

From Democracy to Juristocracy

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Carlo Guarneri and Patrizia Pederzoli, *From Democracy to Juristocracy? The Power of Judges: A Comparative Study of Courts and Democracy*, C. A. Thomas, English editor. Oxford: Oxford University Press, 2002. 235 pages. \$75.00 cloth.

Alec Stone Sweet, *Governing with Judges: Constitutional Politics in Europe*. Oxford: Oxford University Press, 2000. 232 pages. \$75.00 cloth; \$27.50 paper.

Ran Hirschl, *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism*. Cambridge: Harvard University Press, 2004. 294 pages. \$49.95 cloth.

The phrase *the power of judges* turns up 103 recent titles on the Borders/Amazon search list, many of which, like the ones under review here, have a comparative focus—comparative at least in the casual sense, where *comparative* includes single country studies of foreign judiciaries. Each of the books under review, by contrast, takes a systematically comparative look at several countries, and in that sense this selection marks an important breakthrough for political science.¹ But the more general point is that the sharp recent rise in “the power of judges” the world over has attracted considerable notice. Titles such as *The Global Expansion of Judicial Power* (Tate & Vallinder 1995) and terms such as *juristocracy* (Hirschl) and *courtocracy* (Scheppelle 2002) proliferate precisely because that power has spread around the globe, in a development that seriously began only after World War II and that has taken on real momentum in the last thirty-five years.

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¹ This breakthrough shows up also in particular chapters of other books—see Russell (2001) and Scheppelle (2002). See also Scheppelle (2001:1370–95).

All three of the books here under review not only offer comparative descriptions of this development in several countries, but also make important contributions toward developing an explanatory theory about the causes and consequences of this massive recent growth in judicial power the world over. However, each emphasizes a different aspect of the picture.

Alec Stone Sweet's *Governing with Judges* looks at the power to review laws for constitutionality in the post–World War II courts of France, Germany, Italy, Spain, and the European Union (EU) and argues that this power has shown a tendency to both spread beyond the Constitutional Court to which it is formally restricted, down into the “ordinary” courts, and permeate partisan conflicts within the legislature. He believes this “judicialization of politics” is endemic in the dynamic of judging itself, and that both the institution of a priori judicial review and the presence of lengthy bills of rights have accelerated this development.

Patrizia Pederzoli and Carlo Guarneri compare the exercise of judicial review in the United States, England, Wales, Germany, Portugal, Italy, France, and Spain. They are particularly intrigued by the recent trend in some of the countries for major political controversies to end up in courts, decided by judges, rather than by elected legislators, and they explain this by looking at the combination of variations in the legislative partisan balance and variations in political institutions—particularly those for recruiting and promoting judges and those that structure the degree of separation between prosecuting and judging.

Ran Hirschl's *Towards Juristocracy* focuses on four former British colonies—Canada, Israel, the Republic of South Africa, and New Zealand—and argues that the delegating of constitutional review power to judges emerged out of the perception by dominant groups that their hegemony was threatened by the rise in power of previously subordinated groups, and that in fact this recent constitutionalization of rights has had largely negative consequences for marginalized, subordinated groups.

This review essay concentrates on these three books but, where appropriate, draws on other works in the large and fast-growing literature on this subject. It concludes with some independent reflections on the kind of political environment likely to produce the most luxuriant growth in judicial power.

Worldwide Increase in Judicial Power

Before World War I, and again as of 1942, only the United States and Norway had a court with power to throw out laws adopted by the national legislature (Guarneri & Pederzoli

135).² Today, more than eighty countries do (Hirschl 1). This rapidity of the transformation of constitutions around the globe is nothing short of remarkable.

In both the United States (1803) and Norway (1866), this power came not explicitly from the written constitution but from court precedent (Smith 2000; Ryssdal 1981). The Weimar Republic, Austria, Spain, and—in Alec Stone Sweet’s phrase—“some states in Eastern Europe[,] had possessed constitutional courts of varying effectiveness in the interwar years,” which were ended by the wartime constitutions (Stone Sweet 31 [hereafter Sweet]; Guarneri & Pederzoli 135). In 1943, Iceland joined this tiny judicial review club, making it a threesome (Smith 2000).

During the 1940s and 1950s, the postwar wave of (in Hirschl’s term) “reconstruction” constitutions that instituted judicial review included Austria, Italy, Germany, France, and Japan (Guarneri & Pederzoli 135; Hirschl 7; Sweet 31). The decolonization of Africa and Asia in the 1950s and 1960s brought judicial review in several “independence” constitutions of Africa and Asia (Hirschl 7). A wave of democratization in southern Europe brought judicial review to Spain, Portugal, and Greece in the 1970s, and then, in the late 1980s and early 1990s, to new constitutions in the Republic of South Africa and in several Latin American countries. Yet another wave struck in the 1990s, as the former Soviet, Soviet bloc, and Yugoslavian republics adopted liberal democratic constitutions that included judicial review. As part of no specifically classifiable trend, several additional countries adopted new constitutions or new constitutional guarantees of fundamental rights to be enforced via judicial review between 1979 and 1994: Sweden, 1979; Egypt, 1980; Canada, 1982; Belgium, 1985; New Zealand, 1990; Mexico, 1994; and Israel, 1992–1995 (Hirschl 8; Sweet 31; Guarneri & Pederzoli 136).³

Complicating the trend toward handing a policymaking power that had once belonged exclusively to legislatures (i.e., the power to determine the constitutional reach of the legislative power) to judges via judicial review were two additional trends enhancing judicial power: one that extended from the 1960s through the 1990s, and the second emblematic of the 1990s. In the first, transnational courts in Europe in particular (the European Court of Justice [ECJ] and the European Court of Human Rights), and to a lesser degree other supranational tribunals, took on the power under various multilateral treaties to identify conflicts between

² Switzerland’s 1848 constitution allocated to its tribunal federal power to declare unconstitutional cantonal laws but not federal laws. The latter can, however, be voided by popular referenda.

³ By 1995, the Israeli Supreme Court announced that the 1992 Basic Laws could be applied by courts to strike down ordinary legislation, giving the courts of Israel the power of judicial review (Jacobsohn 2000).

national laws and transnational treaties with rulings that indicated that such conflicting laws should be eliminated in the home country, in effect behaving as though the treaty were a higher-law constitution.⁴ Ordinary member state courts that had enjoyed no previous exercise of judicial review power cooperated in this transformation and began declaring their own country's laws void.

The Politicization of Judging: Guarneri and Pederzoli

The Guarneri and Pederzoli volume, which compares the systems of the United States, England (and Wales), Spain, Portugal, Italy, France, and Germany, zeroes in on the second additional trend: These authors have noticed, particularly within the countries of Latin Europe—Italy, Spain, Portugal, and France—a trend that might aptly be called “the politicization of judging [or of courts]” (although they use for it Sweet’s broader label, “the judicialization of politics”). They identify a tendency of political parties or factions to turn to prosecution in court as a way of eliminating political opponents by showing them to be guilty of corrupt practices. These scholars relate this development to the prevalence of divided government (as contrasted with government unified by a clear political majority across legislative and executive branches).

The practice of the politicization of judging that is examined in depth by Guarneri and Pederzoli is familiar to Americans in a slightly different format. Here one witnessed at the end of the twentieth century the Watergate scandals, the enactment and multiple applications of the Independent Prosecutor law by both parties in turn, and the failed Clinton impeachment—all in periods of divided government in Washington, D.C. What is different in the United States is that the mobilization of political power via scandal tends to be pushed into the electoral branches as a result of certain constitutional provisions.⁵ Impeachment happens within the

⁴ For an early examination of these, see Volcansek (1997). Additional examinations of this phenomenon with particular focus on the European Court of Justice include Slaughter et al. (1997), Alter (2001), and Goldstein (2001).

⁵ U.S. Const. Art. I, Sec. 2, gives the U.S. House of Representatives exclusive power to impeach (bring charges); Art. I, Sec. 3; cl. 6, gives the U.S. Senate power to try all impeachments and specifies that the President can be convicted by a vote of two-thirds of those present; cl. 7 specifies that conviction produces removal from office and disqualification for future office, but that criminal prosecution may follow thereafter. Art. II, Sec. 4, specifies the grounds of impeachment for the President, Vice-President, and “all civil officers,” as conviction for “treason, bribery, or other high crimes and misdemeanors.” Art. III limits the term of federal judges to “good behavior” (which may be a higher standard than the absence of “high crimes”). Art. I, Sec. 5 gives each house of Congress power to make its own rules of proceeding, punish its own members, and expel a member by a two-thirds vote. Art. I, Sec. 6, specifies that members of Congress “shall not be questioned in any other place” for speeches in either house, and it privileges them from arrest except on the grounds of treason, felony, and breach of the peace.

legislative branch, as do public investigative hearings aimed at rooting out corruption from the executive branch or within its own house. These legislative investigations often result in resignation—the politically desired result—but rarely end up in criminal court.⁶

The constitutions of Latin Europe, as depicted by Guarneri and Pederzoli, do not seem structured to keep these processes within the political branches, and consequently cases with strongly partisan motivation and outcome were decided by high courts in the 1990s, embroiling these courts deeply in the partisan politics of their countries. However, there may be something of a terminology problem here: the French constitution, the only one of their examples that I investigated on my own, does have provisions comparable to the U.S. provisions listed in footnote 5—Articles 26, 67, and 68–68.3. Article 68–68.3 establishes (as of the 1990s) a special “Court of Justice of the Republic,” comprising essentially members of the legislature, for trying “members of the Government” for crimes. This “court” has six Assembly members, six senators, and three members of the Supreme Court of Appeal (*Cour de Cassation*). While the U.S. Senate, sitting as a court for trying an impeached president in the United States, does contain the Chief Justice of the Supreme Court as presiding officer, Americans understand the body to be still in the legislative branch, not part of the judiciary. It is possible that Guarneri and Pederzoli would consider the U.S. Senate qua impeaching body to be a court.

In sum, when Guarneri and Pederzoli speak of “the power of judges,” they refer not only to the increased saliency of and heightened level of controversy over the policymaking power that is inevitable in applying the vague laws characteristic of the bureaucratic welfare state that prevails in modern technocratic societies; and not only to the (judicial review) power of constitutional courts to throw out laws that conflict with constitutional rights. They refer also and particularly to the increased use of judicial power to intervene in decisive ways to alter the balance of partisan power.

Such an intervention did take place in the United States during the *Bush v. Gore* (2000) election case. While such instances are rare in the U.S. system,⁷ that case illustrates a number of the claims of

⁶ The independent prosecutor, Kenneth Starr, could have charged President Clinton with perjury in criminal court after he left the presidency (once his term expired) but chose instead to settle out of court by having Clinton surrender his license to practice law.

⁷ This is rare, but by no means unheard of, particularly when the executive branch and legislative branch are held by opposite parties. Both the Watergate and Iran-contra scandals produced judicially imposed prison sentences on White House-level officials, and legislators as prominent as Dan Rostenkowski, powerful former chair of the House Ways and Means Committee, have received criminal convictions. The more common pattern in the United States is legislative investigation followed by sanction and apology and/or resignation.

their book: such judicial power is likely to rise at times when neither party can mobilize a decisive majority; when such power is exercised, it makes the judges look particularly “political,” and this fact raises questions about the legitimacy of judicial power. Those questions typically lead to calls for reform. In the U.S. case, although some discussion focused on reform of the electoral college (rather than the judiciary), the only real reforms adopted aimed at improving the reliability of vote-counting machinery.

This “politicization of courts” trend identified by Guarneri and Pederzoli also encompasses actions by domestic courts to issue judgments against nonnationals for crimes committed extraterritorially as violations of international law, such as the Spanish and English hearings concerning Augusto Pinochet, the former ruler of Chile (Guarneri & Pederzoli 3). Such actions move what used to be dealt with as foreign policy through diplomatic or military means into the hand of domestic court judges.

This aspect of the trend seems to stem not so much from divided government as from the same elevated rights consciousness of the civilized world that is fueling the movement to put increasing levels of control over domestic policy into the hands of judges. The link between this elevated rights consciousness of late twentieth-century democracies and the judicialization of political power is noted by Guarneri and Pederzoli (e.g., at 12–13), but their own stance toward that consciousness is essentially to embrace it as the necessary handmaiden of democracy (e.g., at 1). The Sweet and Hirschl volumes, by contrast, treat it to a more extensive critical analysis.

The explanation with which Guarneri and Pederzoli begin their discussion in a broad sense characterizes the project of all three of these books:

To understand the specific reasons why judicial intervention in politics occurs at different speeds and intensities in different countries, a comparative analysis of a range of democratic regimes can help identify general trends as well as the particular features of individual cases. (Guarneri & Pederzoli 4)

The three books, however, do not all examine the same aspect of “judicial intervention in politics”; the aspect preoccupying Guarneri and Pederzoli—the turn to courts to, and the willingness of courts to, alter the balance of partisan power—is not the focus of the other two books. Therefore, I treat them separately here.

From Parliamentary Sovereignty to Rule by Judges

Both the Sweet and the Hirschl volumes deal with the “judicialization of politics” as it takes place via the practice of

constitution-based judicial review. Although these are both wonderful books, filled with interesting theorizing, fascinating case accounts, and astute analysis of the political implications of various judicial moves, there is a sense in which much of what agitates them (or, more properly, of what they expect will agitate their readers) is old hat to American judicial scholars. In continental Europe, England, and those of their former colonies here examined, parliamentary sovereignty has something of the flavor of the flag and apple pie in the United States. Parliament represented *vox populi* and stood for the revolutionary replacement of the Crown by the people. The constitutional traditions of these countries understood the elected legislature (not the appointed judges) as the guardian of democracy and the role of the courts as simply *la bouche de la loi*. The job of the courts was to apply pre-existing legislatively adopted rules to settle disputes among the people. Even in the common law countries, the courts were understood to be applying pre-existing customs of the community rather than inventing new rules. And these rules could always be overridden by a parliamentary majority. Administrative review (judging whether an executive exercised power in an unauthorized way) fits comfortably into this paradigm; it too presented the judge as the agent of parliamentary sovereignty. All of this changed in the second half of the twentieth century, with the adoption of constitution-based and then European Higher Law-based judicial review.

Evidently the myth that this paradigm has not changed—or has changed much less than matches the reality—lingers in Europe because political scientists there do not often study courts and law professors do not often acknowledge that judges make policy (Sweet 28, 115, 131, 136–37, but cf. Guarneri & Pederzoli, who note “growing recognition” of the phenomenon at 185). (Sweet, Guarneri, and Pederzoli are obvious evidence that this pattern is changing, as is the fact that Oxford Press has a Socio-Legal Studies Series now, of which the Guarneri and Pederzoli book is a part.) Much of what occupies the Hirschl and the Sweet books is the demonstration of just how extensively the power of constitution-based judicial review has come to replace basic policy choices of the elected representatives of the people. American scholars have been discussing the tension between electoral democracy and judicial lawmaking at least since the New Deal era, and that interest groups go to court when they lose in the legislature is also by now an old story on this side of the Atlantic and the Great Lakes, as is the fact that judges sometimes order sweeping reforms on the basis of negatively worded rights (as when federal judges ordered prison reform or busing for desegregation).

That said, there is much else in their books that warrants attention, both from scholars of comparative politics who much too

often study only the electoral branches, and from scholars of American courts, who too often fail to acquire the perspective on the judicial branch that can come from an exposure to other examples of it. It is long past time to abandon such a narrow focus; it produces a truly distorted picture of the politics of countries with constitutional courts and an unfortunately limited image of judging.

Alec Stone Sweet's Explanation

The Sweet book takes up five cases for analysis: Germany, France, Italy, Spain, and the European Community (Union). His goal is to develop a scientific, general theory of how constitutional courts function in democratic polities, and his interest in being scientific (along with the fact that Oxford Press did not impose on him as strong a copyeditor as they might have) produces a certain inelegance of writing style that makes his book (particularly in his first chapter, which explains his general theory of judging, and which I found most off-putting for jargon-like style) a bit harder to get through than the other two.⁸ But it is worth the effort.

His basic conclusions are that a new set of norms, summarized by the phrase *modern constitutionalism*, is effectively replacing the older ideology of parliamentary sovereignty in Europe and is doing so in a self-reinforcing, self-strengthening feedback loop that is bringing about the judicialization of politics in two senses of the word. First, far more than previously, policy is being decided by constitutional courts in Europe, which have been strengthened by the adoption of comprehensive rights lists in constitutions and by courts' enhancement of their own powers by novel interpretations of laws and constitutions that expand judicial power. If imaginable, European constitutional courts have the capacity to dominate policy even more than in the United States because European bills of rights are so extensive. They often contain statements of positive (as well as negative) rights—such as the right to work, to adequate pay, to adequate housing, to leisure and vacations, to human dignity, and to old age pensions (as well as freedoms of speech, religion, privacy, etc.) (Sweet lists them all at 42–43). Obviously, such extensive lists of rights will require balancing by someone, and if courts end up as the decider of last resort, they increasingly will adopt rules such as balancing or proportionality tests, or what Sweet calls “least means tests” (97–99). This is an elliptical reference to rules of the sort that say (hypothetically), “A law against direct incitement to mass murder of an ethnic group can be upheld only if it is the **least** drastic **means** available for securing the safety

⁸ A far more engaging and lucid explication of the general theory of judging, from which Sweet's appears to derive, is that of Shapiro (1980).

of the group in question; it may interfere with freedom of speech no more drastically than necessary for attaining the valid goal.” Obviously, when a legislature enacts a bill, it has thereby selected its preferred version of the balancing of the competing interests at stake. When a constitutional court steps in to substitute its own balance as more proportional or as a less drastic interference with protected freedom, it is performing a legislative (i.e., rule-making) function, dressed up in the forms of judging.

This invitation to judges to legislate that is generated by the lengthy rights lists in European constitutions is rendered even more insistent by the format of constitutional review of the continental system. All four countries examined by Sweet have constitutional courts specially designated to review the constitutionality of enacted legislation a priori, or as an abstract question before it becomes official law, if so requested by a sizable legislative minority. In France, this is 60 deputies (out of 577) or 60 senators (out of 321); in Germany, one-third of the population-based legislative house or the government of a *Länder* (state) government; in Italy, a regional government (or national government against state legislation); and in Spain, 50 deputies (out of 350) or 50 senators (out of 259). All of these except France also allow individuals to challenge the law later, once it has been applied, using U.S.-style “concrete” judicial review. In France, such concrete review occurs only in the context of challenges to laws as violating the transnational law of the EU or of the European Court of Human Rights (hereafter, “Eurolaw”), a practice that came into being by practice rather than explicit constitutional mandate, although the French constitution was explicitly amended to permit ratification of the Treaty of Maastricht of the EU.

Abstract judicial review functions similarly to the plan of James Madison’s proposed (but rejected) Council of Revision (comprising the U.S. Supreme Court justices). In his version all bills, once approved in both houses, would be subjected to the review, but the Council’s veto could get overridden with a two-thirds vote in each house of Congress. Thus, one-third plus one vote in either house coupled with a majority of the justices could block a law. On the continent, as should be predictable, whenever the legislative minority in opposition to a law is big enough in these abstract review systems, if they seriously oppose the law, they go to court to ask for a reversal (of course, dressing their request in proper legal discourse). The mere threat that they might do so is often enough to get the majority to compromise so as to stave off a court challenge or to rephrase the law to comport with the language of constitutional court precedent.

When the latter transpires, Sweet points out the second sense in which judicial influence comes to dominate legislative bodies:

legislative discourse, indeed legislative thinking, has become shaped by judicial readings of constitutions. In anticipatory reactions, legislators ask themselves, "Will this bill be ruled unconstitutional?" and then modify the bills according to the expected response of the Constitutional Court. Thus, the thinking of the Constitutional Court takes over the legislative process by insinuating itself into the very minds of the legislators. Sweet sees this version of the judicialization of politics as being pushed first by the opposition that initiates or threatens a constitutional challenge because it wants to win on the policy question, but also by the ruling party whenever it incorporates the anticipated judicial response into its framing of the bill to avoid a court challenge.

Sweet focuses with good reason on the relatively new power of constitution-based judicial review. He freely acknowledges that European judges have often "interpreted" statutes so as to render them barely recognizable to the legislatures that adopted them, and that this practice has been no secret. So judicial power per se is not what is new. It has always been possible for a determined legislative majority to override the interpretive power of judges. Constitutional review is a different story. Although in terms of the mechanical requirements, constitutional amendment is considerably easier in European polities than in the United States,⁹ and thus in principle could be used to check the courts, the current European ethos seems to have rendered it largely unusable. In Spain, for instance, the constitution can be revised by a three-fifths vote in each of the two legislative houses or, if a rights provision is at issue, by a two-thirds vote plus a simple majority in a national referendum (Sweet 59).¹⁰ Compared to the U.S. system, which requires two-thirds of each house of Congress and then approval in three-quarters of fifty state legislatures, all but one of which contains two houses in the legislature (each of which wields a veto), the Spanish arrangement seems easy. Yet Sweet tells us that in Spain and Italy, legal scholars consider "core rights provisions" immune to constitutional revision. In Germany, the constitution (or Basic Law)

⁹ With respect to review by the two European courts, the ECJ, wielding the EU treaty, or the Court of Human Rights, wielding the Convention on Human Rights, the situation differs markedly. Treaty amendment to override a court interpretation is extraordinarily difficult, requiring not only unanimity from every single member of the EU, or participant in the Convention, but after that in several of the countries approval by a referendum. The practical politics of the situation would seem to push nation-states unhappy with a particular result to install new judges on the court to get new interpretations (for which a mere majority would suffice), rather than embark on the Sisyphean task of overruling the court via treaty amendment.

¹⁰ The other country requirements are as follows: in France, a majority of each house plus three-fifths of the Congress sitting as a whole; in Germany, a two-thirds majority of each house; in Italy, a majority of each house plus a referendum unless the majority in each house is two-thirds (Sweet 59).

singles out two articles (1, which affirms human dignity, and 20, which affirms the democratic and federal nature of the constitution) as nonamendable and explicitly provides for restricting various itemized rights in order to secure other constitutional values (Articles 17a, 18, 19), but bans doing so in a way that affects “the essence of a basic right.” In short, those essences amount to unamendable parts of the constitution. Of course, the bounds of those essences are determined by the Constitutional Court. France alone (of Sweet’s four cases) does not secure selected parts of its constitution against any amendment (59),¹¹ and France alone of the countries Sweet examines offers an example (but only one) of an instance where the constitution was amended (in a move to tighten immigration rules) in order to overturn a ruling of the Constitutional Council (89).

To the extent that not even the constituent power of the people can alter certain parts of the constitution or principles that judges claim to find therein, judges rule the land. Only new interpretations from the high courts can alter these “core” parts of these constitutions, and since interpretations are altered far more typically by new judges than by their original authors, the power to select and appoint (and remove) judges becomes absolutely fundamental. Sweet does not give attention to this issue (beyond stating the formal selection, tenure, and eligibility rules, at 46–49), although he does note that when a party of long-term dominance is ousted, one can expect a temporary rise in the number of judicial-legislative clashes, which will diminish over time as the newly dominant party puts its judges into power. Guarneri and Pederzoli analyze judicial recruitment extensively, so I will return to their book below.

The only political check on the judging power explored and acknowledged by Sweet stems from judges’ concern for having their rulings carried out. This concern, which extends to a concern for maintaining their own legitimacy (diffuse support), moves judges, he says, to adopt decisions that “split the difference” between opposed parties, in effect trying to come up with moderate, compromise solutions. This practice of the judges amounts to an internalized political constraint. By avoiding producing decisions at a political extreme, they seek to assure that their policymaking will be viewed as unbiased and fair (Chs. 1, 5, pp. 90, 200).

The truly fascinating sections of both the Sweet and Hirschl books are the many illustrative case accounts provided in both. In

¹¹ In the United States, no state can be deprived of its “equal suffrage in the Senate without its own consent,” per U.S. Const. Art. V, but no other right is singled out against amendment.

these case accounts, Sweet is at his best, offering detailed and nuanced narratives of the delicate interplay of political and judicial forces that combine to produce policies on politically volatile issues.

With the account of pension reform in Italy, for instance, American readers can witness the dynamic of judicial enforcement of a positive right in the face of legislative intransigence. In this instance, the Italian Constitutional Court, confronting claims over some fifteen years of unequal treatment on the subject of pension calculation rules, finally issued a ruling in 1988 “inviting” the legislature to harmonize its pension law across different industries. Parliament stonewalled. Not until five years later did the court rule the situation in violation of rights and demand legislative reforms by, at the latest, the next budget bill. It threatened to provide its own solution if Parliament did not meet the deadline. Parliament did. One observes here parallels to the prison reform and busing litigation in the United States.

Similarly, one can read detailed accounts of the political forces producing abortion law reform in Spain and Germany (twice) and of the complicated judicial responses to these reforms (Sweet 109–13). In Germany, for instance, the Constitutional Court does not allow abortion to be “legalized” but does allow an open policy to let it “go unpunished” under a detailed set of (generally permissive) circumstances. The practical difference seems to be that “legalization” in Germany would entail government or insurance company funding of abortion costs, so such funding has now been cut off.

The difference between calling something legal and calling it “permitted to go unpunished” has parallels in a number of the other particularized case accounts. For example, the Italian Constitutional Court, in coming to terms with the ECJ assertion that even the Italian constitution must give way to the ECJ’s interpretation of the demands of the European Economic Community (EEC) Treaty and EEC law, produced another ruling that is likely to strike American readers as a legal fiction: In Italy’s constitution, “judicial review” of legislation for constitutionality is reserved to the Italian Constitutional Court, but since the ECJ ruled that national laws in conflict with Eurolaw must be treated by all judges as invalid, the Constitutional Court simply ordered ordinary judges in Italy to “ignore” any law that conflicts with EEC law (rather than declare it void, which declaration would usurp its own prerogatives!) (Sweet 166–68 and note 11).

The limitations of space in this essay do not permit doing justice to the many intriguing case stories included in this book. They alone would warrant the cost of purchase, because they shed so much helpful light on the actual judicial-legislative interaction that lies at the heart of the “judicialization of politics” in Europe.

Ran Hirschl's Explanation

Ran Hirschl's book expands our focus beyond Europe, offering the salutary reminder that the move toward "juristocracy" is a truly global trend. Hirschl looks at the supreme courts of Israel, New Zealand, the Republic of South Africa, and Canada, and does so with more detail and greater depth than either of the other two volumes. It is a truly impressive piece of research, comprehensive in coverage of the relevant scholarship, cogently argued and elegantly presented.

Like Sweet, Hirschl is promoting a thesis. He first wants to understand what political forces moved countries to amend constitutions to empower judges to throw out democratically enacted laws where those countries were not caught up in other fundamental transitions—such as the need to develop a postcolonial, or post-dictatorship, or post-Communist constitution. Second, he wants to know what sorts of policy consequences ensue from the adoption of judicial review. He believes he has figured out the answers and he pushes them hard, and usually convincingly.

His answer to the first query is that in countries where hegemonic elites observe the rising power of competing groups, groups who do not share their fundamental values and worldview, the hegemonic elites seek to entrench their fundamental values above the vagaries of majority rule. They make this move before the majority supportive of their leadership gives way to what might be called the "rising" majority; in effect, they are entrenching values supported by the majority before it becomes too late to garner majority support for these values.

This thesis differs from, although it has parallels with, the "thin political" rational choice explanation that one often sees: namely, political parties or groups that have been dominant in dictatorial (or other) situations willingly entrench judicial power to protect themselves from later retaliation from their enemies, and they do so in alliance with groups that fear regression back to dictatorship. Their hope is that neutral judges committed to rule-of-law rights will give them a fairer shake than their unchecked political enemies would.¹² Hirschl does not disagree with these accounts so much as he finds them incomplete. They cannot explain why legislative forces in countries such as England or Canada that get along for centuries without judicial review and with liberal rights generally honored would suddenly adopt entrenched bills of rights to be enforced against legislatures by courts. Moreover, they fail to take account of cleavages in other domains than electoral conflict, such as cultural and social cleavages. Finally, they fail to pay adequate

¹² Versions of this thesis appear in, e.g., Epstein et al. (2002:215–16), Moravcsik (2000), and Ramseyer (1994).

attention to the political influence wielded by judicial elites and economic elites in bringing about transitions to juristocracy (Ch. 2).

Hirschl's answer to the second query, on the policy consequences of judicial empowerment, is that the kind of elite judges likely to serve on supreme courts are judges who support individualistic, secular, personal freedoms, such as due process for the accused, speech and press, abortion, equal treatment for gays, and (classical) liberal protections for property rights, but would give short shrift to communitarian, traditional religious, and collectivist values (including both issues involving labor union organizing and issues of minimum subsistence rights such as housing and health care). Hirschl associates the rise of juristocracy with a decline in socioeconomic egalitarianism or, in his words, "progressive concepts of distributive justice" (13).

He builds a powerful case. His four political accounts of the adoption of bills of rights to be enforced via judicial review amply support his "hegemonic preservation" thesis. In Israel, which entrenched certain rights by adopting a Basic Law in 1992, the hegemonic elite was the group of Ashkenazi Jews, of European and/or North American descent, who were typically affluent, secular Zionists and dominated political office and cultural institutions. They wanted Israel to be democratic and Jewish (in the ethnic sense) and favored Enlightenment values. The challenging groups were (1) the Jews of North African and Middle Eastern (Mizrahi) and Ethiopian descent, who were often religiously Orthodox; (2) the ultra-Orthodox, who have very large families and are often poor; (3) the Arab Israelis (20% of the population by 2002); and (4) the largely poor and nonreligious million or so recent immigrants from the former Soviet Union/Russia. These "disadvantaged minorities" grew in both population and political clout during the 1980s and 1990s.

Suddenly, in 1992, after years of opposition to an entrenched bill of rights, the politically dominant but soon to be nondominant Ashkenazi changed their tune. The Basic Law does not say explicitly that Israel's Supreme Court has the power to throw out legislation, but that court had exercised such activist administrative review and aggressive legislative "interpretation" (altering apparent meanings of laws in order to have them conform to certain principles such as equality before the law) long before the advent of a written bill of rights (Jacobsohn 1993) that its use of the new list of rights and liberties in the Basic Law to rescind legislation was quite predictable. Incidentally, as with the European examples, the Israeli Basic Law strikes an American as remarkably easy to amend (it takes only a majority of the total Knesset), but the practice seems to be that entrenched provisions do not later get altered.

In Canada, the adoption of a constitution and Charter of Rights took place in 1982, and Hirschl attributes its adoption to a perception by its Anglophone, Protestant, business-oriented “establishment” that its political and cultural dominance was being threatened by the Quebec separatist movement “and other emerging demands for provincial, linguistic, and cultural autonomy” (77). Canada’s constitution has a “notwithstanding” clause that lets the legislature refuse to honor a judicial declaration of unconstitutionality, but as in Europe the political ethos is such that legislative forces refrain from attempting to override the court.

New Zealand, long viewed as a stalwart of the British parliamentary sovereignty system, made the turn to a written bill of rights in 1990. Hirschl finds the rising political threat there in what he calls “peripheral” groups. These peripheral groups immigrated largely during the 1980s. In the late 1970s, the New Zealand population was more than 90% of European descent; by the mid-1990s, it was fewer than 75%. By 1995, the population was 15% Maori and 11% Asian/Pacific Islander. Between 1984 and 1994, New Zealand rapidly transformed its political economy from a strongly welfare-promotive state to a neoliberal economic order. Economic inequality rose sharply. These changes produced political volatility and the rise of new minority parties. The New Zealand Bill of Rights, technically “unentrenched,” has been treated as “de facto entrenched” by the New Zealand Supreme Court of Appeal (88).

The Republic of South Africa, as is well known, underwent an anti-apartheid revolution in the early 1990s. It adopted an interim bill of rights in 1993 as part of its interim constitution, ran democratic elections in 1994, which produced a Constituent Assembly, and adopted a permanent bill of rights and constitution in 1996. In South Africa, the Constitution explicitly creates a Constitutional Court with the powers of judicial review. The 80% black population, led by the African National Congress—Hirschl’s most indisputable example of a newly empowered majority—went along with the idea of a constitution with an entrenched bill of rights because, according to Hirschl, of a desire to reassure powerful foreign investors that South Africa would retain a friendly business climate. He sees this development as, if not a sellout of the revolution, at best a short-circuiting of it. Political power may have changed hands, but egregiously inequitable distribution of economic resources stays in place or worsens (96).

Hirschl’s case accounts—again the most fascinating part of the book—provide the ammunition for his general claims that constitutional courts support Lockean versions of property rights, due process, and freedom of expression protections—including the expression of atypical sexual orientations—and do not support

strong versions of labor union rights or claims for redistributive justice. His book is a tour de force, and a brief summary cannot do it justice.

It does, however, contain one unconvincing chapter. Hirschl documents that, from 1980 to 2002, economic inequality was exacerbated in each of the countries he examined. He sees this development as causally linked to the entrenching of bills of rights with judicial review. This claim-by-coincidence might be more persuasive if he could cite some countries without judicial review where it did not happen. Moreover, he claims that people “often overrate” the potential of constitutionally proclaimed rights to bring about socioeconomic redistribution in capitalist countries. I have never read or heard such a claim and do not find the few quotes he offers in this vein to support his characterization of them (148–50, 168). This section seems to attack a straw man.

Hirschl’s broader claim, however, is far more cogent. He sees the constitutionalization of rights and the move toward juristocracy as part of a broader neoliberal global trend toward delegating power away from electorally accountable bodies and toward quasi-autonomous decision makers—not just constitutional courts but also civil service-protected administrative bodies and transnational decision makers, whether self-appointed (as in the International Monetary Fund and the World Bank) or appointed as independent judges (as in the World Trade Organization, the ECJ, the European Court of Human Rights, the American Court of Human Rights, and the International Criminal Court).

Distrust of Majorities and Judicial Recruitment: Guarneri and Pederzoli

A close look at these three books leaves the indelible impression that the worldwide trend toward democratization has been accompanied by a worldwide increase in distrust of majoritarian power. That distrust, per Hirschl, has fueled the constitutionalization of rights. The Sweet book teaches us that efforts to limit and channel that distrust into courts of tightly constrained powers were grounded in a mistake about the ways judicial power grows. The Guarneri and Pederzoli book indicates that when political forces approach electoral deadlock, power will be sought via other channels, particularly judicial channels.¹³

For all these reasons, the politics of judicial recruitment becomes fundamental, and on this topic the Guarneri and Pederzoli

¹³ This book provides implicit support for the thesis of Mark Graber (1993) that the U.S. Supreme Court most boldly shapes public policy in situations that are best described as “nonmajoritarian.”

book is indispensable. This book details not only the judicial recruitment and promotion systems of seven countries, but also the relation between the prosecutorial arm in those countries and the judiciary and the relation between both of these and the political forces in each country (Chs. 2–4). It matters for judicial power and judicial independence, for instance, whether one party or majority coalition stays in power for long periods or (as happens in the United States) alternates in power with its opposition. J. Mark Ramseyer and Eric B. Rasmusen (2001) have demonstrated with the case of Japan that even a civil service system for judicial recruitment (appointing judges by competitive exam rather than political connections) with a bureaucratic career ladder can still produce judges who toe the party line, because those judges who do so will be rewarded with promotions. (The promotion system is controlled by a body that answers to the Japanese Supreme Court, and the Supreme Court is politically appointed.) Thus, as long as political controls are built into the promotion system, courts can be kept subservient to political forces.

And if political forces do not alternate over time, there will not be a time lag in the forces to which judges are responsive (or express), which time lags cause (the politically appointed) Supreme Court justices in the United States, for instance, to get embroiled in political controversy. For example, the justices who in *Fullilove v. Klutznick* (1980) and *Metro Broadcasting v. FCC* (1990) upheld a more lenient rule for affirmative action imposed by Congress were different justices, appointed by different politicians, from the ones who imposed stricter scrutiny in *Adarand v. Peña* in 1995. Justices to a degree¹⁴ express the politics that produces their appointment, but in the United States, this will sometimes cause them to strike down laws expressed by political forces of an earlier or more recent time.

Guarneri and Pederzoli argue convincingly that the nature of the political system, particularly the politics that shapes judicial promotions within the continental, civil-service-exam-selected judiciaries, sheds a good deal of light on the degree of independence and boldness of particular European courts. The particularities of each judicial system and their various recent reforms responsive to these concerns are too elaborate for adequate summary in this brief review and warrant reading. A key point that the Guarneri and Pederzoli treatment drives home is that the extent to which the judicial promotion system is successfully rendered independent of external political forces and of internal judicial hierarchy decisively shapes judicial empowerment. The frequency with which Europeans

¹⁴ Locating bounds of that “degree” as shaped by more legalistic concerns is beyond the scope of this essay and is not a primary focus of these books.

in recent decades have tinkered with this machinery (often in the form of arrangements for their national “Higher Council on the Judiciary,” elected in large part by judges) indicates a broad awareness of these relations.

Conclusions

Martin Shapiro’s (2002) thesis that constitutional courts are rendered powerful when they are in systems requiring them to police federalism boundaries or separation of powers boundaries can usefully be amended on this point. They are also powerful, other things being equal, when they are in systems where power alternates between differing political parties or coalitions or where the judicial promotion system renders them relatively free of political influence.

We know from the fate of post-Soviet courts in Hungary and Russia that supreme courts can push only so far against majoritarian (or politically dominant) forces before they get politically taken over by new appointments, or a taming of their jurisdiction, or both (Scheppele 2002:262–68 and note 62 at 277). One of the things underlined in each of these three books, however, is just how far courts *can* push in the modern world without getting taken over politically.

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