strongly

supported the use of government authority to implement aggressive militant policies "in all its forms within and without." In order to prepare the public opinion to support such measures, he recommended "teach[ing] them that a strong central government able and willing to take effective action against fascism is not incompatible with democracy" (quoted in Bendersky 2009).

These warnings clearly did spark some resonance with the political circumstances at a time when the national government was imposing restrictions on constitutional rights. For example, Congress during World War I passed measures sharply restricting the criticism of American policies, such as the Espionage Act, the Sedition Act of 1918, and many others. These measures continued in World War II and later throughout the Cold War. The federal government ordered Japanese-Americans into internment camps during World War II regardless of citizenship, the constitutionality of which was sustained by the Supreme Court in *Korematsu v. United States* (1944). During the McCarthy Era, Congress passed measures limiting communist advocacy which was again upheld by the Supreme Court in *Dennis v. United States* (1951).

Despite restrictions on civil liberties during wartime, the United States never became a rigid militant democracy, at least in the aggressive form that was being practiced in Europe. One of the reasons can be found in America's unique leadership role in international politics during and after World War II. The need to gain the approval—or, rather avoid disapproval—from allied countries served as pressure to actively maintain the reputation as the pinnacle of freedom and democracy. During a period when the ideological front was globally established against totalitarian regimes, the image of the United States had to be defined against the massive violation of rights occurring in

Europe. As Mary Dudziak (2000) observes, "civil rights reform came to be seen as crucial to U.S. foreign policy" (6). The pressure was most prominent in policies involving race in light of how the war was being carried out against a racist regime. Eventually, there was a real impetus for social change regarding race relations as "the notion that the nation as a whole had a stake in racial equality was widespread" (7).

More importantly, the domestic political situation and ideological landscape during the early twentieth century was crucial in generating enhanced commitments to liberalism and democracy. Gillman, Graber, and Whittington (2013) detail how political and constitutional liberals reigned supreme during the New Deal era. While the electoral results illustrate a clear dominance of the Democratic Party over the Republican Party, a closer look reveals that the New Deal coalition actually consisted of the liberal Democrats based in the North and the liberal wing of the Republican Party centered in the Northeast. From 1932 until 1969, these political liberals either controlled or exercised significant power in all three branches of the national government as well as in numerous states (479-488). The political coalition that elected Franklin Roosevelt shared a broad commitment regarding the importance of political liberties and fair majoritarian processes. At first, their commitments were defined negatively against the doctrines of classical, laissez-faire liberalism used to constitutionally protect corporate interests through the freedom of contract. One of their priorities was to reverse precedents such as *Lochner v. New York* (1905) that were being used against Progressive reforms and New Deal legislation. However, once *Lochner* was overruled, debates over the direction in which liberalism ought to take surfaced to the political and intellectual forefront. It is

along these lines that the discussion regarding the American version of militant democracy occurred.

Before examining the different arguments, several factors must be considered that uniquely inform the debate over militant democracy in the United States. For one, America had enjoyed a more democratic social basis—or what Alexis de Tocqueville famously called the 'equality of conditions'—in comparison to that of Europe ([1835 & 1840] 2000, 46-53). From the founding, there was an explicit rejection of any notion of a hereditary class which was then widely accepted as a defining feature of the social and political fabric. The liberal discourse in America faced greater obstacles in conspicuously advocating a 'theory of capacities' that would physically exclude the majority of the population from the political processes. This, of course, did not preclude the possibility that majority power could be redirected or dispersed through a carefully designed constitutional framework, as many critics have argued (Dahl 2006; Wolin 2004). What it does suggest is that the idea and rhetoric advocating popular participation would be met by relatively less resistance than the disdain expressed by quasi-aristocratic European liberals. Secondly, a different expression of the European liberal theory of capacity came from the sharply divided issue of race. Even after African-Americans were granted the constitutional right to vote through the Fifteenth Amendment, many states concentrated in the South adopted poll taxes and literacy tests as a means to alienate them from politics. Therefore, the central battle over popular inclusion was fought over not class, but race. The history of the politics of inclusion in America cannot be detached from the 'unsteady march' towards racial equality (Klinkner and Smith 1999). Third, the domestic political circumstances leading up to the 1930s, particularly the dominance of political

liberals in mainstream political and intellectual circles, played a crucial role in shifting the focus of the core debates. Max Lerner ([1943] 1989), who was one of the few American intellectuals who explicitly advocated the need for a militant democracy, observed how the central issue regarding militancy in the United States will take place over the positive advancement of the quality of democracy. The disagreements amongst political liberals were less about irreconcilable ends, but more so over the methods for promoting a shared commitment to democracy.

The first amongst the two groups consisted of those who inherited the classical progressive vision of politics. Finally having defeated the specter of *Lochner* and the Republican Era, they proposed a more participatory blueprint for reforming American politics. The general theory was based on the presumption of an identifiable public interest that could be reached through scientific and action-oriented knowledge accessible to all citizens. They were "democratic collectivists" seeking to broaden the base of government and political culture to "the newly emerging class of today" so that all citizens could act as responsible agents to the public affairs of the state (Lerner [1943] 1989, 20-21). A chief intellectual proponent of this view was philosopher John Dewey ([1927] 1954). He offered a theory of communication and education as a means to instill democratic habits of thought and action into the moral fiber of the people. It was a program of democratic socialization that placed great emphasis on the active engagement of the citizenry. In the absence of a robust democratic culture, he warned that liberal political institutions will monopolize the "modern economic régime" and the means of disseminating information (108). Those who subscribed to this view did not neglect the importance of instituting legal protections for political and civil liberties. However, they

believed that the final bulwark of liberty did not come from laws but by the unflinching convictions of the citizens. This sentiment was best expressed by Judge Learned Hand (1952) who wrote that "liberty lies in the hearts of men and women. […] While it lies there it needs no constitution, no law, no court to save it" (190).

The second camp of liberals held a modified vision of the progressive outlook. They shared the same commitment to democracy and political liberty though arguably with less intensity. Those in the first camp were willing to grant some immediate losses on civil rights and liberties if the decision was legitimately reached by open democratic processes. This wasn't because rights were considered less important, but because they viewed democracy as a crucial learning process in self-government. In their view, if a majority was determined to undermine the entire constitutional order by willingly discarding all forms of primary political rights, then no good laws could save it and democracy is fated to fail. Those in the second camp shared the general belief that democracy must have its way in most circumstances, but they were not willing to go as far as accepting the infringement of certain fundamental rights and liberties. In other words, they had a reserved, as opposed to an unqualified, faith in democracy and were wary of the dangers in projecting too much optimism in majoritarian processes. The commitment to certain non-negotiable fundamental rights was seen as the hallmark that distinguished democracy from totalitarianism.

The competing visions naturally led to a full-fledged debate about the best institutional means in advancing and maintaining a constitutional democracy particularly in regards to the role of the judiciary. Historically, prominent liberals have been ambivalent about the role of unelected justices in a democratic society. Prior to 1932, it

was common for progressives to criticize the Supreme Court as a "prætorian guard" that protected the interests of propertied minorities by "strik[ing] down radical state legislation that might aim at economic democracy, and […] federal legislation that might hurt the hegemony of the corporation." Their "veto power" became the "bottleneck of legislative policy" and ultimately a major hindrance to democracy (Lerner [1943] 1989, 93). Indeed, the first thing the New Deal liberal coalition did was to ensure that the national government was constitutionally authorized to resolve all national economic problems without the interference from courts. However, some liberals, namely those in the second camp, gradually realized and insisted that unelected justices had special roles to play in advancing democratic purposes. The view was first pronounced in footnote four of *United States v. Carolene Products Co.* (1938). The footnote, penned by Justice Harlan Fiske Stone, maintained that the commitment to democracy entailed a special judicial solicitude for two kinds of rights in addition to those specified in the Bill of Rights. The first were rights directly associated with democratic processes, the most important of which were the right to free speech and the right to vote. The second were the rights of "discrete and insular minorities," such as persons of color or religious minorities, who because of their small size or prejudice were unable to fully utilize ordinary political processes to protect their own rights and interests. While footnote four would later become the renowned expression of New Deal jurisprudence, its implications were vigorously disputed at the time.

The justices on the Supreme Court as well as core members of the executive branch, including President Roosevelt himself, were deeply engaged in the debates over the proper role of the judiciary in a democracy. Closely mirroring the intellectual

landscape, the bench was divided between two contrasting factions regarding the scope of judicial oversight for individual rights. The classical progressive wing led by Justice Felix Frankfurter argued that deference to majority rule should be applied across the board, explicitly rejecting an interpretive double standard that carves out exceptions for protecting rights. Frankfurter's unwavering commitment to progressivism was grounded in an "almost Aristotelian belief in participatory democracy" (Levinson 1973, 439). He denounced the Supreme Court even when it sought to protect values he approved. In a letter he wrote to Judge Learned Hand in 1925, he expressed his concerns that judicial activism could shrink legislative "responsibility and the sense of responsibility [of citizens] much beyond what is healthy for ultimate securities" (quoted in Levinson 1973, 440). On the other hand, the opposing wing spearheaded by Justices Hugo Black and William O. Douglas advocated the modified view that a more activist, interventionist role for the Court was appropriate when fundamental rights were at risk.

During the late 1930s and early 1940s, tension heightened within the national government between these competing theories of democracy and judicial function. The political and historical context in which the Supreme Court first upheld mandatory flag salute in 1940 only to overrule the decision in 1943 serves as an informative lens for understanding how the modified vision ultimately triumphed over the progressive vision. Both cases involved the question of whether flag salute mandated by a local school board infringed upon the liberties of Jehovah's Witnesses as protected by the First and Fourteenth Amendments. In *Minersville School District v. Gobitis* (1940), Frankfurter wrote for the 8-1 majority upholding the mandatory salute. "Except where the transgression of constitutional liberty is too plain for argument," he argued, "personal

freedom is best maintained […] when it is ingrained in a people's habits and not enforced against popular policy by the coercion of adjudicated law." He reasoned that the appropriate forum for disputing an allegedly "foolish legislation" should be where the question was first raised which in this case was the state legislature and the local school district. Rather than granting immediate judicial relief, he maintained that civic engagement in legislative politics and in the public realm was a crucial "training in liberty."

> But to the legislature no less than to courts is committed the guardianship of deeply-cherished liberties. […] To fight out the wise use of legislative authority in the forum of public opinion and before legislative assemblies rather than to transfer such a contest to the judicial arena, serves to vindicate the self-confidence of a free people.

The decision immediately sparked public controversy. One important reason was how the form of the existing pledge of allegiance, also known as the Bellamy salute, closely resembled the Nazi salute in its gesture of stretching out the right arm and keeping it raised. In December 22, 1942, Congress quickly amended the Flag Code officially replacing the Bellamy salute with the hand-over-heart salute. By the time the law was amended, however, the Roosevelt administration had already embarked on challenging the *Gobitis* decision. In light of how the war was also being fought on the ideological plane, President Roosevelt sought to generate patriotism not by extending public displays of loyalty but by appealing to that which the enemy lacked the most, namely the universal idea of freedom expressed in the Constitution. Among the rights formally protected by the Bill of Rights, the "sharpening of the First Amendment" was prioritized as the "favored instrument" for serving this greater objective (Tsai 2008, 386).

In light of the changing political circumstances, a major transition occurred within the Court. Three of the justices who voted with Frankfurter—Justices Hugo Black, William O. Douglas, and Frank Murphy— publicly confessed their error in *Gobitis*.[27] Furthermore, President Roosevelt was presented with the opportunity to appoint two new justices to the Supreme Court between 1940 and 1943. Robert Jackson and Wiley Rutledge were chosen because they were on record as critics of *Gobitis* and supported greater protection for civil rights and liberties in general. For example, Robert Jackson published a book in 1941 which was written during his years as Solicitor General from 1938 to 1940. As a core member of the Roosevelt administration and a political liberal, he devoted most of the book in criticizing previous court decisions that curbed the national government's economic and social policy based on an unfounded laissez-faire philosophy. "The vice of judicial supremacy," he wrote, "has been its progressive closing of the avenues to peaceful and democratic conciliation of our social and economic conflicts" (321). Unlike classical progressives, however, Jackson carefully qualified his views by avoiding a whole sale denouncement of courts. He acknowledged that "constitutional litigation is an essential part" of American democracy and added that "the sovereign power of judicial review of constitutionality of legislation" ought to be

[27] These confessions were made in the dissent in *Jones v. Opelika* (1942). In the decision, the Court upheld an ordinance prohibiting the sale of books without a license. Although the petitioner was a Jehovah's Witness, the majority decided that when traditional means of distribution are used by religious groups, they can be held to the same standards as non-religious groups. Justices Black, Douglas, and Murphy joined in the dissent, announcing their error in *Gobitis*: "Since we joined in the opinion in the *Gobitis* case, we think this is an appropriate occasion to state that we now believe that it was also wrongly decided. Certainly our democratic form of government functioning under the historic Bill of Rights has a high responsibility to accommodate itself to the religious views of minorities however unpopular and unorthodox those views may be. The First Amendment does not put the right freely to exercise religion in a subordinate position. We fear, however, that the opinions in these and in the *Gobitis* case do exactly that."

centralized to "a court of finality" rather than being scattered amongst district and circuit courts (309-310). Amidst the lengthy recollection of the Roosevelt administration's legal battles against corporations and utilities holding companies, he inserted a short passage where his views on the judicial protection of civil rights are revealed. Mirroring the arguments in *Carolene Products* footnote four written by Justice Stone, who he replaced on the bench, he wrote that "[t]he presumption of validity which attaches in general to legislative acts is frankly reversed in the case of interferences with free speech and free assembly." He argued that a double standard was in fact coherent and justified because corruption within the "channels of opinion and of peaceful persuasion" most vital to the democratic system cannot be "redressed by the ballot box or the pressures of opinion." In regards to these core liberties, "the Court, by intervening, restores the processes of democratic government" (285). His statement regarding the legitimacy of the Court's activism foreshadowed his later commitment to the judicial guardianship of fundamental rights. Much like Jackson, Wiley Rutledge was an ardent New Deal liberal and a vocal supporter of Roosevelt's 1937 plan for packing the Supreme Court. Interestingly, Roosevelt's decision to nominate Rutledge was made over Learned Hand who, as a federal judge on the Second Circuit, was publicly known for sharing similar views with Frankfurter regarding the broad deference that should be offered across decisions made by majority rule. As Gerald Gunther points out, "the more significant meaning of Hand's rejection lies in political-philosophical factors stemming from the internal dynamics of the 1942 Supreme Court" where "Hand's appointment would have given another vote to [Frankfurter's] side, just as the designation of Rutledge instead assured a strengthened opposition to it" (quoted in McMahon 2004, 139).

Just three years later, in *West Virginia State Board of Education v. Barnette* (1943), the Supreme Court overruled its decision in *Gobitis* and held that a virtually identical flag salute requirement in West Virginia violated the First Amendment. One major difference was how the Court employed a different doctrinal path, interpreting that compulsory flag salute was a form of coerced speech. This was due to how the jurisprudence on free speech was stronger and more likely to be effective in overruling *Gobitis* which was decided on the basis of free exercise of religion. Above the doctrinal differences, however, was the gradual shift in politics and public opinion towards a consensus that democracy demanded judicial guardianship regarding certain fundamental rights, even if it meant constricting legitimate democratic majorities. This sentiment was expressed through Justice Jackson's majority opinion in the following passage:

> The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials, and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.

This time, Frankfurter was the only justice on the bench to openly express his dissent. He criticized how the majority was willing to reverse its previous judgment in *Gobitis* by conveniently shifting the doctrinal basis that mandatory flag salute can be viewed as a form of coerced speech. He wrote how the Constitution does not grant "greater veto power when dealing with one phrase of 'liberty' than with another." The difference in doctrine made little to no difference for Frankfurter since the constitutional issue was identical, namely whether the court possessed the authority to strike down a law that promotes a legitimate legislative end. The fact that the other justices were

willing to recant their position in such a short period time suggested how the court was assuming a role above that of legislatures, akin to that of a "superlegislature." As before, he repeated the advocacy for democratic faith, that is, of trusting the people and holding them responsible for changing laws that do not serve their interest. However, the statement was amended with a warning regarding what he observed was gradually becoming a trend in American political development: the *constitutionalization* of core values. In the concluding remarks to his dissent, he wrote:

> Our constant preoccupation with the constitutionality of legislation rather than with its wisdom tends to preoccupation of the American mind with a false value. The tendency of focusing attention on constitutionality is to make constitutionality synonymous with wisdom, to regard a law as all right if it is constitutional. Such an attitude is a great enemy of liberalism. […] Reliance for the most precious interests of civilization, therefore, must be found outside of their vindication in courts of law. Only a persistent positive translation of the faith of a free society into the convictions and habits and actions of a community is the ultimate reliance against unabated temptations to fetter the human spirit.

Frankfurter's warning notwithstanding, the Roosevelt administration welcomed the decision in *Barnette*. Acknowledging the growing attention towards human rights protection abroad, Congress followed the president's lead in affirming the prioritization of certain fundamental rights above ordinary political processes. The commitment also found a home within the Supreme Court through 'partisan entrenchment' driven by the majority who joined hands in *Barnette* (Balkin and Levinson 2001). Partisan entrenchment occurs when enough members of the federal judiciary share a particular interpretation of the Constitution, thereby changing the understanding of the Constitution expressed in positive law through interpretation. Because federal judges hold life tenure, decisions that reflect the dominant partisan interest are eventually entrenched within

constitutional doctrine established through precedent. With the active support of the political branches and of popular opinion, the Court was able to gradually secure its role as the guardians of fundamental rights. By the end of the war, the views of the liberal political coalition had made the New Deal into a full-fledged constitutional revolution that prepared the stage for the heyday of liberal politics and of judicial activism in the 1950s and 60s (Griffin 1999).

The events surrounding the flag salute cases capture the context for this larger historical transition, namely how American constitutionalism chose a developmental path between the crossroads of democratic reform. Although the United States from the founding professed to be a popular government of "We the People," history is replete with evidence that suggests how the earlier aspirations for political democracy were never brought to fruition. The central obstacles in "form[ing] a more perfect Union" historically came from the marginalization of large portions of the population most notably along the lines of race but also of gender and class. In light of the deep-seated discontent towards the Gilded Ages coupled with the Great Depression and the two 'total wars' in Europe, the New Deal came as both a reaction to the impending crises and an opportunity for correcting the course of American democracy. Those subscribing to the classical progressive view sought to introduce broad political and social reforms geared towards greater inclusion and collective action on both the state and national level. They envisioned a political society that was 'militantly' participatory in all aspects of public life. However, this approach was challenged and ultimately replaced with a modified vision. Advocates of this latter view made it a priority to 'militantly' immunize democracy against the threats that were posed by totalitarian enemies abroad. While this

was in no small part a reflection of the political circumstances of the time, on the normative level they did not share the same degree of optimism towards the self-correcting potentials of actual majorities. In this regard, the modified view that emerged triumphant in the United States resembled European militant democracy in its imperative to safeguard certain fundamental rights even against the democratic processes.

The New Deal constitutional order was certainly very different from the post-war constitutional settlement in Europe. One obvious difference is the absence of aggressive restraints against subversive movements emblematic of militant democracy. Another difference is how the scope of judicial power in protecting rights is formally limited by the Constitution since the list of protected rights is far less extensive than those catalogued in the new wave of constitutions. Most importantly, unlike those of many other nations, the United States Constitution "does not explicitly grant the judicial review power" asserted in the landmark case *Marbury v. Madison* (1803). "This silence" has historically been the source of a protracted "legitimacy debate" over judicial review (Sullivan and Gunther 2004, 15). In the more immediate past, the experience with activist courts during the *Lochner* era made it even more difficult for New Deal liberals to openly endorse a robust conception of judicial guardianship even if they believed in its necessity. An alternative theory devised to bypass possible criticism was that judicial intervention would be limited to serving the function of "representation reinforcement" (Ely 1980). While courts are not authorized to make substantive policy judgments, their training in and commitment to procedural fairness makes them better qualified than the other branches for policing the political processes and broadening access to representation. Using this rationale, John Hart Ely justified how the liberal activism of the Warren Court

"was fueled not by a desire on the part of the Court to vindicate particular substantive values it had determined were important or fundamental, but rather by a desire to ensure that the political process […] was open to those of all view points on something approaching equal basis" (74). The ingenuity of process-based justification is how it allows courts to perceive and portray themselves as advancing democracy even as they are striking down the legitimate actions of democratic majorities. However, the non-involvement into the actual workings of politics may be harder to maintain in practice since "process by itself determines almost nothing unless its presuppositions are specified, and its content supplemented, by a full theory of substantive rights or values" (Tribe 1980, 1064).

Beyond normative justifications, it is undeniable that judicial review emerged as a centerpiece of American democracy in a way that was unprecedented in the past. Surveying the history of judicial review since the founding, Edward Corwin in 1938 observed that the importance of the Supreme Court as an agent of constitutional interpretation "is still contingent on public opinion, and seems likely to remain so" (83). He was referring to how American constitutional development has always retained a tension between what he calls the "juristic conception" versus the "political conception" of judicial review. The former view entails giving finality to the Court's pronouncement which then attaches a fixed meaning to the Constitution. On the other hand, the latter view regards the Constitution as an instrument of popular government and hence stresses the role of public opinion in its interpretation as well as that of the politically responsible departments. At the time, Corwin believed that the juristic conception has "never assumed a sufficiently authoritative shape to put it beyond the reach of important

challenge" by political branches (82). His expectations, however, were defeated as the New Deal order gradually diminished the concurrent involvement of all three branches over constitutional interpretation in favor of authoritative settlement by the Supreme Court.[28] A less apparent but crucial dimension of this transition is how elected officials have increasingly acquiesced to the Supreme Court, not simply by delegating the nationalization of fundamental rights but also by refusing to pass legislation stripping federal courts of their jurisdiction. The type of judicial guardianship emblematic of constitutional courts in Europe eventually found public acceptance in the United States. While these changes were never officially constitution-*ized* in the form of positive law, they were constitution-*alized* as a shared practice outside the formal amendment procedures of Article V. Through the construction of judicial power, American democracy was fundamentally redefined, joining Europe in transferring authority from the realm of politics to the realm of law.

3.5. Shifting the Burden: From the Paradox of Democracy to the Paradox of Militant Democracy

The paradox of democracy is that it may, by its own specific methods and procedures for expressing the will of the people, abolish itself (Pfersmann 2004).[29]

[28] A good example is the Supreme Court's decision in *City of Boerne v. Flores* (1997) where the justices curtailed congressional authority provided by Section 5 of the Fourteenth Amendment. The decision declared unconstitutional the Religious Freedom Restoration Act, which was a bipartisan statute that required state governments to respect certain free exercise rights that the Court had previously ruled were not protected. Against the plain textual language of Section 5 that "Congress shall have the power to enforce" the Fourteenth Amendment, Justice Anthony Kennedy held that Congress could only "remedy and deter constitutional violations" but not "decree the substance of the Fourteenth Amendment's restrictions on the States."

[29] Otto Pfersmann (2004) explains that "[d]emocracy is legally contingent on the democratic stances of the majority of direct or higher-order voters. If they are in favor of maintaining the

Democracy allows for the political choice to opt out of popular rule in favor of an oligarchy or even a dictatorship if the people so decide. To some degree, this may be true of all regimes as any form of government cannot be permanent in the face of resistance supported by real power. However, democracy is arguably the only regime that openly recognizes and perhaps even invites people to consider this fundamental choice. Whether this may either be considered a privilege or an inherent flaw depending on one's viewpoint, the pure political form of democracy inherently displays a certain degree of instability and uncertainty. Indeed, this has been considered one of the raisons d'être for constitutionalism and the rule of law—the preservation of stability and order including the prevention of democratic suicide. Laws, however, are neither self-legitimating nor self-sustaining. Although laws can be sustained with the aid of sanctions, sanctions alone cannot sustain law. Effective compliance to legal constraints is therefore dependent upon a system of non-legal commitments or a value consensus that cannot be completely isolated from the habits of political life. Just as democratic politics demands constitutionalism for its stability, constitutionalism cannot be expected to operate outside politics. As Keith Whittington (2009) points out, "[b]oth the threats to the success of a constitutional project and ultimately the tools for the maintenance of a constitutional project have to be found within politics itself" (223). The formula for sustaining democracy is contingent upon carefully designed institutions and legal instruments as much as upon the moral and political education of its members. These set of requirements highlight the necessary burdens that accompany the maintenance of a democratic order.

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system as it goes, it will be maintained; if, for whatever reason, discontent becomes majoritarian, open democracy will openly and democratically disappear" (54-55).

On a normative plane, the clash between totalitarianism and liberalism at the turn of the twentieth century can also be situated within this framework. In endorsing parliamentarism, liberals grasped the basic idea that the defense of a constitutional order ultimately resides within politics itself, but sought to severely limit the access to politics. Totalitarianism, on the other hand, exploited how liberals were unprepared, if not reluctant, to expand the constituent basis of democracy and challenged the existing order with a greater appeal to the inclusion of the people. Their promise of popular empowerment, however, was based on a false theory designed to channel or manipulate participation solely for the purpose of endorsing a dictatorship. Although both liberal and totalitarian theories acknowledged the centrality of politics as a source of legitimacy and collective meaning, neither of them were actually committed to constituting a democracy *by* the people.

In this context, militant democracy represents an altogether different response in its claim to protect or advance democracy. Though markedly different in historical background, institutional architecture, and political culture, the direct or indirect exposure to totalitarianism generated a shared anxiety towards unconstrained collectivities and majoritarian power in both Europe and the United States. The central threat to democratic order was diagnosed as coming from the very nature of politics itself. Rather than jettisoning the idea of democracy altogether, however, democracy was redefined in a way that effectively discredited politics as a source of meaning and as the central site for practicing freedom. The post-war constitutional settlement in Europe can be called a model of limited democracy. It starkly distinguishes democracy between its substantive and actual (or procedural) form, and subjects the latter to the former. Implicit in

substantive democracy is a "theory of prior rights" where certain fundamental rights possess a morally or constitutionally superior status independent of politics (Dahl 1989, 169). They serve as prior constraints on what can be done by means of democratic processes. The justification for specialized guardians can easily be derived from this rationale. This is most evident in the entrenchment of human dignity within Germany's Basic Law or in cases where high courts have decided on the unconstitutionality of constitutional amendments based on extra-constitutional principles.[30] On the other hand, American democracy after the New Deal can be labeled as a model of reinforced democracy. Unlike the European model, the American model seems to reject the distinction between substantive and actual democracy. On the surface, it denies the notion of superior rights except that of self-government through which the democratic process is made possible. Nevertheless, the model also reserves a special role for courts in protecting rights and interests integral to the democratic processes. Courts are benignly portrayed as improving the actual operation of politics by making it more truly democratic. However, there is an ambiguity whether procedural fairness or justice could be conceived without some prior understanding of a substantive theory of rights or values. In short, the non-involvement in substantive questions is harder to maintain in practice than in theory.

[30] There are numerous cases worldwide that have declared duly enacted constitutional amendments to be unconstitutional. To list only a few notable examples often discussed in the comparative constitutional law literature: *Kesavananda Bharati v. State of Kerala*, AIR SC 1461 (1973) in India; *Certification of the Constitution of the Republic of South Africa*, CCT 23/96 (1996) in South Africa; *Paul K. Ssemogerere and Ors v. Attorney General*, Constitutional Appeal No.1 of 2002 (2004) in Uganda. The case of unconstitutional constitutional amendments presents a fundamental dilemma in terms of constitutional governance and the separation of powers as courts can be viewed as both enacting and executing the source of their own powers.

Despite the apparent differences, both models reserve an important role for judicial guardianship in policing, guarding, and enforcing democracy, all *in the name of* democracy. Though perhaps to a different degree, judges are seen as bearing the special responsibility for planting, interpreting, and transmitting essential elements of the democratic culture and fabric. In the long run, they share the risk of alienating democracy from its own foundation, i.e. the demos, as it reduces democracy into a legal concept or category subject to judicial characterization. The balance between politics and the rule of law necessary for sustaining a healthy constitutional democracy is collapsed into an asymmetrical relationship where politics is subjected to the rule of law. As a result, the paradox of democracy is shifted to a paradox of militant democracy where the burden of maintaining a democracy is transferred from the collective effort of citizens and elected officials to the exclusive effort of judicial officials. A democracy that only marginally depends on the education and integrity of its citizens but rather places greater emphasis on the training and professional ethics of judicial officials is no longer a democracy, but becomes a juristocracy.

CHAPTER 4: THE INSTITUTIONAL FOUNDATIONS OF JURISTOCRACY

4.1. Introduction

The waves of constitutional reform that swept the globe in the aftermath of World War II indicate an unprecedented amount of power being transferred from representative institutions to judiciaries. The emergence of the 'new constitutionalism' signaled the demise of legislative supremacy and the embrace of a new orthodoxy committed to the principle of constitutional supremacy as interpreted by judges (Hirschl 2004; Stone Sweet 2000). Among the important features of the new constitutionalism is the institution of constitutional review. Constitutional review is defined as "the authority of an institution to invalidate acts of government—such as legislation, administrative decisions, and judicial rulings—on the grounds that these acts have violated constitutional rules, including rights" (Stone Sweet 2000, 21).[31] As examined in the previous chapter, the original purpose of constitutional review during post-war reconstruction was to entrust courts with the authority to protect the democratic processes against anti-totalitarian or anti-extremist threats. However, its role has expanded significantly beyond this scope. Judges have exercised constitutional review as a means to define the contents of a nation's most fundamental values as well as to oversee the appropriate workings of the basic structures of governance. In this regard, constitutional review represents a "new

[31] The usage of the term constitutional review is sometimes distinguished from or used interchangeably with judicial review. When the two terms are distinguished, constitutional review is used to refer to the power to invalidate legislation exercised by specialized, constitutional courts (generally, in the civil law tradition); whereas judicial review by ordinary courts (generally, in the common law tradition). This structural difference will be discussed in the subsequent paragraphs. Here, I generally use the term "constitutional review" to refer to the specific *function* of invalidating acts of government and will only use "judicial review" within the specific context of the United States.

type of political function" where courts are actively engaged in "transforming societies" by "spreading the values set out in the constitutional throughout […] state and society" (Robertson 2010, 1). Although the formal introduction of constitutional review does not automatically translate into an energetic assertion of judicial supremacy, it is undeniable that courts in general have come to play an expansive role with the introduction of this authority. As Mauro Cappelletti (1980) observed, constitutional review has become evidence for "the ultimate crowning of the Rule of Law" in both new and existing democracies (422).

In regards to the institutional origins of constitutional review, scholars have generally assumed that its structural prototype is based on one of two models: the American model of judicial review as pioneered by John Marshall in *Marbury v. Madison* (1803) or the Austrian model of constitutional courts as created by Hans Kelsen (Murphy 1993; Tushnet 2014; Wenzel 2013).[32] In the American model, all federal courts of general jurisdiction can interpret the constitution. In other words, the authority of courts to review the constitutionality of legislation or executive action is dispersed or decentralized. In most cases, the model has been adopted by countries in the common law tradition, including the United States, Australia, Canada, India, Ireland, and Israel among others. On the other hand, countries in the civil law tradition have followed the model of constitutional courts designed by Hans Kelsen for the 1920 Austrian constitution. The

[32] There is arguably a third model which is the Constitutional Council of France (*Conseil Constitutionnel*) established during the Fifth Republic in 1958. The Council consists of former presidents plus nine additional members, three of whom are chosen by the current president, three by the president of the National Assembly, and three by the president of the Senate. The Council is not a court that hears cases in the formal sense, but offers binding opinions on the constitutionality of bills pending in Parliament. Despite its structural uniqueness, many scholars have considered the Council to be a variation of the Kelsenian model because it is vested with judicial power to resolve conflicts between a statute and the Constitution in which its decisions are final. See, for example, Favoreu 1990, Lijpart 1999, and Stone 1992.

Austrian or Kelsenian model makes a distinction between 'ordinary' courts (with jurisdiction over 'ordinary' legal disputes) and a specialized tribunal that exclusively deals with matters of constitutional interpretation. As opposed to the American model, the authority of constitutional review is centralized in the hands of constitutional courts. This model has been prominent in new democracies within the civil law tradition including countries in Central and Eastern Europe, in Latin America, and in East Asia. Contemporary discussions on constitutional review predominantly focus on highlighting the differences between these two, despite some recognition that judicial power has significantly expanded under both models. Only recently have scholars been turning their attention to the increasing convergence between the common law and civil law traditions, but most of the discussion still remains focused on identifying some classic *loci oppositionis* between the two traditions (Mattei and Pes 2008). The global emergence of juristocracy despite considerable variation in the substantive contents and structural machinery of civil law and common law systems thus raises a challenge for the study of comparative law and of constitutionalism more broadly.

This chapter seeks to identify the point of convergence by examining the political theory underlying the development of constitutional review. In particular, I argue that the structure of constitutional review derives its origins from neither Marshall nor Kelsen but is rooted in an alternative historical and intellectual narrative exogenous to the theory and practice of modern constitutionalism. Institutional choices are never made in a political vacuum. They are tailored to suit narrower political agendas and must therefore be understood within their historical context. In this regard, understanding constitutions demand an inquiry into the underlying trends including the broader conception of and

attitude towards politics based on which constitutions are erected (Friedrich 1951). The foundations of post-World War II constitutional design is based on the acceptance and enforcement of the idea that democracy is not equivalent to majority rule; that in a *real* democracy public power must be guarded by *judicial* enforcement of higher law. This development has been considered an inevitable by-product of or even a necessary precondition for the proliferation of democracy during the second-half of the twentieth century (Guarnieri and Pederzoli 2002; Smith 2009). Accordingly, the undemocratic characteristics of judicial guardianship have not only been justified as reconcilable with majority rule but also actively endorsed as a salutary limit on democracy.[33] The irony of this consensus, however, has been that the triumph of democracy in the twentieth-century has been "accompanied by a worldwide increase in distrust of majoritarian power" (Goldstein 2004, 626).

In what follows, I examine how post-World War II constitutional design is based on a particular understanding of constitutional politics that surfaced in response to the shadows of totalitarianism. The first section surveys the general features of contemporary constitutions in comparison to its modern predecessors (4.2.). The inquiry illustrates how courts occupied a marginal role under the institutional design of early modern constitutions, only to be expanded subsequently with the incorporation of a charter of rights. The subsequent sections reinforce this observation by tracing the early

[33] Mainstream theorists and legal scholars have argued or assumed that judicial guardianship is normatively justified for protecting or even advancing core democratic principles. A leading voice of this view is Ronald Dworkin who believed that a 'true' democracy must protect itself against the tyranny of the majority through the constitutionalization of basic liberties (Dworkin 1990). Similarly, in their comparative study of courts in democracies such as the United States, England, Spain, Portugal, Italy, France, and Germany, Carlo Guarnieri and Patrizia Pederzoli (2002) explain the prominence of the view that "democracy with strong judicial power is unquestionably a stronger democracy, since it is a polity where the rights of the citizens are better protected" (1).

development of constitutional review in the United States (4.3.) and in Austria (4.4.). Despite their presumed differences, both models manifest striking similarities regarding how the scope of constitutional review was originally limited to resolving issues of federalism, that is, the adjudication of competing claims between federal and state law. Furthermore, the guardianship role of fundamental rights and values was explicitly denied to courts in both models. In conclusion, my analysis will suggest that the institutional origins of juristocracy lie not simply in the expansion of judicial *power*, but in the transformation of the judicial *function* that breaks with the theory and practices of modern constitutionalism (4.5.). The discussion reveals how post-World War II constitutions emerged from what Carl Friedrich (1951) has called a "negative revolution." The recognition of judicial protection for constitutional charters is of fundamental significance not because it expresses a "positive enthusiasm for freedom" but rather a "negative distaste for a dismal past" (14-15). By understanding the institutional origins of twentieth century constitutions, my goal is to illustrate how the post-war constitutional paradigm has redefined constitutional politics by structurally facilitating the judicialization of politics as a necessary remedy to the failure of republican, representative institutions once considered the hallmark of modern constitutionalism. While institutions alone may not constitute a sufficient condition for understanding the transition towards juristocracy, it is a necessary condition.

4.2. The Principles of Constitutional Design: Old and New

According to Giovanni Sartori (1962), constitutions are broadly defined as "a fundamental law, or a fundamental set of principles, and a correlative institutional

arrangement, which would restrict arbitrary power." While the existence of a written document is sometimes assumed as a precondition for the success of constitutionalism, Sartori points out how a written charter of constitutional *law* is merely a "means" for achieving "the end" or "*telos*" of establishing a "distinctive political order" that binds and constrains power to ensure political liberty (855). The adjective 'constitutional' suggests the recognition and implementation of this principle, regardless of the basic form of the regime. Constitutional monarchies are not an oxymoron, just as constitutionals democracies are not a tautology, because it is possible to envision a form of political regime unbound by constitutional constraints. The antithesis of constitutionalism is not anarchy, as politics could still be structured while making claims to legitimacy. What sets these types of 'pure' regimes apart from a *constitutional* regime, however, is whether those who govern recognize inherent limits to their otherwise, potentially arbitrary power (Elkin 1993a). In this regard, "[t]he rise of the modern notion of constitutionalism was intertwined with liberalism, the belief that there were limits to the legitimate power of government" (Whittington 2009, 221).

The term 'democracy' or 'constitutional democracy' that we use today refers to what is more properly considered a 'constitutional republic,' where sovereignty is vested in the people, but is expressed through an elected legislature who are limited in their exercise of power (Lutz 2006). It relies on a synthesis between the principles of popular sovereignty and what Robert McCloskey ([1960] 2005) calls the "higher-law background." McCloskey describes how constitutions, most notably expressed in the American founding, embody a commitment to maintaining a healthy tension between these "contradictory ideas." The idea of "popular sovereignty suggests will" which

"conjures up the vision of an active, positive state" through collective engagement in politics. On the other hand, the idea of higher law "suggests limit" which "emphasizes the negative, restrictive side" necessary to protect individual liberties through constraints on power (6-7). Questions of constitutional design have primarily been concerned with reconciling these two conflicting ideals within a single institutional structure. While the normative justification for higher law may be grounded upon some transcendental or metaphysical source, its actual expression or implementation in any constitutional project is very much an inherent part of politics itself. Politics deals with manifest behavior and constitutionalism has as its chief purpose the discovery and implementation of realistic means of controlling power. In a constitutional democracy, these limits must therefore be politically and popularly willed in order to be practicable. In this sense, the foundations of a constitutional democracy rests on the creation of a "self-limiting popular sovereign" (Elkin 1993b, 132). This imperative remains to be central to both twentieth century constitutions and its eighteenth century predecessors. As Donald Lutz (2006) explains, "people across cultures seem to arrive at constitutional solutions that display a *shared underlying logic* despite an astonishingly wide array of institutional arrangements" (xi; emphasis added).

The history of constitutional development can be best described as the ongoing effort to develop a *form* of politics that can most effectively advance this purpose. Different framers at different generations have sought distinctive solutions to the creation of internal safeguards within the political system to protect the constitutional order. The most common formula has been to diffuse political power amongst different decision-making centers or agents while ensuring that all power will ultimately be "dependent on

the people alone" (*Federalist* #52). Here, it is important to recognize how popular sovereignty originally developed not simply as some abstract ideal but as an important and realistic constraint on power itself. The best historical evidence for the triumph of popular sovereignty as a fundamental check is reflected in Parliament's defeat of the monarch's claim to rule by divine right in the English Civil War as well as in the French Revolution. As Stephen Gardbaum (2001) explains:

> […] legislative supremacy is often understood as the distinctive institutional manifestation of popular sovereignty, the notion that all political power derives from and remains with the people. Moreover, popular sovereignty is not generally perceived as an empty political truism for it was typically the concrete and hard-fought result of centuries of struggle between the people on the one hand, and the monarch (usually supported by church and aristocracy) over where ultimate power lay. During the course of this struggle, popular sovereignty was generally institutionalized in the legislature and monarchical power in the executive and judiciary. Legislative supremacy thus reflected the historical triumph of the people against the rival claims to supremacy of the Crown and a narrow political elite. (740)

This idea of legislative supremacy was long seen as the norm for constitutional politics during its early development. The superior position of the popularly elected legislature and its affirmation of majority rule have been central principles for democratic revolutionaries since the notion was appended to the unwritten English constitution. Historically, the primary threat to liberty came from concentrated power in the hands of the monarch or executive, so the subjugation of this power to popular control through representatives naturally emerged as the solution. The resulting doctrine was that Parliament had "the right to make or unmake any law whatever; and further, that no person or body is recognized by the law of England as having a right to override or set aside the legislation of Parliament" (Dicey [1885] 2013, 27).

The American constitutional project took this idea further in recognizing the necessity of placing checks upon legislative authority as well.[34] The framers created a complex scheme of checks and balances in which power was dispersed both vertically through different levels of government and horizontally across any given level of government. As presented in *Federalist* #51, the goal was to "enable the government to control the governed; and in the next place oblige it to control itself" by making it difficult for any parochial political faction or group from gaining control to implement its narrow interests. Only those objectives widely shared and consistent with constitutional limits would be realized through the use of government power. Although the system of checks and balances formally prevents any one branch form emerging as a dominant force, these measures were considered necessary precisely because of their understanding that "[i]n republican government the legislative authority, necessarily, predominates."

In terms of constitutional architecture, early modern constitutionalism and its commitment to legislative supremacy represent a design paradigm where power is controlled by establishing the basic parameters of governance while only documenting those rights that the people relinquish *to* the government. It is a system where the people grant certain powers to the government rather than the government to its citizens. In carefully designing institutions that can channel the exercise of political power, the rights and liberties of citizens are safeguarded by defining what government can or cannot do. When faced with circumstances of legislative overreach, the constitutional system

[34] The literature on the Founders' intentions regarding the theory and practice of American constitutionalism is too vast to be fully surveyed here. Some notable works include Beer 1993; Elkin 2006; Graber 2013; and Griffin 1996. For the purpose of understanding constitutional development, however, it suffices to acknowledge the continuity of the American constitutional project with the English Constitution despite some important differences in terms of the forms for limiting power. A discussion of the role of the federal judiciary regarding constitutional maintenance will be reserved for the next section.

responds to the imperatives of higher law by institutionalizing the final check that is offered by popular will. Legislators must be willing to pay the price if they wish to act beyond its constitutionally proscribed powers as it will ultimately "have to answer to public opinion through the game of politics" (Wenzel 2013, 594). The political expectation for, if not the constitutional duty of, representatives is that the higher law will trump in the end through the medium of popular sovereignty. In this sense, constitutionalism was expected to be *politically* enforced as supreme law.

On the other hand, judicial power occupied an ambivalent space. While it was not uncommon to assign the role of resolving individual disputes to 'impartial' judges, the judicial *function* was not seen as uniquely autonomous from other functions of government. For example, John Locke in his *Second Treatise* ([1689] 1988) famously theorized a limited government whose central concern was the protection of natural rights but did not contemplate the possibility that judges would enforce these rights and limitations against the legislature. This is apparent in his exclusion of a separate and independent judiciary branch in his formula for constitutional design. He considered the central division of power to be that between the legislature and the executive which he believed was not only necessary but also sufficient to counteract the dangers of tyranny (ch. XII, para. 143-4). The judicial function was regarded as being shared by these two branches: the function of the legislature was to "dispense justice" through the making of laws, whereas the function of the executive was to put these laws into effect. In this sense, the "main function of the State" *as a whole* was considered to be "essentially judicial" since the two branches shared judicial power in a balanced constitution (Vile [1967] 1998, 65). Between the two, Locke insisted upon the supremacy of legislative

power, as executive power must always be exercised according to the rules laid out by the legislature. In this regard, legislative representatives were essential for the maintenance of constitutional order. He believed that the legislature could effectively signal the usurpation of power by the executive to the people thereby functioning as the guardian of political liberty and ultimately of the principles of natural law.[35]

The idea of legislative supremacy, however, does not theoretically preclude the possibility of constitutional review exercised by courts from enforcing the constitution.[36] Constitutional review could be exercised in order to hold executive or administrative action unlawful when the act was not explicitly authorized by legislation, as according to the common law doctrine of *ultra vires* ("beyond power"). Furthermore, courts could insist on a higher degree of specificity in the authorization for executive action or for secondary legislation. The key characteristic of a system of legislative supremacy, however, remains intact as courts could not find unconstitutional primary legislation as well as executive action expressly authorized by primary or secondary legislation (Tushnet 2014).

In contrast to how modern constitutionalism sought to protect political freedom by carefully defining the way in which government power is legitimately exercised, contemporary constitutionalism takes a different approach by adding a new dimension to the idea of constraint. Beyond defining the scope of government authority, constitutions

[35] Locke further writes that "should either the Executive or the Legislative" exceed their authority and violate their trust to the people, there is "no Judge on Earth" but only an "appeal to Heaven"—that is to say a call to arms through revolution (ch. XIV, para. 168).

[36] In response to the expansion of judicial power in contemporary democracies, scholars have recently taken renewed interest in elaborating a form of constitutional review that is responsive to and reconcilable with the demands of legislative supremacy, such as "weak-form constitutional review" (Tushnet 2008) or the "new Commonwealth model of judicial review" (Gardbaum 2013).

after World War II adopt a notion of rights that are granted *to* citizens *by* constitutions. In most new democracies, these rights are usually codified within the text of the constitution in the form of an elaborate bill of rights. Rights provisions in existing constitutional systems of the eighteenth-century have also gained renewed force by the way in which their largely declaratory character have been reinterpreted as actual constraints on the powers of government. As Peter Quint (2007) points out, twentieth century constitutions are not only generally more detailed and complex, but they incorporate "several provisions that "partake of the prolixity of a legal code"" (256). This stands in stark contrast to the early modern paradigm, captured by Chief Justice John Marshall's reflection in *McCulloch v. Maryland* (1819), where the nature of a constitution requires "that only its great outlines should be marked, its important objects designated, and the minor ingredients which composes those objects be deduced from the nature of the objects themselves."

Another feature of contemporary constitutions is how the declaration of rights is qualified by circumstances under which rights can be abridged. They typically include "double barreled" provisions where "a statement of the right [is] followed by a statement of permissible limitations." This structural element alters the constitutional politics of rights by entrusting the courts to "balance the right against the limitation on a relatively ad hoc basis" through judicial interpretation (Quint 2007, 253). Balancing, also known as proportionality analysis, has become a general technique used by contemporary courts to weigh all the considerations at stake, such as the governmental interest involved in the regulation against the impairment of fundamental rights and values. Whereas in the early modern paradigm, conflict over rights was seen as a confrontation between the

government and the people primarily to be resolved through politics, courts now serve as the arbitrator as well as the enforcer of higher law. As a result, contemporary constitutions significantly reduce the discretion of legislatures in their choice of government policies by elevating courts as a major actor in national policy-making.

The constitutionalization of rights and the corresponding empowerment of courts has been widely perceived as a necessary condition for, and an inevitable by-product of, the proliferation of democracy in the twentieth century. The normative justification has been that a democracy with independent and active courts is a stronger democracy because vital protections are offered to the basic liberties of citizens. This commitment to a thick protection of rights offered by courts has been regarded as assisting the consolidation of constitutionalism and the rule of law in new democracies. From the standpoint of institutional design, new democracies such as post-fascist Spain, post-apartheid South Africa, or post-communist countries in Central and Eastern Europe have replicated the template of liberal democracy that emerged after World War II with very little revision. However, whether these "contemporary constitutions are different in kind or different in degree" with their historical predecessors, especially in terms of the way courts function, is "unclear" (Graber 2013, 38). The question rarely receives sustained attention, perhaps because the possible answers are assumed to be obvious, though they might have some non-obvious implications. It is to this inquiry that the next two sections turn to by examining the prototypes of constitutional review.

4.3. The Origins of the American Model of Judicial Review

A common and classic response has been to seek the institutional archetype of judicial guardianship from the U.S. Constitution and the American model of judicial review. Writing in the direct aftermath of World War II, Carl Friedrich (1951) observed how "the idea of making the courts, or at least a judicial body, the guardian of the constitution, rather than the legislative and/or executive authorities" is an important feature of American constitutionalism that has taken hold of Continental European theorists to an unprecedented extent" (20). Similarly, Stephen Gardbaum (2001) writes that "[n]otwithstanding important and fascinating differences in the forms that these developments have taken […] the fundamental story is one in which the essentials of the American model of constitutionalism have been adopted" (707). Tom Ginsburg (2008) also identifies the origins of constitutional review as "an innovation of the American constitutional order that has become a norm of democratic constitution writing" after World War II (81). For Friedrich, Gardbaum, Ginsburg, and numerous others, the American political system stands for an institutional model where the judiciary stands as an independent branch with legitimate power to review and strike down laws that are not in accordance with the higher law mandate of the constitution.

In light of the hierarchically inferior status of judicial power in early modern constitutional thought, the idea of a tripartite separation of powers was first established not by the James Madison or Alexander Hamilton, but by Montesquieu. His contribution to constitutional thought was in extracting the "power of judging," understood as the power to announce what the law is in the settlement of disputes, from the Lockean division between the powers of enacting laws and of putting them into effect. However, his notion of an autonomous judicial power was clearly very different from the

contemporary understanding of courts. In Book XI of *The Spirit of the Laws* ([1748] 1989), Montesquieu describes a judicial system without professional judges. His view was that judicial power should be exercised by persons drawn from the people, on an ad hoc basis for fixed periods of short duration. Once the jury decides whether the accused is guilty or not, the role of the judge is to simply pronounce the penalty imposed for this deed. In this sense, Montesquieu understood judicial power narrowly, limited to "that of judging the crimes or the disputes of individuals," and as primarily being exercised by petit juries, rather than by judges in robes. At best, professional judges were considered to be "no more than the mouth that [passively] pronounces the words of the law," once decided by the jury (pt. 2, bk. XI, ch.6). They would serve as clerks or technicians working within the tight framework of positive law established by the legislature. In this regard, the presence of the judiciary was still very much overshadowed by that of the legislative and executive.

The American Constitution represents an innovation in the separation of powers as it aims to place the legislative, executive, and judicial branches on equal footing. As a means to ensure that judicial power would occupy a distinct constitutional space and function, the framers argued that judges must be armed with the constitutional means to check the legislature by limiting it to its proper functions. Should the executive veto be insufficient to restrain improper legislation, the courts would serve as an additional layer of protection by declaring these acts void. However, it is curious to see how Article III does not explicitly provide for the authority of judicial review to courts. While this omission has sometimes been the source of dispute over the legitimacy of this practice, it is commonly assumed that judicial review was nevertheless intended within the tripartite

structure of Articles I, II, and III of the Constitution. Although Chief Justice John Marshall was the one who formally declared the authority in *Marbury v. Madison* (1803), the force of his opinion rests on the assumption that judicial review was implicitly intended by the framers.

The silence of the Constitution regarding judicial review must therefore be supplemented by a close reading of *Federalist* #78 as well as the historical context in which the framers contemplated its function. In discussing why it is necessary to provide life tenure to members of the federal judiciary, Alexander Hamilton argued that judicial independence is crucial for guaranteeing the "right of courts to pronounce legislative acts void." This prototypical statement is justified by the idea that courts are critical for constitutional maintenance in order to serve as "bulwarks of a limited constitution." In contemporary constitutional theory, this phrase has been interpreted expansively to support the broader conclusion that constitutionalism demands limits on majority decisions as a matter of general principle. However, the concept of a "limited constitution" was defined more specifically as "one which contains certain specified exceptions to the legislative authority." The question then is whose legislative authority the courts were primarily designed to constrain.

In light of the failures of the *Articles of Confederation*, the founders were deeply concerned with the "political conditions in the states" where "legislative abuses" were common (Wood 1981, 6-7). For example, in his *Notes on the State of Virginia* ([1785] 1999), Thomas Jefferson expressed concerns that there was "no barrier […] provided between the several powers" (126). As a consequence of rejecting all monarchical and aristocratic elements, the states created a form of government where executive and

judicial power gravitated towards the legislature. The first indicator was how state legislatures rigidly controlled (and in some cases, elected) the governor or chief executive official in their respective states. The bitter memory of executive tyranny by the British Crown was still fresh that the revolutionaries believed it was necessary to strip the office of the governor of all its prerogatives. The governor, president, or executive council in each of the states became 'executive' in the strictest sense of the word, merely assigned to administer the rules made by legislatures. Furthermore, state legislatures also assumed (or rather subsumed) a quasi-judicial function inherited from royal courts during the colonial era. For example, the state legislature of Massachusetts was named the 'General Court' as an indication that it would serve as a court of appeals similar to how the House of Lords functioned as a court of first instance for the trials of peers and as a court of last resort. In addition, it was not uncommon for legislative assemblies in the several states to hear individual petitions concerning the redress of grievances.[37] The legislative overreach in the states was sufficiently alarming for the framers of the Constitution to view legislative power with suspicion, as an "impetuous vortex" (*Federalist* #48). The original intention of judicial review as the "bulwark of a limited constitution" must therefore be understood within this historical context as being primarily directed towards legislative abuses in the states, as opposed to towards a federal legislative authority that was yet to be established.

[37] The American right of petition in the colonies was derived from British precedent. In his *Commentaries on the Laws of England* ([1765–1769] 1979), Sir William Blackstone writes: "If there should happen any uncommon injury, or infringement of the rights beforementioned, which the ordinary course of law is too defective to reach, there still remains a fourth subordinate right appertaining to every individual, namely, the right of petitioning the king, or either house of parliament, for the redress of grievances" (138).

The Anti-Federalist objection to the Constitution further supports the conclusion that the primary target of judicial review was in establishing federal supremacy over the state legislatures. In the *Eleventh Essay* which was directed against the nature and extent of federal judicial authority in the new Constitution, Brutus repeatedly expressed concerns regarding how the federal judiciary "will operate to a total subversion of the state judiciaries, if not, to the legislative authority of the states." He states that:

> The judicial power will operate to effect, in the most certain, but yet silent and imperceptible manner, what is evidently the tendency of the constitution: — I mean, an entire subversion of the legislative, executive and judicial powers of the individual states. Every adjudication of the supreme court, on any question that may arise upon the nature and extent of the general government, will affect the limits of the state jurisdiction.

Since the Supreme Court has the authority to "determine all questions that may arise […] on the meaning and construction of the constitution," the Anti-Federalists anticipated that the Court would broadly interpret constitutional provisions such as the "necessary and proper" clause of Article I, sec. 8 or even the Preamble's commitment to the promotion of the "general Welfare" in order to expand the scope of Congressional power. Contrary to serving as a check against Congress, its central purpose was viewed as arming Congress with "general and unlimited powers." In this sense, critics were in agreement with the framers that judicial review would serve to affirm or impose federal supremacy over the states.

Nearly all sides appear to have accepted that the Constitution's Article VI supremacy clause allowed for the Supreme Court to exercise judicial review and veto state laws that trespassed on federal jurisdiction or violated the Constitution. Whether this unelected branch possessed the authority to disregard federal statutes determined in the

course of litigation to be add odds with the Constitution was an altogether different issue. Hamilton arguably does seem aware of this possibility when reading *Federalist* #78. However, even so, the "rights of the courts to pronounce legislative acts void" is defined narrowly as the power "to declare all acts contrary to the *manifest tenor* of the constitution void" (emphasis added). Whereas state authority was easily subject to federal control through the supremacy clause, the interbranch relationship within the federal government was more complicated as it dealt with checks amongst co-equal branches. At most, the role of judicial review in terms of the political branches of the federal government would be limited to that of policing the boundaries or scope of constitutional authority. In other words, the Court would be responsible for keeping Congress "within the limits assigned" only when there was a very clear violation of its enumerated powers. This is a far cry from claiming that the framers designed judicial review as a vital constitutional mechanism where it is assigned some Herculean role.

The fact that the framers objected to the inclusion of a bill of rights in the Constitution further supports how the judicial review of federal legislation would be limited to questions concerning the separation of power. In *Federalist* #84, Hamilton insisted that specific constitutional protections for individual rights were "unnecessary," "dangerous," and "confusing." He maintained that the best way to limit government power was by careful design of republican institutions. That the "Constitution is itself […] a Bill of Rights" highlights the framers' belief that fundamental rights can only be protected through a well-defined political process that enable governing officials to check one another. Conversely, the Anti-Federalist advocacy of the inclusion of a bill of rights was primarily directed towards constraining the scope of federal power rather than for the

judicial protection of individual rights. In the *Fifteenth Essay*, Brutus "venture[s] to predict" how state governments will be abolished "if [the Constitution] is adopted without amendments [i.e. the Bill of Rights], or some such precautions as will ensure amendments immediately after its adoption." The Federalist and Anti-Federalist disagreement over the Bill of Rights suggests how the primary issue of the debate was in defining the proper parameters of constitutional authority, rather than in the judicial enforcement of rights and higher law.[38]

Early case law confirms that the central purpose of judicial review was to defend the federal position when there was a conflict between federal and state law. Section 25 of the Judiciary Act of 1789 granted the Supreme Court jurisdiction to hear appeals of decisions from state courts when those decisions involved questions of the constitutionality of state or federal laws.[39] In *Martin v. Hunter's Lessee* (1816), which upheld the constitutionality of section 25 against a recalcitrant state court in Virginia,

[38] Madison's original draft of the Bill of Rights included a provision declaring "No state shall violate the equal rights of conscience, or the freedom of the press, or the trial by jury in criminal cases." The fact that the provision was rejected suggests a general understanding that the first ten amendments limited only Congressional power. For an overview of the debate over the Bill of Rights, see Veit, Bowling, and Bickford 1991. The original intention of the Bill of Rights was subsequently reaffirmed by the Supreme Court in *Barron v. Baltimore* (1833) by none other than Chief Justice John Marshall.

[39] Section 25 of the Judiciary Act of 1789 reads: "*And be it further enacted*, That a final judgment or decree in any suit, in the highest court of law or equity of a State in which a decision in the suit could be had, where is drawn in question the validity of a treaty or statute of, or an authority exercised under the United States, and the decision is against their validity; or where is drawn in question the validity of a statute of, or an authority exercised under any State, on the ground of their being repugnant to the constitution, treaties or laws of the United States, and the decision is in favour of such their validity, or where is drawn in question the construction of any clause of the constitution, or of a treaty, or statute of, or commission held under the United States, and the decision is against the title, right, privilege or exemption specially set up or claimed by either party, under such clause of the said Constitution, treaty, statute or commission, may be re-examined and reversed or affirmed in the Supreme Court of the United States […]."

Justice Joseph Story reaffirmed the role of the Supreme Court in ensuring the conformity of state laws to federal laws. He argued that:

> A motive […] perfectly compatible with the most sincere respect for State tribunals, might induce the grant of appellate power over their decisions. That motive is the importance, and even necessity, of uniformity of decisions throughout the whole United States upon all subjects within the purview of the Constitution. Judges of equal learning and integrity in different States might differently interpret a statute or a treaty of the United States, or even the Constitution itself; if there were no revising authority to control these jarring and discordant judgments and harmonize them into uniformity, the laws, the treaties, and the Constitution of the United States would be different in different States, and might perhaps never have precisely the same construction, obligation, or efficacy in any two States.

The federalist logic of judicial review has been dominant throughout the early stages of constitutional development in the United States (Rakove 1997). In a system where there are two levels of government with different lawmaking jurisdictions, it is natural that there will be a potential for conflict over jurisdiction. The primary role of the Supreme Court was to serve as a third body that can resolve these disputes as they arise. Another aspect of the federalist dynamic was in ensuring credible commitments from the states in regards to interstate commerce (Qian and Weingast 1997). In a free trade system with multiple lawmakers, states face a collective action problem. Under the Articles of Confederation, the absence of a supreme authority to regulate interstate commerce became an issue because, although the Continental Congress was endowed with the sole authority to negotiate foreign treaties, it did not have the power to control trade between individual states and foreign countries. States were granted the right to levy imposts on foreign goods, and they freely interpreted this to mean goods from other countries as well as other states in the United States. States also insisted on printing their own paper money

and required it for payment of tariffs regarding purchase of goods. In order to prevent states from putting up protectionist barriers, the Constitution controversially assigned significant discretionary powers to Congress in regulating interstate commerce. However, as Brutus predicted, it was the role of the Supreme Court to reaffirm and promote congressional authority through judicial interpretation, giving a broad construction of federal powers over states in regards to free trade issues.

Table 4-1 compares the number of federal statutes to state and local statutes that were held unconstitutional by the Supreme Court from 1791 to 2011. A few observations can be made about the Court's willingness to exercise judicial review. First, the Supreme Court generally exercised judicial review more sparingly, especially during the antebellum period. The first time in which the Supreme Court declared an act of Congress unconstitutional was in *Marbury v. Madison* (1803). The whole point of a written constitution, Marshall asserted, was to ensure that government stayed within its prescribed limits: "The powers of the Legislature are defined and limited; and [so] that those limits may not be mistaken or forgotten, the Constitution is written." In cases where a law conflicted with the Constitution, Marshall wrote, "the very essence of judicial duty" was to follow the Constitution. The decision famously concluded that "a law repugnant to the Constitution is void, and courts, as well as other departments, are bound by that instrument." However, despite the strong assertion of judicial review in *Marbury*, Table 4-1 shows how the Court did not strike down another federal law until the *Dred Scott v. Sandford* decision in 1857. This shows how the relevance of the power of judicial review only expanded gradually and incrementally rather than being firmly established by design of the constitutional structure itself.

Table 4-1: The Supreme Court's Willingness to Declare State and Federal Laws Unconstitutional (Source: Baum 2013, 163)

Period	Federal statutes	State and local statutes
1790-1799	0	0
1800-1809	1	1
1810-1819	0	7
1820-1829	0	8
1830-1839	0	3
1840-1849	0	10
1850-1859	1	7
1860-1869	4	24
1870-1879	7	36
1880-1889	4	46
1890-1899	5	36
1900-1909	9	40
1910-1919	6	119
1920-1929	15	139
1930-1939	13	92
1940-1949	2	61
1950-1959	4	66
1960-1969	18	151
1970-1979	19	195
1980-1989	16	164
1990-1999	24	62
2000-2009	15	36
2010-2011	3	4
Total	166	1,307

Second, even when the Court was less likely to exercise judicial review in general during its early development, the judges exhibited an asymmetrical commitment to striking down state and local laws as opposed federal laws. There is a noticeable difference between the frequencies in which the Court was willing to challenge federal statutes as opposed to state statutes. Prior to the 1850s, the Court declared federal law unconstitutional only once out of the 30 times it struck down a law. In light of the previous discussion on the framers' original intentions as confirmed by Justice Story's

opinion in *Martin v. Hunter's Lessee* (1816), it is not a coincidence that the Court was more willing to exercise judicial review over the states than to apply the doctrine in striking down federal laws. Even after the Civil War and the ratification of the Thirteenth, Fourteenth, and Fifteenth Amendments, the Court devoted more attention to policies emanating from the state governments. The marked increase of state and local laws struck down after 1860 was also an extension of the earlier federalist logic in light of how Congress passed laws that committed the Court to reviewing state laws that ran counter to national statutes. This tendency continued throughout the twentieth-century.[40]

Furthermore, one needs to consider the importance or impact of the Court's decisions in making significant changes in public policy (Baum 2013). Although the Court struck down relatively few laws in general during its early stages, the decisions that were directed towards state and local laws charted important doctrines that limited state powers under the Constitution. For example, the Court handed down major precedents establishing federal supremacy that are even applied today, such as *McCulloch v. Maryland* (1819), which denied the states' power to tax federal agencies, and *Gibbons v. Ogden* (1824), which reduced state power to regulate commerce. In contrast, the record for challenging federal statutes has been more ambiguous, as many decisions have been less important to the policy goals of Congress, either because the statutes were minor or because they were struck down only as applied to particular circumstances. For example, despite how *Marbury* is cited as a major precedent today, the actual decision involved the Court avoiding a head-on collision with the federal government by ultimately dismissing

[40] As Justice Oliver Wendell Holmes Jr. ([1920] 2007) remarked: "I do not think the United States would come to an end if we lost our power to declare an Act of Congress void. I do think the union would be imperiled if we could not make that declaration as to the laws of the several states" (295-6).

Marbury's petition on the basis of lack of jurisdiction. Those decisions that were significant subsequently prompted a backlash from the federal government as demonstrated by the reversal of *Dred Scott* through the post-Civil War Amendments or in the reversal of the judicial protection for the freedom of contract, including child labor laws and a minimum wage law, after the New Deal.

While the Supreme Court gradually managed to extend its authority and scope in a piecemeal fashion, it only gained its status and reputation in national policy-making after World War II, especially during the Warren Court era. There is a noticeable disjunction between the Court as an enforcer of the vertical and horizontal separation of powers during its early- and mid-development as opposed to the Court as an activist institution involved in the settlement of fundamental constitutional issues across both liberal and conservative agendas today. The Court overturned 95 federal statutes between 1963 and 2011, far more than in any period of the same length and more than half of the total for the Court's entire history. This coincides with the arguments of the previous chapter, that the theoretical and doctrinal framework underlying the explosion of judicial power in the United States was established as a reaction to the transition in constitutional thought after World War II. Prior to this period, the dominant paradigm of judicial review was primarily defined by its role in policing the boundaries of federalism and, occasionally, the separation of powers. In this regard, American constitutional development shares more with the paradigm of early modern constitutional thought in confining judicial review to structural and functional issues, while leaving significant room for constitutional politics outside the courts for the enforcement of higher law. Revisiting Ginsburg's statement at the beginning of this section, although the institution

of judicial review may have been "an innovation of the American constitutional order," it cannot endogenously explain how judicial guardianship has "become a norm of democratic constitution writing" after World War II.

4.4. The Origins of the Austrian (or Kelsenian) Model of Constitutional Review

An alternative model for the institutional design of constitutional review has been attributed to Austrian jurist Hans Kelsen. His proposal for a constitutional court, first adopted by the Austrian Constitution in 1920, has been regarded as highly influential in Europe and subsequently across various countries within the civil law tradition. As Georg Vanberg (2005) observes, "Kelsen's model quickly gained acceptance" in light of "the aftermath of the horrific suffering and destruction wrought by Nazi Germany" (10). For example, the new democratic constitutions in Italy (1948) and West Germany (1949) included provisions adopting a constitutional court. Constitutional review was also introduced in France in a more constrained form of a Constitutional Council, with Charles de Gaulle's constitution for the Fifth Republic (1958). When authoritarian regimes were replaced by democratic constitutions in Portugal (1976) and Spain (1978), constitutional courts received a prominent place in the new institutional structure. More recently, almost all former Soviet bloc countries, including Russia, have established constitutional courts based on the (neo-) Kelsenian model (Schwartz 2000).

Constitutional courts have often been regarded as a compromise or balance between legislative supremacy and the American model of judicial review (Lijpart 1999; Wenzel 2013). Alec Stone Sweet (2000) identifies "four constituent components" that distinguish the Kelsenian model of constitutional review from American judicial review

(33-34). First, constitutional courts are a special tribunal that "enjoy exclusive and final […] jurisdiction" over constitutional disputes. Second, the monopoly that constitutional judges possess over issues concerning constitutionality in turn suggests that these courts are excluded from presiding over other types of judicial disputes or litigation which remain within the jurisdiction of 'ordinary' courts. This creates a potential for conflict between the constitutional court and the highest appellate ordinary court. Constitutional courts typically "win the battles on the level of formal constitutional theory" but they may avoid such a conflict from the outset by "defer[ring] to the ordinary courts' reasonable applications of constitutional law" (Tushnet 2014, 52-53). [41] Third, constitutional courts occupy a distinct constitutional space that is neither clearly 'judicial' nor 'political.' There is some controversy over whether constitutional courts should be considered as performing a special judicial function or a 'fourth state function' beyond the tripartite separation of powers. However, their composition and 'court-like' appearance has created a tendency amongst legal practitioners and ordinary citizens alike in which they are perceived as serving a functional division *within* the judiciary (Merryman and Pérez-Perdomo 2007). Fourth, in some cases, constitutional courts are given broad jurisdiction and open rules of access that allow and often require them to decide constitutional questions even before the emergence of a concrete dispute. The

[41] The issue, however, is much more complex and warrants a case-by-case analysis according to the nature of the dispute. Martin Shapiro and Alex Stone Sweet (2002) have indicated a general trend where constitutional courts are increasingly "delv[ing] ever more deeply into the work of the ordinary judiciary" by the process in which concrete cases are referred by individual petitions. They write: "The phenomenon has provoked protests from ordinary judges and scholars, who lament that their constitutional court has become de fact a general appellate instance, or a cassation court, thus violating separation of powers. […] Once constitutional judges required the ordinary judge to engage in balancing, they made the latter's decision-making reviewable; and, in doing so, they empowered individuals, through the constitutional complaint procedure, to appeal *how* the ordinary judge has balanced directly to the constitutional court" (364-365, fn. 19).

power of abstract review can be distinguished from the concrete review power of American courts that can only decide 'cases or controversies' raised by litigants with provable injuries. The implications of this distinction, however, should not be overstated as concrete review has been quickly approximating abstract review under a regime of constitutional rights where "any law which substantially deters the exercise of some fundamental, constitutional right […] creates, by its very existence, a 'case or controversy'" (Shapiro and Stone Sweet 2002, 352).[42]

The contemporary legacy of Kelsen has focused on the role of constitutional courts for generating the "ongoing construction or development of the normative basis of the state itself." Constitutional courts today are responsible for "construct[ing] theories of constitutional rights, or constitutional justice" and "developing hierarchies of norms and values within the constitution itself" (Stone Sweet 2000, 29). There is, however, the question of whether this assessment is actually supported by Kelsen's original proposal for a constitutional court. Thus, his supposed contribution to contemporary constitutional design must be reevaluated within its historical context.

The Austrian Constitution of 1920 established a parliamentary system that inherited the core features of legislative supremacy in early modern constitutional thought. The federal government was to be elected by the National Council, which was the lower house of the federal parliament, and the president by the Federal Assembly

[42] Shapiro and Stone Sweet (2002) advance the argument that the distinction is further being blurred by pointing to instances where abstract review may occur in the United States: "First, under certain circumstances, plaintiffs may seek declaratory or injunctive relief by a judge which, if granted, suspends the application of the law in question pending a judicial determination of its constitutionality. […] Second, under judicial doctrines developed by the U.S. Supreme Court pursuant to litigation of the First Amendment freedoms [such as the doctrine of 'overbreadth'], plaintiffs may attack a law on its face, called a 'facial challenge,' and plead the rights of third parties" (348).

consisting of both chambers of the federal parliament. Similar to the Westminster model, the entire executive branch was designed to be accountable to legislative authority. The Constitution also set forth a strict principle of legality according to which both federal and state governments must function within the confines of statutes enacted by parliament.[43] The combination of parliamentary supremacy taken together with an adherence to the principle of legality is what defined the basic foundations of constitutional democracy at the heart of the 1920 Constitution. Kelsen's proposal for the creation of a constitutional court was situated within this political context. Under contemporary standards, the combination of parliamentary supremacy with a constitutional court armed with a power to nullify legislation would seem like an oxymoron. As Theo Öhlinger (2003) observes, "it seems as if the fathers of the constitution (i.e., the leaders of the political parties of the time) did not perceive a contradiction between the dominant position they had granted to parliament and its legislative acts and the power of a court to review the constitutionality of these acts" (209). However, their seeming contradiction was addressed by a constitutional design meant to carefully define the authority of the constitutional court towards serving a particular task.

In devising the constitutional court, Kelsen addressed nearly identical questions as did the framers of the American Constitution in regards to the establishment of judicial review. Similar to the circumstances of the United States, there was a pressing concern for constitutionally maintaining a workable system of federalism. The reconstruction of Austria as a federal state was the main topic in constitutional debates. After Article 1

[43] The principle of legality is expressed in Article 18, section 1 of the 1920 Constitution which states that: "The entire public administration shall be based on law."

which states that "Austria is a democratic republic" the remaining Articles of Chapter 1, Part 1 (from Articles 2 to 23) all deal with defining the relationship between the federal government and the several states (*Länder*). Kelsen was concerned that a federal system would suffer from inconsistency in the application of its laws. He was critical of a system of decentralized review as practiced in the United States which he believed would only exacerbate this difficulty by creating judicial cacophony. Kelsen (1942) offered the following assessment in regards to the American model of judicial review:

> The disadvantage of this solution consists in the fact that the different law-making organs may have different opinions with regard to the constitutionality of a statute, and that, therefore, one organ may apply the statute because it regards it as constitutional whereas the other organ will refuse the application on the ground of its alleged unconstitutionality. The *lack of a uniform decision* of the question as to whether a statute is constitutional, i.e. whether the constitution is violated is a great danger to the authority of the constitution. (185, emphasis added)

Since judges in the civil law tradition are not formally bound by the principle of *stare decisis*, not only did the decision of higher courts have no binding force upon lower courts, but even the same court was prone to reversing its own decisions regarding the constitutionality of an identical statute as applied to different occasions. To further the difficulty, the subordination of the judiciary to the legislature has been considered a foundational principle of civil law systems (Merryman and Pérez-Perdomo 2007). In congruence with the early modern paradigm of constitutional design, the European continent has been "haunted by fears of a self-seeking, anti-democratic judiciary, that any judicial interpretation or, *a fortiori*, invalidation of statutes was a political act, and therefore an encroachment on the exclusive power of the [democratically elected] legislative branch to make law" (Cappelletti 1971, 54). Kelsen was concerned that

allowing ordinary courts to engage in judicial review would undermine the unity and congruity that was demanded by the principle of legality. "The problem of legality (*Rechtsmäßigkeit*)," for Kelsen, was in maintaining "the "relation of correspondence" between the lower and higher levels […] found in the hierarchy beneath the constitutional level" (Paulson 2003, 235). The challenge was then to adopt a means for ensuring the uniformity between federal legislation and the legislation of the states or *Länder*, while avoiding American-style judicial review. Kelsen believed that the integrity of the entire legal system can only be assured if the superior status of the constitution, atop a hierarchically ordered system of legal rules, could be guaranteed by a separate, court-like entity. His proposed solution was the creation of a specialized tribunal called the constitutional court endowed with the centralized power to annul—as opposed to enact—statutes on the basis of the highest positive law, i.e. the constitution. Similar to the federalist logic in the American model, constitutional review was designed to primarily ensure the "compliance with jurisdictional norms" by merely examining whether a law had been "constitutionally enacted" on narrow, procedural grounds (Heun 2003, 198, 200). Kelsen envisioned the constitutional court to serve as a crucial institution that could guarantee uniformity across the federal system based upon the principle that "federal law overrides *Land* law" (Schmitz 2003, 251).

Kelsen took great care to ensure that constitutional review would only serve its intended purpose in policing the formal competencies of government agencies rather than passing judgment on the actual substance of legislative statutes. For starters, he openly acknowledged how the constitutional court occupied an ambiguous space between

politics and law that may potentially pose a dilemma for a constitutional government committed to legislative supremacy:

> The decision of the Constitutional Court by which a statute was annulled had the same character as a statute which abrogated another statute. It was a *negative act of legislation*. […] [T]he Constitution conferred upon the Constitutional Court a legislative function, i.e. a function which, in principle was reserved to the Parliament […]. (1942, 187)

Since constitutional review was considered "a legislative and not a purely judicial function," the 1920 Constitution provided that members of the constitutional court had to be elected by parliament rather than being appointed by the administration as in the case of ordinary judges (200). To limit the role of the constitutional court to that of a "negative" legislator, Kelsen further stressed the importance of allowing the 'positive' or 'political' function of actual legislation to be reserved to parliament. The will of parliament obviously had priority as long as the court had not declared a statute unconstitutional. However, when a statute was challenged, the constitutional court could provide for a delay rather than immediately striking the law down, which would enable "the legislature to replace the statute by a new and constitutional one before the annulment became effective" (187). An additional means for keeping the constitutional court detached from politics was by limiting access to the constitutional court. During the drafting stages, Kelsen explicitly rejected propositions for the right of citizens to directly file a petition to the constitutional court which, as a result, was excluded in the final version of the 1920 Constitution. Rather, Article 140 stated how the jurisdiction of the constitutional court was to primarily decide "on the unconstitutionality of *Land* laws on the application of the Federal Government and on the unconstitutionality of Federal Laws

on the application of the *Land* Government or of a third of the members of the National Council or by one-third of the members of the Federal Council."[44] Although the underlying issue of the dispute brought to the court may not overtly involve questions of jurisdiction between the federal and state governments, the strict rule concerning standing nevertheless affirmed that the constitutional court was primarily intended to serve as an arbitrator for conflicts between the two levels of government and law.[45]

These procedural safeguards, however, are incomplete and thus insufficient to prevent constitutional judges from handing down general norms through their interpretation of vague and indeterminate constitutional provisions. Despite how the civil

[44] In addition to disputes between Federal and Land governments, Article 141, section 1 further states the following instances regarding the scope of the court's jurisdiction:

Art. 141. (1) The Constitutional Court pronounces upon

a) challenges to the election of the Federal President and elections to the popular representative bodies or the constituent authorities (representative bodies) of statutory professional associations;

b) challenges to elections to a Land Government and to municipal authorities entrusted with executive power;

c) application by a popular representative body for a loss of seat by one of its members; application by at least eleven member of the European Parliament from the Republic of Austria for a loss of seat by a member from the Republic of Austria;

d) application by a constituent authority (representative body) of a statutory professional association for a loss of seat by one of the members of such an authority;

e) the challenge to rulings whereby the loss of a seat in a popular representative body, in a municipal authority entrusted with executive power or in a constituent authority (representative body) of a statutory professional association has been enunciated, in so far as laws of the Federation or Laender governing elections provide for declaration of a loss of seat by the ruling of an administrative authority, and after all stages of legal remedy have been exhausted.

[45] Kelsen, however, did not object to granting the constitutional court the power to review statutes *ex officio* which was accepted in the final version of the 1920 Constitution (Article 139). This authorization allowed for the constitutional court to initiate review proceedings in cases that it had doubts regarding the constitutionality of either a state or federal statute prior to an actual dispute. He understood *ex officio* review as a procedural extension of the court's existing functions to ensure and promote coherence and harmony, rather than adding a new dimension to its power. The contemporary legacy of this authority to engage in an abstract form of review, however, has been complicated by the inclusion of broad charters of rights in constitutions that were established after World War II. There is, however, nothing inherently at odds with the institution of *ex officio* review as originally conceived to the principle of legality.

law tradition was grounded on the expectation that professional judges would strictly be the mouth that pronounces the formal words of the law, Kelsen was realistically aware of the likelihood in which constitutional judges might be called upon to address political questions. For this reason, terms such as liberty, justice, or equality were all viewed with great suspicion for the practice of constitutional review as they would potentially force judges to decide whether a statute is unconstitutional on substantive grounds before reviewing whether the law in question was procedurally enacted in a constitutional manner. To prevent such dangers at its roots, Kelsen believed that the Constitution had to be "adapted to the requirement of constitutional review" by keeping the constitutional text as precise and positivistic as possible (Öhlinger 2003, 218). He therefore strongly supported the decision to omit a bill of rights in the 1920 Constitution as well as the exclusion of a preamble which contains general declarations of purpose that invoke meta-positive moral principles. Such language should never be a standard of constitutional review as they will inevitably 'politicize' the constitutional court to function as a 'positive' as opposed to a 'negative' legislator.

Kelsen's efforts to carefully define the constitutional court's authority reflect his broader commitment to develop a theory of constitutionalism adequate for the principle of legality. His embrace of a "pure" theory of law has been commonly interpreted as an effort to achieve a positivistic and universal definition of law divorced from historical particularities as well as void of normative contents (Caldwell 1997; Dyzenhaus 1997; Posner 2003). Kelsen indeed rejected the idea that positive law can be derived from some transcendent or normative order, such as natural law or a conception of justice. A pure theory is concerned solely with describing law as it is, rather than to prescribe how it

ought to be. This interpretation finds support in his statement that "any content whatever can be law," where law is nothing but a technique of social control ([1934] 1992, 56). Thus, for Kelsen, constitutions merely define the objective conditions for the valid exercise of government authority by establishing a hierarchy of positive law enforced by the constitutional court. The interpretation of Kelsen as a legal positivist or a legal scientist, however, does not fully capture the way in which he envisioned the broader relationship between constitutionalism and democracy, as reflected in his simultaneous endorsement of legislative supremacy and constitutional review in the Austrian Constitution.[46]

Kelsen's goal in proposing a constitutional court wasn't to assert the objective and factual superiority of a "pure" theory of law *over* (or set *apart from*) politics, but rather to deliberately reserve the question of core value judgments *to* politics. Mirroring his view of legality, Kelsen understood democracy as also being grounded in a "relativistic value theory of positivism" (1955, 39, 97 n. 70). The core feature of positivistic relativism is not nihilism or value skepticism, i.e. that there are no values at all or that there is no moral law or order, but rather a rejection of "philosophical absolutism" (16). While Kelsen argued that democracy expressed through majoritarian rule "secures the highest degree of political freedom that is possible within society" for

[46] A sophisticated analysis of the relationship between Kelsen's legal theory and his political philosophy is offered by Lars Vinx's *Hans Kelsen's Pure Theory of Law: Legality and Legitimacy* (2007), a work to which I am much indebted. My argument here mirrors Vinx's central contention that Kelsen "is not wearing two different hats when speaking as legal theorist and when speaking as political philosopher" (16). Vinx offers a comprehensive analysis of Kelsen's pure theory within various contexts as applied to his conception of the rule of law, his theory of democracy, his defense of constitutional review, and his views on international law. My general argument regarding how the institutional foundations of juristocracy cannot be traced to Kelsen's original proposal for a constitutional court draws upon one particular aspect of Vinx's argument.

its members, he also conceded that this alone cannot offer a self-sufficient justification for the acceptance or maintenance of a democratic form of government (25). In other words, value judgments in general as well as the particular political judgment that democracy is a desirable form of government cannot be sustained or settled indefinitely. The challenge of deciding in favor of democracy amongst a multiplicity of alternative political orders, Kelsen believed, was a task that must be left to politics. The formal legality of the constitution had to be safeguarded through constitutional courts so that "the constitution itself, the list of rights and principles enjoying the protection of constitutional form is […] open to democratic change" (Vinx 2007, 165). In other words, the positive determination of fundamental rights and values that occurs in the political arena is not only a function that was formally reserved to the legitimating forces of democratic majorities, but is also a crucial process for which citizens and their representatives autonomously bear the responsibility for sustaining democracy. Kelsen understood that once we accept that the central purpose of legality is to maintain "an open framework for the ongoing renegotiation of the identity of the community," it was only logical that the constitutional court had to "be tailored to fit the theory of democracy [rather than] the other way around" (166, 170). While acknowledging that constitutional review as "negative" legislation can never be strictly divorced from all political elements, the constitutional court should not only aspire to be apolitical, but more importantly ought be constrained through institutional design in order to fulfill this specific role.

To summarize, the primary role of the constitutional court, according to Kelsen, was in policing the constitutionality of statutes within the confines defined by the precise language of the constitution. Similar to how the purpose of the American model of

judicial review was in monitoring legislation that violates the "manifest tenor of the Constitution," the Austrian model was also directed towards reviewing the lawmaker's formal scope of competence rather than to lay down general norms based on some abstract principle, fundamental value, or extra-constitutionality. Contrary to contemporary forms of constitutional review, the "constitutional protection of basic rights was not driving the effort that culminated in the Austrian Constitution" (Paulson 2003, 237). Despite how the Austrian model is widely regarded today as a prototype for constitutional courts erected after World War II, Kelsen's actual legacy is far more questionable in light of how contemporary courts seem to merely borrow the general form or appearance of his model, but go beyond these intended functions.

4.5. Shifting the Purpose: From Constitutional Coordination to Constitutional Settlement

Despite far-reaching historical differences and legal systems that reflect altogether different traditions, the development of constitutional review in the United States and Austria manifest striking similarities in regards to their definition of the appropriate scope and function within a constitutional government. The primary function in both cases was aimed at resolving conflicts that emerge between the federal and state governments. In such cases, constitutional review was largely viewed as a means to ensure the uniformity of law by asserting the supremacy of federal over state laws. While the possibility to review and annul federal enactments was not precluded, these cases were strictly limited to addressing questions of jurisdiction and formal institutional competence. Furthermore, the scope of constitutional review in both prototypes did not

originally extend to the judicial enforcement of rights as expressed through their shared repudiation of a written charter of rights. By defining the powers of the courts narrowly, the prototype of constitutional review was not seen as incompatible with legislative supremacy where elected officials bear the primary responsibility for constitutional decision-making. While constitutional review cannot be completely detached from this process, it at best only played a marginal role in providing negative oversight rather than positive guidance. In this regard, the original purpose of constitutional review can be viewed as assisting or, in some cases, even facilitating the political construction of higher law outside of courts. This is in accordance with the design paradigm of early modern constitutions since constitutional review was merely a coordinating mechanism for constitutional politics outside the courts.

The institution of constitutional review in democracies today seem to employ a completely different rationale. Courts not only exercise oversight over issues concerning federalism or separation of powers, but exert increasing levels of control over substantive issues ranging from fundamental rights to domestic policy. The new constitutionalism puts an enormous amount of trust in courts to perform the task of fulfilling both written and unwritten mandates of the constitution which inevitably accompanies a higher sense of discretion. By assuming the role of the final, authoritative interpreter of higher law, courts have come to enjoy an elevated status in setting guiding principles and general norms for constitutional governance (Robertson 2010). In this regard, contemporary constitutionalism represents an altogether "different understanding of the constitution," one in which "constitutional norms, in particular fundamental rights, are something different from strict legal rules [but rather] constitute a set of values that are to be shaped

by the Court" (Öhlinger 2003, 220). The practice of contemporary constitutional review is not simply an expansion of judicial power, but suggests a fundamental shift in the nature of the judicial function.

The recognition of judicial protection for constitutional charters of rights is of fundamental significance for the political theory of the new constitutionalism. Many have celebrated the post-war constitutional order as expressing a broader and deeper appreciation of the importance of rights, arguing that it represents a perfection of the ideals of a 'true' constitutional democracy (Dworkin 1977). Its emergence was regarded as reflecting a global political consensus on the centrality of human rights as a requirement for "sound and moral" constitutional governance. As Lawrence Beer (1992) describes, constitutional reforms that occurred in the west after World War II captured a "seriousness and comprehensiveness" in its commitment to human rights for which it became a model of "human rights constitutionalism" to be exported to new democracies in various parts of the world (1, 11-12). From an institutional point of view, the protection of rights has always been tailored to the question of empowerment, namely, identifying the sources of danger to liberty and the entities that need to be empowered in order to effectively prevent or counteract such a threat. When modern constitutions first emerged, rights were understood as a protection against the monarchical executive from infringing the popular will. As a result, the legislature was assigned the role of guardians of basic rights and liberties because they were seen as the most effective check. Although access to the legislature itself may not have always been entirely inclusive, parliamentarism nevertheless embodied the basic idea of empowering the beneficiary to protect their own well-being. Ultimately, constitutional liberty was presumed to be best

protected by the collective power of citizens expressed through their representatives. People exercised rights and managed to preserve them only when they were powerful enough to defend them through politics. Constitutional review, on the other hand, was seen as merely playing a secondary or marginal role for achieving this purpose. Thus, early modern constitutionalism retained a commitment to the idea that the defense of a constitutional order must ultimately reside within politics itself. The emergence of a "human rights constitutionalism," however, recognizes the constitution as a fundamental law in a manner that departs from what was in principle a majoritarian constitutional paradigm.

Contrary to those who have celebrated this development as a major accomplishment, Carl Friedrich (1951) soberly argued how the tendency to put rights at the forefront of constitutional reform in the post-war era was a result of a "negative revolution." In looking beyond the descriptive features of the new constitutions—such as the affirmation of human dignity and the extensive codification of rights— he explains how this development was not an expression of some "positive enthusiasm for freedom" but rather a "negative distaste for a dismal past" (14-15). What is notable about this revolution was how it advanced a "reaffirmation of human rights" but was qualified by "efforts to restrict these rights in such a way as to make them unavailable to the enemies of constitutional democracy" (18). As discussed in the previous chapter, the constitutionalization of rights was historically part of an effort to institutionalize the imperatives of 'militant democracy' which was not limited to a distrust of traditional parliamentary sovereignty but "deeply imprinted with a distrust of popular sovereignty" (Müller 2011, 128). It not only set forth to protect the individual rights of people from

legislative encroachments but was more broadly directed against the people themselves in their *collective* exercise of political freedom. While masked in the inherited vocabulary of liberalism and democracy, contemporary constitutionalism is based on a political theory that does not simply seek to rebalance higher law and popular sovereignty, but to redefine the relationship in a way that the latter is subsumed under the former.

Contemporary constitutional review was an institutional expression of this emerging consensus and was accordingly re-created or re-imagined from its historical prototypes. Rather than supplementing the efforts of constitutional politics outside the courts, the relationship was inversed where courts stood outside of politics *for* the purpose of settling constitutional disputes with final authority. Larry Alexander and Frederick Schauer (1997), for example, suggest that constitutionalism primarily serves to maintain stability by "coordinat[ing] for the common good the self-interested and strategic behavior of individual officials" (1376). If the role of constitutional settlement is left to politics, they warn that the constitution will inevitably be subject to multiple interpretations thereby causing "interpretive anarchy" (1379). They conclude that stability demands a "preconstitutional understanding" that courts are best suited to provide an authoritative settlement on constitutional disputes, whose interpretation is binding upon all others (1369). The expansion of judicial control over political branches is not a coincidental, but a primary facet of the "negative revolution" that was adopted in the constitutional design of post-war constitutions. What appears as an elevated commitment for the protection of individual rights was in fact a commitment to protecting the integrity of the constitutional order against the collective power of citizens and representatives alike to engage in constitutional decision-making.

In reality, the distinction between coordination and settlement may be difficult to maintain as there is no such thing as perfect finality or settlement in the realm of constitutional politics. As Mark Graber (2013) points out, "[c]onstitutional conflicts are settled politically, not legally" where the dispute is resolved "only when the political forces backing the losing issue concede defeat, lose political interest in the issue, or [...] are slaughtered on the battlefield" (135). While this may be true, the new constitutionalism provides institutional incentives for channeling constitutional battles to be fought on the legal rather than political plane. Considering how the choice between judicial supremacy and legislative supremacy "is not between order and chaos or stability and anarchy, but between different types of stability and different mechanisms for achieving it," post-war constitutions create structures that operate under the presumption that constitutional coordination demands authoritative settlement by law rather than politics (Kramer 2004, 234). The actual efficacy of constitutional review may ultimately rest on the political acceptance of courts as a guardian of constitutional values and fundamental rights, as well as on the continued vitality of this commitment. However, when the people "choose [constitutional] review as a mode of enforcing the contract of government, they also choose to take the bitter with the sweet of the institution they have chosen" where they inevitably "must surrender some power to govern to the judges" (Shapiro and Stone Sweet 2002, 164). Although institutions alone may not constitute a sufficient condition that informs this choice, it is a necessary condition for the transition towards juristocracy.

CHAPTER 5: THE ETHICAL FOUNDATIONS OF JURISTOCRACY

5.1. Introduction

In *The Hollow Hope* (2008), Gerald Rosenberg questions the validity of the popular myth that the Supreme Court of the United States is an iconic guardian of fundamental rights for its role in initiating broad scale social reform. In American society, decisions such as *Brown v. Board of Education* (1954) or *Roe v. Wade* (1973) have achieved the status of canon and are celebrated as examples of the Court's competence in "protecting minorities and defending liberty, in the face of opposition from the democratically elected branches." Rosenberg calls this the "Dynamic Court view," which holds that courts are "powerful, vigorous, and potent proponents of change" (2). The opposite view, which Rosenberg refers to as the "Constrained Court view," maintains that courts are "weak, ineffective, and powerless" in possessing a limited capacity to bring about real political and social change (3). While both views have coexisted throughout the history of American political development, Rosenberg argues that the constrained court view "more closely approximates the role of the courts" in practice and that courts are "much less exceptional than is generally thought" (35). Although decisions such as *Brown* or *Roe* may have symbolic or doctrinal value, he concludes that their actual impact outside the legal arena has been much less significant than what people have presumed.

The most interesting question raised by Rosenberg's work, however, is not his conclusion but rather derived from his diagnosis. Indeed, his effort to debunk the illusion of dynamic courts has been influential precisely because it is counterintuitive (Delgado 2008). Evidence increasingly suggest that the 'hollow hope' is not simply an aberration

limited to the United States, but has become a global phenomenon. Comparative studies have indicated the high degree of public trust towards courts as well as their moderate success in achieving progressive social reform in various countries (Epp 1998; McClain and Fleming 2005). In a cross-national analysis of diffuse support towards national high courts in the United States and in Europe, Gibson, Caldeira, and Baird (1998) discover a "strong positivity bias in popular reaction to national high courts" (356). They illustrate how the dissatisfaction with particular decisions do not necessarily translate into negative attitudes towards the courts in general. Furthermore, they point out how "to know courts is to love them," as citizens are more likely to "adopt an uncritical and unrealistic" acceptance of courts the more they are aware of and exposed to "symbols of justice, judicial objectivity, and impartiality" promulgated by judges (345). These trends also seem to be correlated to a noticeable growth in litigation, particularly those concerning the protection of constitutional and statutory rights.[47] While the judicialization of politics has occurred with different degrees of intensity in diverse institutional, political, and cultural settings, Rosenberg's account of the 'hollow hope' reflects a worldwide trend that is becoming symptomatic across constitutional democracies worldwide.

The 'hollow hope' is not simply some fictional myth but has had real influence in actual political processes as well. Courts are increasingly being involved in determining national policy in part due to the adoption of a comprehensive list of rights in addition to

[47] The comparative data on litigation is surprisingly scarce. A frequently cited study is that offered by Christian Wollschlager (1998), which compares litigation rates per 1,000 population in thirty five countries in different parts of the world. This data, while informative, is not only outdated, but is also limited in scope as it primarily focuses on civil litigation while not accounting for litigation grounded in constitutional and statutory rights claims that has markedly exploded over the past few decades. As Martin Shapiro and Alec Stone Sweet (2002) point out, "[l]itigation and the threat of litigation […] has become a commonplace" for contemporary democratic politics with the proliferation of constitutional review mechanisms (181).

the enhancement of their own powers through novel interpretations of existing laws and constitutional provisions. Even elected officials, who are directly responsible for creating policy, have grown more deferential in allowing courts to play a major role in mainstream politics over the past few decades. Ian Shapiro (2003) comments how American politicians often "feel they cannot openly defy courts with which they strongly disagree" despite possessing the authority to limit the jurisdiction of courts (64). While parties have often criticized specific decisions that do not conform to their ideological interests, they maintain a general acquiescence towards courts—though perhaps not towards individual judges, but towards the judicial branch or function in general. In reviewing the comparative literature on the global expansion of judicial power, Leslie Goldstein (2004) similarly notices how "the political ethos [in Europe] is such that legislative forces refrain from attempting to override the court" despite how direct forms of checks, such as constitutional amendments, are "considerably easier" (625). The increasing degree of deference and trust that is afforded to courts thus raises a challenging question for constitutional democracies today as it underlines a crucial detail for understanding how contemporary politics is becoming increasingly judicialized.

This chapter traces the intellectual foundations informing the guiding beliefs, cultural attitudes, and ethos that have supported the worldwide convergence towards juristocracy. The causes underlying the expansion of judicial power is only in part structural. Institutions are never self-fulfilling, but are sustained by patterns of behavior that reflect "historically conditioned attitudes about the nature of law, about the role of law in the society and the policy, about the proper organization and operation of a legal system, and the way law is or should be made, applied, studied, perfected, and taught"

(Merryman and Pérez-Perdomo 2007, 2). In this regard, institutions embody a set of ethical and cultural norms implicit in the behavior of those who are involved, which are subsequently made explicit in formal constitutional rules as well as in political practice. While terms such as culture or ethics are frequently used to identify practices or attitudes specific to a particular community or group, the idea need not be defined narrowly considering how "a *constitutional* culture can encompass several nationalities" (Lutz 2006, 14, emphasis added).[48] In other words, a constitutional culture or ethos is not necessarily a sub-category of national or local culture, but may also be described as a set of attitudes and behaviors that are required for the creation and maintenance of a specific institutional arrangement.

The development of a "global legal culture" or "global legalism" as applied to courts at both the national as well as the supranational or international level has been one of the driving forces for the judicialization of politics (Koch 2003; Posner 2009). Heinz Klug (2000) explains that the proliferation of constitutionalism in the second-half of the twentieth century has been accompanied by the emergence of a "thin, yet significant, international political culture, which is shaping the outer parameters of feasible modes of governance" (5-7). From a theoretical viewpoint, the foundations of this culture are

[48] For example, existing studies have generally accepted a "cultural explanation" defined in the narrower sense, regarding the causes underlying the frequency in which litigation is invoked in various countries. They posit that "litigiouness [is] the result of rights consciousness and popular attitudes towards claiming" that are specific to a particular context or culture (Van Aeken 2012, 230). The standard argument is that the rate of litigation will depend on underlying attitudes towards adversarial proceedings that are weak or absent in indigenous communities that value social harmony and social relations, such as in East Asian countries (Ginsburg 2003; Hahm 1986). These cultural differences, however, should not be overstated as they tend to mask common behavioral trends, such as the proliferation of "adversarial legalism," that have impacted even those traditionally 'less litigious' societies (Galanter 1992; Kagan 1997). While particular aspects of culture do yield explanatory value for local practices, this should not preclude the possibility of recognizing general, or even universalistic, tendencies spreading amongst constitutional democracies.

rooted in a transfer of *perceived* legitimacy. The increasing popularity of litigation and judicial recourse as a means for social reform is but one particular expression of the changing attitudes toward the role of judges in a constitutional democracy. According to Karol Soltan (2006), the legitimacy of courts today are assessed on the basis of "the legitimacy of its *ends* and the *effectiveness* with which it pursues those legitimate ends" (118, emphasis added). This understanding departs from conventional notions of democratic legitimation and rather draws upon the alleged benefits of expressing fidelity to a higher law of neutrality or justice associated with the prototype of courts. A reasonable point of departure would thus be to identify the sources of this "larger shift in the process of legitimacy enhancement that occurs as the world comes out of the crisis of the twentieth century" (116).

In what follows, I argue that the enhanced legitimacy of judicial power is rooted in the development of a particular understanding of constitutions as fundamental law that emerged in response to the intellectual and political crisis of totalitarianism. The first section provides an overview of the basic social logic of courts as a triadic dispute resolving mechanism (5.2.). The inquiry reveals how the prototype of courts suffers from an inherent instability that necessitates the use of judicial myth for the purpose of maintaining social and institutional legitimacy. The historical and political context that inform this judicial myth, however, has changed as constitutions were elevated as expressions of meta-positive norms beyond the written text (5.3.). The ascendance of constitutions as fundamental law reflect an effort to place certain core principles, such as natural law or justice, beyond the reach of democratic majorities who were considered the source of the totalitarian crisis. The elevated status of law, which was accompanied by a

corresponding loss of faith in politics, has been gradually internalized within ordinary political practice through the path dependent force of legalized procedures and the creation of new institutions that sought to channel political disputes towards the judicial processes (5.4.). In conclusion, these changes reflect how juristocracy is grounded in an impoverished view of participation and citizenship that has become a part of the political ethos of contemporary democracies (5.5.). Juristocracy is ultimately sustained by a form of political socialization that has gradually instilled elected officials and citizens with the expectation that only courts are authorized to decide or are capable of deciding constitutional questions.

5.2. The (In-) Stability of Courts and the Role of Judicial Myth

Courts occupy a unique space within a system of constitutional government. Unlike other branches, judges are not elected by the people but require a distinct recruitment process.[49] Furthermore, they generally enjoy longer tenure than political officials, ranging from as short as four years, usually with a possibility of renewal, to serving on the bench for life, as in the case of federal judges in the United States. Despite significant variance in the ways in which courts are established, constitutional governments share the basic principle of insulating judges from political pressures for which they become only indirectly accountable to the people. The classic justification for

[49] There is significant variance in the judicial recruitment mechanism across different legal systems. The two major modes of appointment are nomination or election, but some countries adopt a hybrid model that mixes elements of both (Stone Sweet 2000). Countries that have a constitutional court usually seek to divide the nomination authority amongst the three branches where each branch nominates one-third of the members of the bench. Where election systems are used, a qualified or supermajority (e.g. a two-thirds or three-fifths vote) within a parliamentary body is required for appointment which usually demands building coalitions across party lines.

judicial independence is best captured by Alexander Hamilton's statement in *Federalist* #78 that "the judiciary, from the nature of its function, will always be the least dangerous branch to the political rights of the constitution." Mirroring Montesquieu's assessment in *The Spirit of the Laws* ([1748] 1989) that "[o]f the three powers above mentioned, the judiciary is next to nothing" (pt. 1, bk. XI, ch.6), Hamilton emphasizes how the judiciary holds "no influence over either the sword or the purse, no direction either of the strength or of the wealth of the society, and can take no active resolution whatever." The independence of the judiciary is necessary precisely because judges possess "neither Force nor Will," but merely the power of "judgment" in interpreting the law. The source of the courts' authority is mandated from the constitution which is the ultimate expression of popular will. It is this indirect mandate from the people through the medium of the constitution that allows courts to formally maintain a co-equal status with the elected branches. The distinguishing characteristics of judicial power as well as the natural feebleness of its functions have been considered the hallmark of the prototype of modern courts.

This theoretical justification alone, however, falls short of ensuring the social legitimacy of judicial power in practice. The rationale underlying judicial independence and the conditions for its legitimacy can thus be better approached from a functional analysis of the role courts play in politics, governance, and society. According to Martin Shapiro (1981), the "basic social logic of courts" is to serve as a triad in the resolution of conflict (1). Whenever two persons or parties come into a dispute that they cannot themselves resolve, societies have universally called upon a third party for assistance in achieving a resolution. Shapiro explains how there have been—and, though with lesser

prominence, still are— diverse forms of triads throughout history, such as in traditional societies where the two parties agree to a mediation or an arbitration that is overseen by a respectable elder of a community. Any triad, however, faces an intractable dilemma. On the one hand, the third party's reputation for neutrality is crucial for the social legitimacy of the triadic structure itself. Otherwise, when the third party offers a decision in favor of one of the two parties that are involved, a shift will occur where the loser will perceive the triad as breaking down into a dyad. The utility of the structure is thus contingent upon disputants believing that the third party was unbiased or fair. Yet in resolving disputes, the third party will constantly run the risk of compromising their reputation for neutrality in being pressured to declare one party the winner, and the other the loser. Shapiro uses this observation to underline how the political and social legitimacy required for the successful maintenance of any triadic dispute resolving mechanism will rely on the presence of "consent" (2). Stability can be secured only when both parties have voluntarily agreed to choose the triad as the appropriate means for the resolution of their dispute. In contrast to classical forms such as a mediator or an arbitrator, courts face an even deeper challenge due to how law serves as a "substitute […] for the particular consent of the parties," and the office of judges a "substitute […] for their free choice of a particular third man to aid in the resolution of their dispute" (5). In other words, courts are the most unstable form of triadic dispute resolution because law and office can never become a perfect substitute for consent. As a result, Shapiro argues that "[c]ontemporary courts are involved in a permanent crisis because they have moved very far along […] from the basic consensual triad that provides their essential social logic" (8).

Shapiro's observation regarding the instability of law and of courts conversely suggests the necessary conditions required for judges to maintain their legitimacy. In order for the judicial system to function as a credible proxy for the lacking degree of consent, the *appearance* or *myth* of judicial neutrality needs to be actively established and accepted. The most obvious means has been to "stress the institutional separation of courts from the remainder of the political system" so that judges are not perceived as mere agents of those to whom they owe their office (20). This, however, is insufficient and must be supplemented by the use of highly complex and technical legal rituals that further seek to detach the office of the judges from outside influence. Judges must maintain the stance that it is not their personal inclination or preference but the law that determines which party wins or loses. The invocation of law, however, will not always persuade litigants of the neutrality and independence of courts if the substantive judgments of the judges too frequently or egregiously appear to favor certain groups or blatantly offend popular notions of fairness. Courts must therefore invest enormous formal and informal efforts in maintaining their reputation as a credible third party. For example, the whole practice of writing judicial opinions is designed to persuade the parties and ultimately the public that there are good legal reasons for the decisions reached which are valid apart from the preferences of judges.[50] The debate over the

[50] In analyzing the ways in which the legal system and legal profession in America (and England) offers a unique advantage over that of the French in providing a counterweight to the democratic pressures of society, Alexis de Tocqueville ([1835 & 1840] 2000) writes:

> The English and the Americans have preserved the legislation of precedent; that is to say, they continue to draw from the opinions and legal decisions of their fathers the opinions that they will hold in matters of law and the decisions that they will take. […] The English or the American lawyer inquires into what has been done, the French lawyer into what one ought to wish to do; the one wants rulings, the other reasons. […] Our written laws are often difficult to understand, but each man can read them; there is nothing, on the contrary, more obscure for the vulgar and less within his reach than

appropriate scope of judicial power thus involves contemplating the means for which courts can maintain their role of social control while at the same time sustaining diffuse support without risking their own stability.

Alec Stone Sweet (2000) illustrates how constitutional review in contemporary democracies follows the same logic of the triad and is thus subject to the same dilemmas. He describes how the judicialization of politics occurs through two general stages. The first stage is how "a TDR [i.e. triadic dispute resolution] mechanism develops authority over the normative structure in place in any given community." The "normative structure in place" refers to the highest positive law of a society, which is the constitution. The second stage is the way in which "the third party's decisions […] come to shape how individuals interact with one another," a process which he describes as "triadic rule-making" (13). Under this process, delegation will occur when the two parties of the dispute fail to reach a resolution on their own and determine that turning to courts is "less costly, or more likely to yield a desired outcome" (15). What is unique about constitutional litigation, according to Stone Sweet, is how the resolution ultimately leads to a broader discussion on how people ought to behave through a general feedback effect on society that will inform future disputes. The fact that more is at stake for the

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> legislation founded on precedents. […] The French lawyer is only a learned man; but the English or American man of law resembles priests of Egypt; like the, he is the *lone interpreter of an occult science*. (254-255, emphasis added)

Tocqueville is referring to the common law doctrine of *stare decisis* and is describing how it serves a social function in shielding American judges and lawyers from the egalitarian fervors of the people. The use of precedent is just another example of a ritual that serves to maintain the social legitimacy and stability of courts. Today, the acceptance or rejection of *stare decisis* fails to offer a meaningful distinction between the common law and civil law traditions, as legal practitioners in the latter are also increasingly drawing upon the force of precedent even when it is not required by the legal system itself. For this contemporary trend, see Merryman and Pérez-Perdomo 2007, 46-47.

disputants as well as for the members of society at large suggests that constitutional judges will need to be even more cautious in maintaining the appearance of legitimacy.

Stone Sweet reiterates the two main strategies available to constitutional judges for this purpose (15-17). The first is how judges will seek to defend their decisions normatively, as constrained and even preordained by the rules expressed in the constitution. Judges must first recast the dispute as a conflict about the meaning and applicability of a particular constitutional provision and present their decisions as the result of pure legal reasoning. In doing so, they obtain the appearance that they have taken the arguments of each party seriously, while concealing whatever influence personal preferences may have played in their decision. Second, judges will seek to anticipate and, at least, partially accommodate the disputants' as well as the broader community's reactions to their decisions. The calculus that Stone Sweet presents in his analysis is reproduced in Figure 5-1. Positions A.1 and B.1 each indicate the substantive outcome desired by A and B, who are the parties to the dispute. Decisions situated between positions A.1 and A.2 (for A) *or* B.1 and B.2 (for B) represent the range of outcomes that the judges believe will not provoke either side to refuse compliance. The space between B.2 and A.2 thus constitutes the judges' assessment of the spectrum of decision-making outcomes that will lead to the resolution of the dispute without sacrificing their legitimacy. Stone Sweet believes that this calculus guides judges to fashion constitutional settlements that avoid the declaration of a clear winner or loser, where each disputant can at least achieve a partial victory. In harder cases, where the positions of A and B are more polarized, he argues that judges have a real interest in deliberately creating such a space through the use of legal argumentation. While Stone

Sweet acknowledges that protest or resistance will be unavoidable in response to certain decisions, he presumes that judges will nonetheless generally behave in a manner that is constrained by their inherent instability.

Figure 5-1: The Dispute Resolver's Calculus (Source: Stone Sweet 2000, 16)

An objection to Stone Sweet's account is whether the calculus will actually be effective in ensuring that judges will generally stay within the boundaries of B.2—A.2. His formulation of the judges' calculus falls back on the classic view that courts are "naturally feeble" and will thus be continuously apprehensive about losing the appearance of neutrality and objectivity. The calculus amounts to an internalized political constraint where the judges' concern for having their rulings carried will in most circumstances be a sufficient check that outweighs other considerations stemming from personal, political, ideological, or even genuinely normative considerations. While it is not completely unreasonable or unrealistic to expect that judges will rarely behave as rogues who are completely detached from any constraint whatsoever, the calculus exaggerates the degree in which the concern for social legitimacy can function as a meaningful check. Empirical evidence suggests that the classic presumption is increasingly becoming harder to maintain in practice. For example, Gibson, Caldeira, and Baird (1998) illustrate that public support towards national high courts in the United States and in Europe has increased in correlation to the growing level of awareness of the

courts' activities. Under Stone Sweet's framework, the more visible and salient courts become in society, the more likely that judges will face greater pressures to rule strategically by avoiding extreme conclusions. However, Gibson, Caldeira, and Baird notice the exact opposite where the frequent "exposure to the legitimizing symbols" of courts contributes to institutionalizing their legitimacy amongst the people who seem to have internalized a "positivity bias" (356). Once courts have accumulated a certain level of prestige and reputation, the people will less likely withdraw general support even when they are discontent with the particular outcome of a specific decision. The fact that courts are constantly in the public spotlight actually serves to reinforce their institutional legitimacy, rather than to provide a check against more extreme—or less popular—decisions.

One possible explanation for this discrepancy may be that judges are becoming more skillful in providing persuasive normative justifications for their decisions. Kim Scheppelle (2002b) lists several "techniques" that judges around the world have commonly employed to expand their own institutional power. These include activating the justiciability of preambles, elaborating "supralegal" or "metaconstitutional" principles animating the constitution, and modifying procedures or relaxing standing rules to expand the reach of their jurisdiction. The fact that judges are becoming more creative in developing new sources of legitimacy enables them to be less constrained by the logic of Stone Sweet's calculus, as they are capable of bypassing the pressures to offer a compromise resolution between the interests of the disputants. On a deeper level, however, the high degree of public support may stem from changing attitudes towards the institution of law and towards judging itself. When contemporary judges "use their

powers to stand up for a compelling moral vision of the constitutional order," Scheppelle writes, "they can often get the political license to go on being activist in the name of individual rights." The increasing level of judicial discretion is only in part due to the judges' success in packaging their decisions with legal argumentation, but suggests a larger shift regarding the general appeal of (meta-) constitutional norms in society.

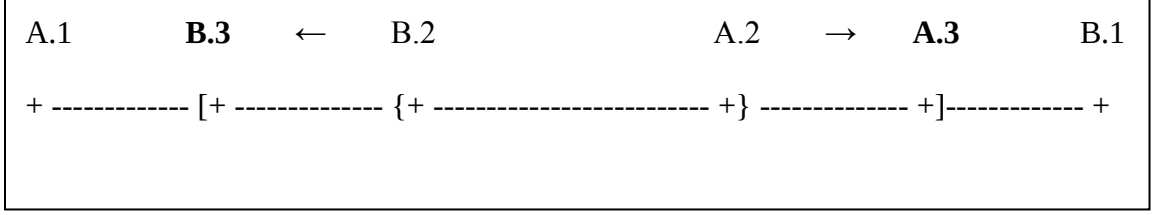
Judges have indeed grown more confident over the past few decades in understanding their own role as the great equalizers in society by openly reaching beyond the written text. As former Chief Justice László Sólymon of the Hungarian Constitutional Court once remarked, judges possess the authority to elaborate "the 'invisible constitution'—beyond the [control of both the] Constitution, which is often amended […] [as well as] future Constitutions" (quoted in Ackerman 1992, 144 n 29).[51] This self-description is not limited to constitutional judges in the civil law tradition but has also been shared by judges in the common law tradition. In a similar spirit, former Chief Justice Aharon Barak (2006) of the Supreme Court of Israel argued that the role of a judge isn't simply to act as a mirror of existing laws in resolving disputes, but to actively engage in judicial legislation in order to bridge the gap between law and society. The contemporary affirmation by professional judges to openly embrace judicial activism moves far beyond Montesquieu's ([1748] 1989) classic statement that the judicial role is "no more than the mouth that pronounces the words of the law" (pt. 2, bk. XI, ch.6).

The basic logic of the calculus must therefore be revisited in light of these observations. The need to maintain legitimacy through the use of a fictional myth is

[51] Judge Sólymon's statement regarding the justiciability of the 'invisible constitution' came in *The Death Penalty Case* (Decision 23/1990) where the Hungarian Constitutional Court declared capital punishment unconstitutional based on a broad construction of the right to human dignity.

based on a static presumption regarding the inherent instability of courts and more broadly the limits of law as a shared source of appeal. Judicial authority and the scope of discretion expands only in part when judges are able to present more compelling normative reasons, but more importantly when the source of the authority itself—the constitution—obtains a higher degree of normative force. As suggested by Figure 5-2, the judges' concern for internally exercising restraint is relaxed once they are aware that the judicial myth has been institutionalized and fortified within society. Judges will be less concerned to stay within the boundaries of B.2 and A.2 but will gain more leeway to issue less moderate or more polarizing decisions, such as between B.3 and A.3, once they are aware that A and B will acquiesce to the court's decision despite expressing discontent in the shorter term. As Stone Sweet acknowledges, considering how constitutional litigation—particularly those concerning fundamental rights and principles—entails decisions that go beyond the interests of the litigants involved, there is a broader social and ethical dimension to the way in which the calculus of the judges has been modified.

Figure 5-2: The Dispute Resolver's Modified Calculus



Constitutional norms are no longer simply rhetorical tools that judges reluctantly use to maintain a formal appearance of neutrality but are increasingly accepted as a genuine expression of a commitment to a higher fundamental law. The "basic social

logic" concerning the court's legitimacy is thus altered once the source of judicial authority is infused with an appeal to meta-positive norms. The judicial myth itself takes on a new function not merely as a constraining factor, but as an enabling factor for judges when constitutional provisions are viewed as being rooted in normative principles beyond the mandates of the written text. What was originally a defensive concept in protecting the courts' innate institutional frailty has been reimagined in the contemporary era as an affirmative concept where courts are not simply "courts of law but [stand above positive law as] courts of justice; not only servants of government, but its supervisors" (Shapiro and Stone Sweet 2002, 167). As guardians of the constitutional order, courts are increasingly implicated in safeguarding abstract principles above and against general laws promulgated and obeyed by elected representatives who are directly accountable to the people. Even when this idea is to a large extent nothing but a fiction, the force of myth is powerful when it alters our basic perception and rules of recognition about the role of courts in a democracy.

5.3. The Ascendance of Constitution as Fundamental Law

The conventional narrative regarding the emergence of constitutionalism and the rule of law in Western political thought stems from the historical necessity for establishing a stable political order that can rationalize or neutralize conflict. When the religious wars of the sixteenth and seventeenth centuries came to an end, secularized conceptions of the modern state and of constitutionalism were called upon to fill this vacuum of authority by offering a credible "anchoring structure" for the "multiple loyalties" of divisive sectarian religions (Levinson 1988, 52, 119). The rule of law

represents the ideal that a single set of rules can be equally and impersonally applied to all. Whereas dependence on the private will of others would be considered a loss of autonomy and therefore illegitimate, obeying laws that the people have collectively participated in making is an expression of self-government where citizens are not being dominated or forced by the arbitrary will of others. As such, law is understood as a highly rationalized process that involves a set of general rules and procedures for decision-making and conflict resolution.

This simplistic characterization, however, can be misleading when it is detached from the intellectual context in which the idea of the rule of law has evolved in accordance with changing social and political conditions The ascendance of constitutionalism in the contemporary era as a normative structure above and beyond the reach of ordinary politics is more directly a response to the moral and political crisis that culminated in the twentieth century with the emergence of totalitarianism. During the time of war, intellectuals argued that Nazism and fascism did not simply represent a form of barbarism against humanity but was an expression of a deeper and broader crisis of modern Western civilization, namely of the Enlightenment itself. The inability to prevent the emergence of totalitarian movements was viewed as a consequence of the way in which the Enlightenment had negated all aspects of objective reason in the name of an all-encompassing subjective rationality. This is what Max Horkheimer ([1947] 1974) and other critical theorists have called the "eclipse of reason." According to Horkheimer, subjective reason refers to "the faculty of classification, inference, and deduction" independent of the specific content of its endeavors. It is narrowly concerned with "the adequacy of procedures for purposes more or less taken for granted and supposedly self-

explanatory" (3). Objective reason, on the other hand, refers to the hierarchical system of values or principles that can serve as the ultimate ends for which individuals and society can adjust their means. The Enlightenment was initially characterized as an effort to challenge the monopoly on claims towards objective ends by traditional forms of authority, such as religion or custom, through the use of subjective reason. Paradoxically, however, the Enlightenment's yearning for humanity's progressive emancipation resulted in undermining not only irrational forms of authority but also "the objective concept of reason itself [which was] the source of power of their own efforts." The advancement of reason as "an organ for perceiving the true nature of reality and determining the guiding principles of our lives" has in effect led to the "liquidat[ion] of [reason] itself as an agency of ethical, moral, and religious insight" (18). The result was a radical dissociation of subjective and objective reason, or what is better known in contemporary political and social thought as the decoupling of 'facts and values' or 'facts and norms.'

Devoid of any sort of metaphysical underpinning, Horkheimer argued that "reason, the highest faculty of man" has been formalized or hollowed of all objective ends by the way in which it "is solely concerned with instruments, nay, is a mere instrument" (105). In a sense, it has reached a state of extreme freedom or perhaps even a state of license where there is no rational foundation for claiming objective truth that is compatible across different sets of values. Ends are no longer pursued for their own sake but are always pursued as a means for the sake of another which spirals into an infinite regression. The crisis of the Enlightenment was characterized by a pervasive nihilism in all aspects of human existence as there were no common grounds for affirming or rejecting any sort of principle or belief in reference to another. It was no longer

meaningful for the individual to maintain any form of principle or conviction since all truth claims have become relative.

This moral crisis was viewed as directly fueling the political crisis of the time as the extreme embrace of individual autonomy had paradoxically led to the parallel increase in passivity and conformity in political life. Freed from all traditional and hierarchical moral ties that once constituted one's social identity, the self descends into a state of total isolation in which "the mass of men lead lives of quiet desperation" (Thoreau 1910, 8). The problem was that democracy was no longer able to provide meaning for political life, but rather assisted this degradation. Horkheimer ([1947] 1974) indicates how the philosophical foundations of modern democracy originally rested on the assumption that "the same spiritual substance or moral consciousness is present in each human being." The radical egalitarianism regarding the moral status of individuals was what informed the defining characteristic of democracy as the collective expression of popular will. While democracy rests upon the "respect for the majority," this commitment "did not itself depend on the resolutions of the majority" but was considered an objective principle (26-27). However, once this philosophical foundation has been eroded with the 'eclipse of reason,' democracy was reduced to raw expressions of the interests of the people which fails to "provide any guarantee against tyranny" (28). That democracy was no longer able to offer an objective standard to determine whether certain forms of political movements were unacceptable suggested that there was no obstacle for the rise of totalitarianism within the political processes. Since all that is left for the modern self to make sense of social existence is a debilitating instrumental rationality, the individual becomes the victim of—or, rather, voluntarily submits to—the political

mysticism of totalitarian authority. The Enlightenment project thus resulted in "a rationalism so ardent that it overshoots its own rationality" (79). Rationality reverts to irrational myth, disenchantment leads to reenchantment, and "the accretion of freedom has brought about a [fundamental] change in the character of freedom" (98). In this respect, Horkheimer believed that the inability of democracy—and of the Enlightenment— to present an objective anchor for individuals to resist the subjectivization and formalization of reason was what caused the rise of totalitarianism. Due to how the philosophical foundations of democracy was hollowed out or formalized, totalitarianism was able to take over functions once performed by objective reason through a political mysticism rooted in the legitimation of masses. The majority principle itself was seen as a form of coercion against all forces that did not conform to this larger trend. The collapse or regression of reason into something resembling the very forms of superstition and myth which reason had sought to challenge was what characterized the 'dialectic' of the Enlightenment—"Myth is already enlightenment, and enlightenment reverts to mythology" (Horkheimer and Adorno [1944] 2002, xviii).

The intellectual crisis during the early twentieth century was indeed a great turning point for the reinvention of the normative foundations of constitutionalism. The primary imperative for post-war reconstruction was to develop a political form or structure that was resistant to fascist and totalitarian challenges. This, however, did not in itself suggest that the structure had to be particularly democratic. To the contrary, the diagnosis of the time was that the cataclysms of the twentieth century was fueled by the introduction of the masses, as the conforming forces of the demos were considered pivotal for the emergence of totalitarianism. Hannah Arendt ([1951] 1973), for example,

characterized the masses as being superfluous and self-less, in the sense of having no proper self. She insisted that "the chief characteristic of the mass man is not brutality and backwardness, but his isolation and lack of normal relationships" (317). The masses didn't abet the atrocities committed by totalitarian regimes because they were evil, but precisely *because* they were masses. Similarly, Carl Friedrich (1951) observed after the War that "[n]owhere on the Continent is there to be found any genuine "belief in the common man" […] In fact, the very term is nonexistent and hence untranslatable" (33). Attacks upon the collective powers of majorities, such as Ortega y Gasset's (1932) condemnation of the masses, achieved widespread currency in intellectual circles and even amongst the people themselves as there was a sense of defeatism that permeated the post-war political culture. The ascendance of constitutionalism as a normative structure thus historically emerged from a lack of confidence in—or, in extreme cases, disdain for— the citizen's ability to deal with common concerns of the community.

The cultural pessimism about the masses translated into a religiously inspired natural law thinking seeking to provide immutable ethical foundations that can guide political conduct. The idea of natural law was defined against the relativism or nihilism of Enlightenment reason which supposedly had characterized totalitarianism and, as many intellectuals asserted, democracy. What emerged in post-war Europe was not a restoration of any preexisting political order but was emphatically a moralized understanding of constitutionalism alongside a set of institutions and attendant justifications deeply imprinted with a distrust of popular sovereignty. The political movement that best reflected this concern was "Christian Democracy," which was arguably "the most important ideological innovation of the post-war period, and one of

the most significant of the European twentieth century as a whole." Christian Democrats played a crucial role in constructing the post-war domestic order in countries including Germany, France, Italy, Belgium, and the Netherlands, amongst others.[52] Their political proposals uniquely "promised a decent enough form of public life, while allowing citizens to turn away from politics if they so desired" (Müller 2011, 130). Christian democrats believed they were offering a vindication of democracy which promises to be more effective than a positivistic—and, thus, hollow— justification of democracy that is susceptible to the dangers of reckless collective action. From the viewpoint of Christian theology, the problem of democracy is presented and supposedly solved through the anchor of higher law or what amounts to a secular approximation of Christian natural law expressed in an elevated commitment to liberty or justice. For example, Jacques Maritain (1950) argued that "political philosophy must eliminate Sovereignty both as a word and as a concept" because he believed that "in its genuine meaning" only God is truly sovereign (343-344). Sovereignty, according to Maritain, refers to a supreme power that is "separate and transcendent" and capable of "ruling the entire body politic from above" (346). The state is merely a manifestation of a temporal order that is "accountable and subject to supervision" by the people and thus cannot be said to be truly sovereign (357). However, rather than renouncing the concept of popular sovereignty and the state altogether, Maritain attempted to draw an inner connection between democracy and Christianity through the creation of just laws in accordance with the principles of natural law. This is the only circumstance in which positive law can be said to be truly binding

[52] Carl Friedrich (1951) writes how the post-war constitutions in France, Italy, and Germany were a "result of compromises between […] Christian and Socialist Democrats, united primarily by their common hostility toward the totalitarianism of right and left." While their views were divergent beyond this common adversary, the Christian Democrats had a stronger input in "assign[ing] a maximum role to religion in the ordering of social relations" (25).

upon the people as it "obliges by virtue of the Natural Law" ([1943] 2001, 53). Thus, an effective defense of democracy against those who seek to take advantage of political liberty for the purpose of destroying it can only come from recasting the foundations of positive law in a theocentric light.[53] Similarly, Reinhold Niebuhr ([1944] 2011) argued that "[t]he final question to confront the proponent of a democratic and free society is whether the freedom of a society should extend to the point of allowing these principles to be called into question." He forcefully asks:

> Should they not stand above criticism or amendment? If they are themselves subjected to the democratic process and if they are made dependent upon the moods and vagaries of various communities and epochs, have we not sacrificed the final criterion of justice and order, by which we might set bounds to what is inordinate in both individual and collective impulses? (68)

Niebuhr believed that the principles of justice, in their final instance, must be declared to be not accessible to critical reason or to deliberation and debate. On a more practical level, he was aware that the absolute validation of natural law over positive law may suggest the complete subjugation of democracy. Thus, he offered a qualified justification similar to that of Maritain's by arguing that democracy must be guided by "working principles of justice, as criteria for its positive law and system of restraints." These will be "historical statement[s]" of natural law that aren't absolute and can thus be amended (71). While he does not fully develop what this might suggest, he alludes to the possibility that constitutional law as the highest positive law can serve this function as a particularistic manifestation of natural law and justice. He cleverly avoids advancing a

[53] Maritain's influence did not remain confined to debates within intellectual circles but has had practical implications as well. He was actively involved in drafting the United Nations Universal Declaration of Human Right (1948).

theocratic claim, while reserving the possibility for a privileged position of constitutional law as qualitatively superior to ordinary law.

The intellectual currents underlying the rise of Christian Democracy generally penetrated all aspects of post-war thinking. Intellectuals in both Europe and the United States embraced an absolutist conception of freedom protected by fundamental law to serve as the ultimate check against totalitarianism. Isaiah Berlin ([1958] 2002), for example, famously advocated the primacy of "negative liberty," that is, the absence of interference in one's life, over ideals centered on a "positive" conception of freedom understood as individual or collective self-direction. Having witnessed the horrors of totalitarianism as an émigré intellectual, he believed that "negative liberty" was the only kind of freedom that was not subject to the threat of being abused by its enemies. As a result of this reasoning, he concluded that "there is no necessary connection between individual liberty and democratic rule." What is even more puzzling was how he described that "liberty [in the negative sense] is not incompatible with [benign forms of] autocracy" or the "absence of self-government" (176-177). For Berlin, the ends of protecting liberty was what ultimately mattered for maintaining a free society, regardless of the actual means or political form that offered the protection. Similarly, Friedrich Hayek ([1960] 1978) argued that the best safeguard for a free society against coercion was a rule by "known general rules" that are "impersonal and [only] dependent upon general abstract rules" (21). The rule of law was uniquely defined as "a meta-legal doctrine or a political ideal" that he believed was implicit in the practices of a free society (206). He emphasized how laws should only be changed gradually and spontaneously as an effort to shield them from the deliberate and orchestrated efforts of human legislators.

In circumstances where change was inevitable, he expressed how the "procedural safeguard" for liberty would only be acceptable through the interpretation of laws "where independent courts have the last word" (219). Even realists such as Walter Lippmann dramatically changed intellectual course with the approach of World War II. In works such as *The Good Society* ([1937] 2005) and later *The Public Philosophy* ([1955] 1989), Lippmann embraced the notion of a higher natural law as a bulwark of public morality. He came to realize that the purely social and instrumental sources of truth and justice provided no protection against the evil tendencies of mobilized groups, and no defense against the rise of would-be *Übermenschen* like Mussolini or Hitler. The effort to place higher law beyond all-too-fallible human reach was a symptomatic expression of a general disdain and disapproval of all forms of collective majorities but, more importantly, of politics in general.

World War II was indeed a great intellectual turning point for the reinvention of the principle of natural law that was infused within the normative foundations of constitutionalism. Mauro Cappelletti (1985) suggested how "modern constitutionalism," for which he is referring to the idea of constitutionalism that emerged during the post-war era, is:

> […] the only realistic attempt to implement natural law values in our real world. In this sense, our epoch, if any, is the epoch of natural law. More accurately, however, I would say that modern constitutionalism is the attempt to overcome the plurimillenary contrast between natural and positive law, the contrast, that is between an immutable, unwritten higher law rooted in nature and reason, and a passing law written by a particular legislator of a given place and time. (31)

The elevation of constitutionalism, however, was accompanied by a diminution of democratic politics as an expression of collective freedom. As Jan-Werner Müller (2011)

points out, politics was no longer "supposed to be a major source of meaning; in fact it was not supposed to be a source of meaning at all" (150). This pervasive distrust was what informed the intellectual movement towards quasi-religious metaphysics and natural law during the post-war era. While the religious overtones were gradually secularized, the distrust towards democratic collectivities was inherited and institutionalized within contemporary conceptions of constitutional justice.[54]

The devaluation of the capacity of collective majorities is tied to an accompanying myth regarding the elevated capacity and role of judges to serve as guardians of democratic politics. The contemporary understanding of the role of courts as well as that of legislatures has been shaped by an implicit assumption regarding a "rough division of labor," where people commonly expect the latter to "focus largely on the task of interest representation while passing on to the courts a substantial share of the responsibility for considering the long-term constitutional questions that continually arise" (McCloskey [1960] 2005, 10-11). A famous contemporary proponent of this view is Ronald Dworkin (1996), who suggested that courts are the only institution capable of

[54] Contemporary theories of justice have frequently shared a similar structure with the religious justification of fundamental law presented by Christian Democrats. Consider, for example, the way in which John Rawls (1971) presents a four-stage sequence for the construction of a just society: The first stage is the choice of principles of justice in the original position; the second is the framing of a just constitution; the third is the choice of legislation by representatives; and the fourth is the application of rules to particular cases by administrators and judges. In regards to the second stage, he writes:

> In framing a just constitution I assume that the two principles of justice already chosen define an independent standard of the desired outcome. If there is no such standard, the problem of constitutional choice is not well posed, for this decision is made by running through the feasible just constitutions (given, say, by enumeration on the basis of social theory) looking for the one that in the existing circumstances will most probably result in effective and just social arrangements. (198)

For Rawls, the determination regarding the two principles of justice are already addressed from the outset at the first stage through the original position (which, as he argued, is a thought experiment) and is thus shielded from actual deliberation among people who disagree about the content of the principles, or who disagree about whether the original position in itself is an appropriate means to address issues of justice.

engaging in serious constitutional reasoning. He argues that "[o]rdinary politics generally aims […] at a political compromise that gives all powerful groups enough of what they want to prevent their disaffection, and reasoned argument elaborating underlying moral principles is rarely part or even congenial to such compromises" (344-345). On the other hand, courts are depicted as operating under an altogether different and distinguished rationale in regards to the settlement of constitutional disputes. He writes:

> [w]e have an institution that calls some issues from the battleground of power politics to the forum of principle. It holds out the promise that the deepest, most fundamental conflicts between individual and society will once, someplace, finally, become questions of justice. I do not call that religion or prophecy. I call it law. (1985, 71)

The contemporary justification for the special competency of judges have generally relied on two arguments. The first is the more moderate justification that judges by virtue of their professional training are better equipped with the knowledge and expertise to deal with hard cases. For example, Lynn Stout (2002) argues that judges are "altruistic hierarchs" who by virtue of their "sense of membership in a common group" allows them to develop socially conscious behavior that will meet the public trust (1615-1616). However, the fact that judges are educated under formalistic legal doctrines may conversely suggest that they are poorly equipped to perform the new and demanding tasks required as a result of the expansion of their functions. The second argument rests on a thicker and more controversial presumption regarding the higher moral capacity of judges. Though scholars have been generally wary of overstating this point explicitly, the presumption is that "judicial interpretation and argument demand consideration of justice and morality in ways that legislative activities do not" in part due to their "diverging

political and institutional responsibilities and different roles in the political system" (Arthur 1996, 68). Both arguments, however, denies to elected officials and to citizens an active and positive role of reflecting and deliberating upon important constitutional questions. The perceived efficacy of law and of the role of judges thus came at the cost of the perceived inefficacy of politics in the maintenance of constitutional democracy.

5.4. The Path Dependency of Law

The elevated status of law with its corresponding loss of faith in politics has been gradually internalized within constitutional democracies through the creation of new procedures and institutions that sought to channel political disputes toward the judicial processes. Post-war democracies deliberately assigned power to unelected judges as a means to prevent backsliding towards totalitarianism by 'locking in' the normative commitments towards their newly established constitutions (Moravcsik 2000). The most immediate consequence of this imperative was the weakening of representative institutions that were seen as susceptible to the popular pressures of democratic breakdown. Courts were correspondingly armed with the power of constitutional review to safeguard the emerging political order as a whole, especially through the protection of individual rights.

One prominent procedure popularly adopted in new democracies was to provide citizens with immediate access to national high courts through the right to file 'constitutional petitions' or 'constitutional complaints.' Modeled upon the "*Verfassungsbeschwerde*" in post-war German law, the institution allows citizens to file a direct petition to constitutional courts whenever government action is suspect of violating

a constitutional right.[55] It is an unprecedented remedy that was created in response to the immanent need for devising institutional countermeasures against the potential infiltration of government by totalitarian movements. In keeping the executive as well as the legislature in check, a broader purpose of the constitutional petition was to supposedly enhance democracy by offering better protections for civil rights and liberties from being infringed by the arbitrary exercise of political power as well as to raise the citizenry's sensitivity towards individual rights. Not only does it allow for courts in new democracies "to generate [their] own symbolic linkages to the ordinary citizen" but it also expresses "the seriousness of the new regime's commitment to limited government and individual freedom" (Ackerman 1992, 107). By granting broader access to courts, constitutional petitions put judges in a better position to maintain an elevated status over ordinary politics.

Political parties have also benefited from such provisions as an indirect method to contest undesirable legislation. They have often strategically urged their supporters to file petitions regarding the unconstitutionality of laws enacted by rival parties. In some cases, parties have sought to challenge laws that they themselves did not originally oppose, but belatedly criticize due to a lack of popular support. In short, constitutional petitions have provided parties with 'veto points' to challenge duly enacted legislative provisions of the governing majority. The result has been a normalization of judicial intervention within the democratic processes. Legislative politics still matters, but the constitutional structure

[55] The German *Verfassungsbeschwerde* was originally part of a federal law (§§ 90 ff. BVerfGG) and not part of the Basic Law itself. It was incorporated in 1969 as a response to the introduction of provisions regarding emergency and war (*Notstandsverfassung*), which was a sensitive issue as it allowed government to impose restrictions on citizens in respect to certain basic rights. In light of the crisis that occurred with Hitler's invocation of emergency powers, it was necessary to constitutionalize constitutional complaints as a countermeasure against potential abuse.

itself provides a framework in which democracy and the meaning of political engagement is radically altered. For one, elected officials may prefer to "run from daylight" when institutions allow for "alternative routes" that typically "throw up fewer roadblocks and attract less attention" than ordinary legislative processes (Hacker and Pierson 2005, 71). In other words, legislators are presented with a *structural incentive* to shift responsibility for divisive choices to the less accountable courts.

Beyond facilitating the transfer of political questions into the judicial arena, constitutional petitions also instill citizens with a hyper-individualistic perception of rights that erodes conventional modes of political participation. As Mary Ann Glendon (1991) points out, "the language of rights is the language of no compromise" that forecloses the possibility of working out disagreements through deliberation within the political arena (9). Constitutional petitions may indeed successfully empower *individuals* but only at the cost of disempowering the collective activities of the *citizenry*. By enabling individuals to file petitions at the first sight of discontent, it promotes a negative conception of rights and freedom in a way that is fundamentally at odds with "the circumstances of politics," i.e. the conditions of living with disagreement amongst fellow citizens (Waldron 1999a, 154). Thus, the enhanced protection for individual liberty through constitutional petitions may suggest adverse effects for democracy, especially in new democracies where the availability of direct access to courts and of immediate relief is likely to alter the political learning experience of first-time citizens.[56]

[56] While these changes are skewed towards enhancing the higher law aspect of constitutionalism, the deficit in popular sovereignty is arguably compensated by the way in which constitutional amendments are far less cumbersome and therefore far more likely. Lowering the bar for amendment facilitates the recurrence of "constitutional moments," making it less rare and less extraordinary (Ackerman 1997). The normalization of constitutional amendments, however, has its own drawbacks as the people are misled into believing that problems are solved not by

Beyond the creation of new institutional veto points, the normative appeal of constitutionalizing politics has more broadly created a path dependency that binds and constructs politics. Path dependence refers to the process in which "preceding steps in a particular direction induce further movement in the same direction." One way to understand this tendency is through "the idea of increasing returns" where the "relative benefits of the current activity compared with other possible options increase over time" (Pierson 2000, 252). When applied to courts, Gordon Silverstein (2009) indicates how the interaction between law and policy creates a special kind of cement that binds political decisions in unintended and even unwanted ways. Legal rules provide many immediate benefits for political actors such as offering shortcuts out of the difficult and uncertain process of coalition-building and compromise. The short term benefits, however, incur long term costs since judicial decisions foreclose some options while facilitate others. Future decisions are profoundly shaped by precedent—that is, by the ideas or ideological frames embodied in past decisions. When legislatures respond and adapt their policies to streams of precedent handed down by courts, the resulting policies are more entrenched and resistant to change than when policies are not subject to judicial influence. As Silverstein points out, "no one quite knows how or why he or she ended up playing in such a constricted space" (66). As a result, the "increasing returns" of staying the course 'lock in' legislatures to take the established path often with little relationship to what is needed whether in terms of policy or of popular demands. Judicial influence in legislative bodies is not simply expressed by greater acquiescence, but more subtly affects the way

politics but by the formal (re-)enactment of legal rules. This has contributed to the relatively shorter life span of contemporary constitutions. As Elkins, Ginsburg, and Melton (2009) point out in their study of the endurance of constitutions, "[o]ver and above the level of development, geographic region, and levels of democracy, there is something about the states that emerged post-World War II, which is depressing mortality rates" (214).

in which "legislative discourse, indeed legislative thinking, has become shaped by judicial readings of constitutions." Courts therefore take over the legislative processes on a deeper level "by insinuating itself into the very minds of the legislators" (Goldstein 2004, 619-620).

The increasing influence of courts has also informed the way in which politics is conducted outside the realm of policy. They create "network effects" for society at large in defining the guidelines and parameters for democratic action. Substantive legal outcomes and doctrines will be "referenced and used by an increasing number of individuals and groups operating in an increasing numbers of arenas, including those not otherwise directly associated with adjudication." Once legal institutions are firmly established and accepted in society, they obtain a "relative embeddedness, through positive feedback and reinforcement of outcomes over time" that manifest a resilience against change (Shapiro and Stone Sweet 2002, 134-135). The elevation of law over politics thus builds a sort of artificial world that constricts political action that is eventually entrenched within everyday politics.

These changes have all contributed to creating a particular type of political ethos and constitutional culture. One particular manifestation of this ethos has been what Judith Shklar (1964) calls a pervasive "legalism" in contemporary democracies. Legalism refers to "the ethical attitude that holds moral conduct to be a matter of rule following, and moral relationships to consist of duties and rights determined by rules." By treating law as a discrete, independent realm with "its own 'science,' and its own values," legalism contributes to isolating law from its historical development as well as its political and social background (1-2). Shklar points out how contemporary legal thinking, whether

analytical positivism or natural law theory, share the presumption that "there always is a rule somewhere to follow" (12). The rationale underlying legalism, however, displays disturbing parallels with the justification for totalitarianism in their exclusion—or, rather, formalized recognition— of the role of the demos. Proponents who advocate elevating the constitution above and beyond politics have assumed that the people or their representatives are unable or unwilling to accept the responsibility for the decision about the social values to be realized, especially in a situation in which their decision may have fatal consequences. Thus, they have attempted to shift this decision from the collective site of politics to an outside authority that they believe is competent to delineate what is right and wrong. Politics is thought to be independent of, though circumscribed by the courts' understanding of the constitution. The appeal to a source of authority outside the collective determination of politics and even outside one's conscience has become characteristic of the political ethos of contemporary constitutional democracies.

If totalitarianism sought to find its source of legitimation from a populist political theology from below, the new constitutionalism takes an inverted approach by finding the principles of democracy to be emanating from above. In the direct aftermath of World War II, Hans Kelsen (1955) warned about the dangers of seeking to defend democracy on the basis of principles that are placed outside the hands of politics. He argued:

> Democracy seems to have less power of resistance than autocracy, which without any consideration destroys every opponent, whereas democracy, with its principle of legality, freedom of opinion, protection of minorities, tolerance, directly favors its enemy. […] From the point of view of psycho-political technique, the mechanism of democratic institutions aims at raising the political emotions of the masses and especially of the opposition parties above the threshold of social consciousness in order to let them "abregieren" (abreact). The social equilibrium in the autocracy, on the other hand, is based on the repression of the political emotions in a sphere which could be compared with that of the unconscious. (31)

Kelsen was soberly aware of the fragility of democracy in the face of totalitarian threats, but believed that citizens autonomously bear the responsibility of leading the struggle for democracy and for the social conditions that they consider could best realize their decision. Democracy cannot be sustained when it is blindly accepted as a given nor when it is forced upon its members, but when sufficient people are willing to defend its values in the face of challenges. Contemporary constitutional democracies, however, seem to be sustained by a political ethos that has effectively relieved citizens of this critical responsibility.

5.5. Shifting the Meaning of Citizenship: From Constitutional Actors to Spectators

Constitutionalism is grounded upon the presumption that there are certain demonstrable relationships between given types of institutional arrangement and the safeguarding of important normative ends (Vile [1967] 1998, 8-9). The role of a constitution is not simply to constrain government, but to enable or empower actual institutions with the necessary means and capacity in the advancement of these ends. Past experience will play a crucial role in defining these ends, but institutions must subsequently transmit these values to its members for the purpose of maintaining stability and order. In this regard, constitutions are a "conjunction of prescriptive theories and behavioral categories" or a "symbiosis of prescription and analysis" where its institutions are "designed to train generations of citizens to prefer certain goods and conduct over all others" (Jacobson 1963, 561). They serve as instruments of political socialization through which political identities, interests, and values are forged. Constitutional maintenance

will, thus, depend on its success in creating and sustaining an underlying notion of constitutional citizenship.

Juristocracy is sustained by a very different conception of constitutional citizenship from that of classical democracy. The classic conception is one that is centered on voice, participation, and autonomy. Democracy is understood as "that institutional arrangement for arriving at political decisions which realizes the common good by making the people itself decide issues through the election of individuals who are to assemble in order to carry out its will" (Schumpeter [1942] 2008, 250). Under this conception, law defined broadly as the statutes and norms governing political life is the object of popular power. The medium through which popular power is expressed is the decision, i.e. the active determination that pertain to how the polity should be governed. This classic account is still considered the dominant view when constitutional citizenship is discussed in the abstract. In reality, however, the actual expression of popular power has not matched this grand commitment. Rather, there is a sense in which people have grown less confident and, as a result, more willing to acquiesce to the decisions of public officials. What is even more significant is how elected officials who naturally would seem to be the primary beneficiaries of popular delegation have also grown deferential to none other than judges who are characterized by an even weaker tie to the will of the people in terms of democratic accountability.

The deleterious effects of juristocracy on constitutional citizenship isn't simply that too many issues are constitutionalized but that both legislatures and citizens have grown accustomed to shed their political obligations in light of the courts' growing

presence. This problem has been eloquently stated by James Bradley Thayer (1901), whose words have become almost prophetic in light of the circumstances today:

> The people, all the while, become careless as to whom they send to the legislature; too often they cheerfully vote for men whom they would not trust with an important private affair, and when these unfit persons are found to pass foolish and bad laws, and the courts step in and disregard them, the people are glad that these few wiser gentlemen on the bench are so ready to protect them against their more immediate representatives. [...] [I]t should be remembered that the exercise of [the power of judicial review], even when unavoidable, is always attended with a serious evil, namely, that the correction of legislative mistakes comes from the outside, and the people thus lose the political experience, and the moral education and stimulus that comes from fighting the question out in the ordinary way, and correcting their own errors. (104-106)

According to Thayer, the tendency to grow dependent on a common and easy resort stunts the political capacity of both representatives and citizens. For one, political engagement has been reconceived as an activity to protect private freedom and interests through the available means to bypass normal political procedures. While this shift may have been originally necessary to combat the ghost of totalitarianism, it also has had negative implications for civic empowerment. The dilemma reopens an age-old dispute regarding the tension between liberalism and democracy. The vision of a progressively democratic society leaves issues to be resolved through constitutional politics and empowers the institutions that are capable of protecting rights. The particular historical experience with the actual deprivation of freedom, however, has led contemporary democracies to be more sensitive towards ensuring that rights are protected rather than waging their bet on representative institutions that are suspect of going awry. The effort to establish a constitutional democracy has led to an ethos in which liberal values embedded in higher law takes priority over democracy.

The ethical foundations of juristocracy thus not only embodies, but also reproduces a general distrust against majoritarian practices by systematically excluding people from the most creative phase of constitutional decision-making, namely where the agenda is first defined. It further seeks to impose a top-down solution to disagreements in society, most notably regarding those over the protection of rights. In this regard, civic participation, both of representatives and of citizens, has been reconceived as that of a spectator rather than as an actor since "neither the people nor their representatives have to take the Constitution seriously because they know—or *believe*—that the courts will" (Tushnet 1999, 66). Learning responsibility through constant trial and error is critical for people to be able to not only engage in ordinary politics, but also to keep a close watch on the activities of the courts. Juristocracy, however, seems to be oblivious if not hostile to this assumption as it rests on an ethos of anti-politics.

CHAPTER 6: CONCLUSION

6.1. The Resilience of Juristocracy

This study began by asking why contemporary constitutional democracies worldwide have been transitioning to a new form of judicial guardianship or "juristocracy." My central argument was that the historical and intellectual foundations of juristocracy can be traced to the proliferation of a depoliticized understanding of democracy that emerged as a reaction to the experience of totalitarianism after World War II. This inquiry provides the key to understanding how the core premises of constitutional democracy was historically reconstructed in a way that informs the rise of juristocracy across different parts of the world. Existing studies have been unable to fully grasp how juristocracy is a distinct type of regime with its own set of commitments, priorities, and institutional arrangements. In examining the historical, institutional, and ethical foundations of juristocracy, the contribution of my research to current scholarship is twofold. First, my research addresses the limits of understanding juristocracy as a result of political empowerment by highlighting the importance of ideas shaped by past experience in conditioning the presupposed appeal of delegating power to courts. While my argument does not seek to discredit the empirical findings presented by the political empowerment literature, it does question the validity of narrowly analyzing the strategic environments in which the judicialization of politics is likely to occur. Second, in demonstrating that juristocracy internalizes a strong distrust against majoritarian practices, my research also challenges normative claims that justify juristocracy as protecting or even advancing democratic principles. The contemporary defense that judicial guardianship complements the shortcomings of constitutional democracy rests on

a static understanding of popular sovereignty as an abstract legal principle that can be elaborated by judges rather than as a dynamic concept that can evolve through the accumulated practice of everyday politics.

The implications of my research should not be misconstrued as offering a sweeping critique of all case specific instances in which courts are becoming involved in the realm of politics. Evidence suggests that contemporary courts in various countries display a mixed record for producing both damaging as well as constructive outcomes for the maintenance of democracy (Hirschl 2004; McClain and Fleming 2005). A comprehensive response to the ongoing discussion concerning the capacity of courts to produce meaningful social change will be highly contingent upon case selection, where there are numerous examples that can support conclusions on either side. In this regard, my goal has not been to offer an evaluation of the benefits or drawbacks of juristocracy in particular decisions concerning specific issues. Rather, I focus on a broader reflection of juristocracy from the viewpoint of constitutional theory by contemplating how we have arrived at our current constitutional arrangement, how the arrival of this new form has altered the meaning of political life, and what we might be losing or forgetting if we take these changes for granted. While it is my contention that juristocracy rests on an impoverished vision of democracy that depoliticizes the *demos*, one may conversely conclude that juristocracy is desirable precisely because it offers a distinct response to the "natural defects [inherent] to democracy" (Diamond 1959, 56).[57]

[57] Leo Strauss (1964), for example, contends that "modern democracy would have to be described with a view to its intention from Aristotle's point of view as a mixture of democracy and aristocracy" (35). While a mixed regime is far from being perfectly just, Strauss believed that it can suppress some of the characteristic vices as well as promote some virtues if it is well-constructed. By this, he means that a small minority of 'the morally serious' or 'gentlemen' will be able to set the tone for politics (See also Strauss 1953, 140-143; 1968, 4-5, 10-15). Thomas

A broader theoretical concern that informs my analysis was the importance of acknowledging the way in which constitutions are not only shaped by past historical and ideational currents, but will in turn also reproduce behavior necessary for its maintenance through political socialization and habituation. If juristocracy is indeed a new constitutional paradigm that has both captivated and circumscribed the political imagination of citizens today, as I have argued, there may be significant difficulties for addressing some of its unintended consequences, if not, its negative implications. Once a particular institutional constellation is set in motion, it will demonstrate great resilience in the face of emerging challenges. For example, Mark Tushnet (2014) points out how "[t]he contemporary issues of constitutional design […] deal with the *form* of constitutional review, [but] *not* whether to have it" (41; emphasis added). He further concedes how attempts to "eliminate[e] constitutional review conducted in some form by courts is probably not a realistic possibility anywhere" (44).

In the real world of politics, constitutional democracies have largely responded to juristocracy in one of three ways. The most common response has been to acquiesce to the increasing presence of courts in political life and to accept it as a given condition for maintaining a constitutional democracy. Although general acquiescence does not mean that courts will always be shielded from partisan cross fire, political discontent in these cases have often been moderate, if not sporadic. The criticism directed against specific controversial decisions are often offset by other decisions that are either widely popular

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Pangle (2006), who is a prominent student of Strauss, argues that "the most obvious feature of contemporary democracy that bears out Strauss's characterization of it as being, in empirical fact, quasi-aristocratic, is the modern judiciary" (141 n.8). This assessment regarding the salutary role of the judiciary in tempering the inherent flaws of democracy is not uncommon amongst many of Strauss's followers.

or congruent with one's political views.[58] This describes the situation in advanced democracies of the west, including the United States and most of Western Europe, where the institutional legitimacy of constitutional review has already been deeply entrenched within ordinary politics as well as in the political culture.

The situation can be very different, especially in new democracies where a political consensus regarding the function of constitutional review is yet to be established. This leads to the second response which entails extreme hostility and political backlash towards courts. The recent controversy surrounding the Constitutional Court in Hungary is a telling example. In its early years, immediately following its establishment in 1990, the Constitutional Court of Hungary had become famous for laying down a robust foundation for fundamental rights, most notably through its interpretation of the right to human dignity. Scholars have celebrated the remarkable success of the Hungarian Constitutional Court as an exemplar of the judiciary's capacity for assisting the transition to and consolidation of constitutional democracy (Ackerman 1997; Scheppele 2005; Schwartz 1998). However, after the center-right Fidesz party took control of the National Assembly in 2010, they were able to pass a constitutional amendment in the following year that significantly constrained the Constitutional Court's powers by expanding the number of judges on the bench, restricting its jurisdiction on reviewing budgetary issues, and changing the rules of access to the Court. This suggests

[58] Political scientists who study judicial behavior have sought to dispel the illusion that courts are a 'forum of principle' that are constrained by constitutional or normative arguments. For example, Jeffrey Segal and Harold Spaeth (2002) elaborate what is known as the attitudinal model of judicial decision-making, arguing that the Supreme Court justices of the United States "make decisions by considering the facts of the case in light of their ideological attitudes and values" (110). In light of how judges routinely form conservative or liberal voting blocs, proponents of the attitudinal model suggest that judicial decision-making is ultimately just another expression of partisan politics in disguise.

how even juristocracy—or, as a matter of fact, any type of constitutional arrangement—can be susceptible to resistance when it has not yet had sufficient time to stabilize within the political and cultural fabric of society.[59]

A third response represents a middle ground between the first two responses, as it consists in adopting moderate reforms aimed at mitigating the countermajoritarian nature of judicial authority. The development of these strategies has been most noticeable in established democracies that have "persisting political traditions of public deliberation and parliamentary sovereignty" (Hirschl 2000, 435). The institutional mechanisms have been diverse and include procedurally postponing court involvement until the exhaustion of all available administrative remedies, enacting 'implementing doctrines' designed to guide and limit judicial discretion, as well as providing override powers to political branches. The Canadian Charter of Rights and Freedoms (1982) contains provisions that illustrate a good example of these limitations. Section 1 of the Charter—also known as the "reasonable limits clause" or the "limitations clause"— states that the rights protected by the Charter are subject to "such reasonable limits prescribed by law as can be demonstrably justified in a democratic society." Considering that rights adjudication has been the primary source of judicial empowerment, the provision not only limits the government from enacting laws that infringe on rights, but it also seeks to preemptively place limits on the way courts can impose buffers around these rights. Another example

[59] Despite how the Hungarian Constitutional Court has been severely constricted after the passing of the 2011 amendment, recent cases decided during its 2013 and 2014 term suggest that the Court still has 'teeth' in its willingness to be involved with controversial policy issues even within its narrowed jurisdiction. See, for example, MTI, "Orbán says Constitutional Court has lost none of its powers to assess laws," *Politics.hu*, 14 March, 2013, http://www.politics.hu/20130314/orban-says-constitutional-court-has-lost-none-of-its-powers-to-assess-laws/ (last visited June 24, 2014). This may conversely support the staying power of juristocracy even in the face of animosity once active courts have been introduced. Whether the Court will be able to maintain its presence is an inquiry that remains for the future.

is Section 33, more famously known as the "notwithstanding clause." This clause enables elected officials, in either the federal parliament or the provincial legislatures, to override certain portions of the Charter under section 2 (fundamental freedoms) and sections 7 to 15 (due process and equality rights) by enacting superseding legislation valid for a period of up to five years. This, at least in theory, suggests that both the federal parliament and the provincial legislatures are ultimately sovereign over judicial decisions.

While this third alternative may seem most promising in light of the extremities of the first or second response, the implementation of such means will not necessarily lead to success in tempering juristocracy. For example, the problem with the "limitations clause" is how the sources of "reasonable limits" that are "demonstrably justified in a democratic society" will ultimately be contingent upon the interpretation that is offered by the Supreme Court of Canada. When the government has limited an individual right as part of a general policy or law, it holds the burden of demonstrating in court that the limitation was prescribed by law and is justified in a free and democratic society. Ironically, the legitimacy of the limitation will rely on the judges' discretion to construct standards of justifiability, thereby furthering rather than mitigating judicialization.[60] In practice, it is thus a unilateral, rather than a bilateral or mutual, mechanism of constraint. The "notwithstanding clause," on the other hand, has not been used frequently enough to be considered a meaningful check on judicial power. Since the Charter's enactment in 1982, there have only been five instances where provincial governments have either

[60] The primary test to determine if the purpose is "demonstrably justifiable in a democratic society" has been developed by the Supreme Court of Canada in the landmark case, *The Queen v. Oakes*, 1 S.C.R. 103 (1986). The Oakes test consists of two prongs. The first is whether the challenged law or conduct violates, denies, or infringes any right. This requires a review of the scope and definition of the right, as well as the purpose and effect of the legislation and conduct. The second is whether there has been a justifiable limitation on the right that is concerned.

invoked or attempted to invoke the notwithstanding clause. As Peter Hogg (2007) notes, "seven of the ten provinces and two of the three territories have never used the power of override; nor has the federal parliament" after 25 years since the passing of the Charter (842). Furthermore, the political costs associated with seeking an override will vastly increase in accordance with the degree in which courts enjoy diffuse support in the eyes of the people. In the end, these strategies have only been nominally innovative but marginally effective in tempering the accelerated judicialization of politics in Canada or attenuating the political prominence of the Canadian Supreme Court.

What these examples suggest is that the mere availability of such institutional checks does not automatically translate into an enhancement of democratic legitimacy, particularly when legislatures increasingly lack the willingness to put them into use. As Carlo Guarnieri and Patrizia Pederzoli (2002) point out, "[s]imply issuing new legal rules in order to check judicial power is not the answer and may actually be counterproductive; since these rules would necessarily be interpreted by judges themselves." There is an irony in addressing the problem of law through more law as "more rules [will merely] result in greater scope for judicial discretion" (192). The fact that social problems, including the judicialization of politics itself, are increasingly approached as issues to be resolved through comprehensive legal reform further attests to the resilience of juristocracy in contemporary society.

6.2. The Challenge of Popular Constitutionalism

In recent years, a number of prominent constitutional scholars have developed robust theories that challenge the stronghold of juristocracy by seeking to restore popular

engagement in constitutional decision-making. These scholars have called for a "popular constitutionalism" (Kramer 2004; Tushnet 2006) or a "political constitutionalism" (Bellamy 2007). They offer a range of proposals, such as institutionally limiting the authority of constitutional review, facilitating citizen involvement in constitutional evaluation, and (re-)enhancing the role of legislatures in constitutional interpretation. The central animating principle of popular constitutionalism is "the idea that ordinary citizens," rather than the courts, are the "most authoritative interpreters of the Constitution" (Kramer 2005, 1344). The approach seeks to challenge the basic presumption of juristocracy that courts possess normative finality or exclusivity in ascertaining the meaning of the constitution. Its principal advocates are generally united in the belief that judicial supremacy is neither normatively attractive nor particularly healthy for the maintenance of a constitutional democracy.

Popular constitutionalists propose a reassessment of the classical question regarding the distribution of constitutional authority, i.e. 'who is authorized to say what the constitution means?'. The basic premise is that a constitution retains a distinct meaning that categorically distinguishes it from ordinary laws interpreted and enforced by courts. As Alexander Hamilton described in *Federalist* #78, the existence of a constitution does not "suppose a superiority of the judicial to the legislative power" but that "the power of the people is superior to both." While a constitution imposes obligations and constraints on the people as does any form of law, it is also the ultimate political expression in which the people as sovereign contemplate the type of political community that they aspire to as well as define how individual members should stand in relation to one another. The problem with contemporary constitutionalism is that it

"thoroughly conflate[s] the meaning of "constitution" with "law" and of "law" with "courts" that we no longer possess the language to describe a distinct category of this sort" (Kramer 2004, 24). Popular constitutionalism, on the other hand, seeks to preserve this unique hybrid dimension by reaffirming the authority of the people over the meaning of the constitution.

Within the context of the United States, the popular constitutionalism movement has been framed not as a contemporary invention, but as "a rediscovery of a very basic feature of [American] constitutional culture that goes back to the Founding and has persisted to the present day" (Balkin 2012, 863). Scholars point to a long tradition in which the authority to ascertain the meaning of the constitution has been a continued source of debate throughout American political development where the interpretive supremacy of the judiciary was never an established rule of recognition. Some have even argued that the Supreme Court today remains to serve as a mirror of the will of the people despite how its appearance during the past few decades may suggest otherwise. For example, Barry Friedman (2009) dispels contemporary claims regarding judicial guardianship by offering a revisionist constitutional history that illustrates how the Supreme Court has always been subject to a higher power, namely the American public. He points to numerous historical instances where judicial positions have been abolished, the justices' jurisdiction has been stripped, and unpopular decisions have been defied, all of which attest to the longstanding relationship between popular opinion and the Supreme Court. Other proponents of popular constitutionalism have not shared Friedman's observation in light of the Supreme Court's recent efforts to definitively settle controversial issues such as the constitutional status of abortion, school prayer, as well as

the contested 2000 Presidential Election. They argue that the role of the people in "bridging the divide between law and politics by acting as authoritative interpreters of a constitutional text" is "no longer a meaningful part of the intellectual universe" with the emergence of judicial activism during the Warren Court era (Kramer 2004, 224).[61]

Popular constitutionalism has also attracted supporters outside the context of the United States who similarly express concerns regarding the growing global prominence of juristocracy. For example, the adoption of the Human Rights Act of 1998 in the United Kingdom was considered a major event in the history of constitutional development as it indicated the adoption of constitutional review—albeit in a constrained form— in the oldest and, arguably, purest parliamentary supremacy system. The Human Rights Act imposes a duty upon all courts and tribunals in the United Kingdom to interpret legislation in a way that is compatible with the rights laid down in the European Convention on Human Rights. In the event that a statute is incompatible with one of the rights set out in the European Convention, the courts may issue a "declaration of incompatibility" which does not invalidate the legislation but return it back to Parliament for amendment through a special expedited procedure under Section 10 of the Act.[62] Although the Human Rights Act is a piece of ordinary legislation and is theoretically

[61] Gordon Silverstein (2009) makes a similar observation regarding the "long-1960s" which he refers to as "a period when government shifted from being the solution to being seen as the problem; it was an era in which public trust in government was tested, eroded, and finally shattered." Due to the perceived failures of the political system, he argues that the "long-1960s" signaled the dawn of an era "in which the formality, apparent transparency, predictability, and moral superiority of legal alternatives became increasingly attractive." The "judicial path," Silverstein writes, "seemed to offer a clean, efficient, and alluring alternative to a discredited political system" (7-8).

[62] In the aftermath of its adoption in 1998, some criticized the Human Rights Act for insufficiently moving the United Kingdom towards a full-fledged juristocracy with "strong" constitutional review, whereas others welcomed the adoption of a "weak" form constitutional review for retaining core aspects of parliamentary supremacy. For these differing assessments, compare the *New York Times* Editorial titled "Half-Measures on British Freedoms," 17 November, 1997, with the arguments presented by Jeremy Waldron (2006).

capable of being amended or withdrawn by Parliament through an ordinary vote, it gradually generated broad support in the legal profession as well as amongst the people as courts accumulated experience in reviewing parliamentary legislation. In light of this unprecedented development, Richard Bellamy (2007) offers a sharp critique primarily directed against legal constitutionalists in the U.K. but more broadly against proponents of juristocracy in general. Similar to popular constitutionalism in the United States, his proposal for a "political constitutionalism" advances the argument that "the democratic process is more legitimate and effective than the judicial process at resolving [reasonable] disagreements" concerning individual rights and the rule of law (4). Drawing upon the neo-republican tradition of freedom as "non-domination," Bellamy contends that constitutional review undermines this ideal because the absence of popular accountability renders constitutional review a form of arbitrary rule which lacks the incentive structure that only democratic procedures can provide in ensuring equal concern and respect for its citizens (159-162).

The debate over popular constitutionalism enjoyed an academic revival in the late 1990s and early 2000s in correlation with the growing salience of courts worldwide. While there is a difference in degree, popular constitutionalists do not seek to completely substitute the constitution that is defined outside the courts by the 'people themselves' for the general power of courts to review the constitutionality of government actions. As Larry Kramer (2004) points out, popular constitutionalism "never denied courts the power of judicial review; it denied only that judges had the final say" (208). In this regard, one cannot accurately describe popular constitutionalism as an "Anti-Court movement" (Benson 2008, 1072). Rather, advocates of popular constitutionalism simply

refuse an uncritical acceptance of the proposition that it is the court's proper place to exercise interpretive finality on constitutional questions.

In theory, popular constitutionalism seems to present a viable critique that offers some counterweight against contemporary arguments advocating juristocracy. However, when faced with the challenging task of presenting practical alternatives, they fall back on conventional forms of institutional checks that presume that judicial power remains tethered to electoral politics. They argue that the problem facing constitutional democracies today isn't simply that judges are becoming increasingly political and activist in their behavior, but that there are insufficient countermeasures that effectively limit them from acting politically. For example, Larry Kramer (2004) suggests that "to find answers one need only look to" what "earlier generations of Americans [did]" to express popular supremacy over the Supreme Court. He highlights how the Constitution "leaves room for countless political responses to an assertive Court" such as impeaching judges, limiting the Court's budget, or stripping the Court's jurisdiction (249). In a similar spirit, Richard Bellamy (2007) urges that "constitutional reforms need to move with the grain of democracy rather than against it" which can be achieved through a greater assertion of legislative power capable of providing enhanced scrutiny towards judges (263). Popular constitutionalists may be correct that there are no structural obstacles for the political branches to challenge or even completely disregard the decisions made by courts. However, these remedies fail to fully grasp the empirical reality in which juristocracy has internalized a serious disincentive for legislatures to fulfill their constitutional responsibility. Much like the case for judicial guardianship in regards to the special competence of judges, the success of these remedies rests on a

weak presumption regarding the willingness of elected officials to reclaim the initiative to check judicial power. Overcoming juristocracy may certainly demand little more than a change in attitude, such as withdrawing acquiescence or offering less prestige or trust towards the power of judges. However, one must acknowledge that this attitude is not merely an aberration, but a reflection of social forces and historical patterns that also influence, shape, or determine the very necessities, possibilities, and strategies for challenging juristocracy. As Antonio Gramsci ([1957] 1971) reminds us, it is precisely this hegemonic dimension of power that is most difficult to change.

6.3. Towards a Counter Discourse

In the concluding pages to *Democracy in America* ([1835 & 1840] 2000), Alexis de Tocqueville warned of a tendency of democracy to succumb to the allures of a new form of political tutelage. He writes:

> Above [the people] an immense tutelary power is elevated, which alone takes charge of assuring their enjoyments and watching over their fate. It is absolute, detailed, regular, far-seeing, and mild. It would resemble paternal power if, like that, it had for its object to prepare men for manhood; but on the contrary, it seeks only to keep them fixed irrevocably in childhood; it likes citizens to enjoy themselves provided that they think only of enjoying themselves. It willingly works for their happiness; but it wants to be the unique agent and sole arbiter of that; it provides for security, foresees and secures their needs, facilitates their pleasures, conducts their principal affairs, directs their industry, regulates their estates, divides their inheritances […] So it is that every day it renders the employment of free will less useful and more rare; it confines the action of the will in a smaller space and little by little steals the very use of free will from each citizen. (663)

In this passage, Tocqueville was referring to the way in which democracy may willingly yield to the rise of a centralized administrative state governed by bureaucrats

and experts. The problem is not that such a government is hard or even harsh, but rather the opposite. He indicated how such a power "does not destroy, it prevents things from being born; it does not tyrannize, it hinders, compromises, enervates, extinguishes, dazes, and finally reduces each nation to being nothing more than a herd of timid and industrious animals of which the government is the shepherd" (663). Once citizens have given up active liberty for comfortable security, and the responsibility of self-government for the ease of guardianship, democratic government will become a type of soft despotism—less coercive in its methods and more benign in its intentions, but despotic nonetheless.

Tocqueville's warning certainly was not written in anticipation of a *gouvernement des juges* nor is it completely fair or accurate to draw a simplistic analogy to our contemporary circumstances. However, the underlying rationale in which people "feel the need to be led" and yet "wish to remain free" highlights a motivational impetus that has important parallels with the proliferation of juristocracy today (664). Constitutional democracies have fallen into the habit of expecting courts to solve all problems and to provide answers to the most challenging constitutional questions involving core moral predicaments, public policy questions, and political controversies. It is commonplace now for individuals to look to courts—rather than to political branches or to civil society—to relieve even their most ordinary concerns, support their basic endeavors, and make good on the simplest injuries anticipated in daily life. As more and more citizens look to courts for benefits and services, they become increasingly dependent on them. In this regard, Tocqueville's warning regarding new political forms that threaten democratic governance is ever more pertinent.

Based on how I have framed the emergence of juristocracy as a comprehensive shift in constitutional governance, the only way out of this predicament may be to turn to "social checks and balances," where the people (re-)learn to work outside of courts and of legalized procedures by reclaiming the value of everyday politics (Dahl 2006, 22). This, of course, will be extremely challenging in light of my own analysis that juristocracy is sustained by an inclination of both elected officials and citizens to rely on judicial recourse. However, I believe that the search for a workable remedy will depend first and foremost upon a proper diagnosis of the foundations of juristocracy. In this context, my research can be understood as an attempt to start this discussion by getting the diagnosis correct. Only then will we have the intellectual tools to create a counter discourse aimed at long term reform within the political system and, more importantly, to restore confidence and trust towards democratic institutions in constitutional decision-making.

A challenge to juristocracy must therefore first begin with the recognition that juristocracy is not a necessity but a choice. The choice depends on one's judgment of the potentialities for collective political responsibility and for civic growth. We must also remember that all choices have consequences. As Robert Dahl (1989) maintains, the "democratic process is a gamble on the possibilities that a people, in acting autonomously, will learn how to act rightly" (192). While unfortunate events in history have made the choice towards juristocracy more compelling to the extent that it may seem even universal or inevitable today, democracies must retain the ability to reassess this choice.

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